Case Law of the Aarhus Convention Compliance Committee
(2004 – 2008)
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(2004-2008)
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INTRODUCTION

The publication attempts to summarize the practice of the Compliance Committee of the Aarhus Convention. Since its set up in 2002 by the First Meeting of the Parties of the Aarhus Convention, the Committee has dealt with numerous issues related to practical implementation of the Convention by the parties. In many cases, the Committee had to interpret and apply Convention’s provisions to specific situations brought to its attention by the public and parties, as well as its own rules of procedures. Therefore, substantial case law was developed by the Committee during 2004-2008. Understanding this case law may help policy makers and practitioners apply and use the Convention in a more effective and uniform way promoting common standards for practical enforcement of environmental human rights in UN ECE region.

Case Law of the Aarhus Convention Compliance Committee was designed as a reference tool as explained below and comprises two parts, each representing similar approach. The first part is Aarhus Convention text (without GMO amendment) with inserted interpretations of its provisions by the Committee. The second part is Decision I/7 of the 1st Meeting of the Parties (establishing the compliance mechanism and setting its key procedural elements) with Committee’s case law on procedural issues (such as admissibility requirements). When developing this publication it was decided not to provide any substantial comments on the interpretations made by the Committee except for a few explanatory notes providing brief context to some of the statements by the Committee.

The publication covers all cases considered by the Compliance Committee until Third Meeting of the Parties of the Aarhus Convention (Riga, 2008), including those declared inadmissible, except for two cases for which decisions were not ready at the time of publication (Denmark and EC cases). It does not include pending cases, as of May 1, 2008. For those unfamiliar with documentation details within UN ECE system, we provide a brief explanation of the reference numbers used in this publication. We hope this will help the readers to make further research when needed. All documents used for this publication were taken from and can be accessed at the official web-site of the Aarhus Convention: www.unece.org/env/pp.

Case Law of the Aarhus Convention Compliance Committee was developed by the European ECO Forum legal team members: Thomas Alge, OEKOBUERO (Austria), Andriy Andrusevych, RESOURCE AND ANALYSIS CENTER “SOCIETY AND ENVIRONMENT” (Ukraine), Clemens Konrad, OEKOBUERO (Austria), Zoryana Kozak (for Russian edition), RESOURCE AND ANALYSIS CENTER “SOCIETY AND ENVIRONMENT” (Ukraine). This publication is part of a project supported by the Sigrid Rausing Trust. More information about European ECO Forum and Aarhus Convention can be found at: www.participate.org.
CASES INCLUDED INTO THIS PUBLICATION:

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CASES REFERENCE NUMBERS:

Aarhus Convention Compliance Committee case

Case initiated by [c]ommunication from the public, or [s]ubmission by a party, or [r]eferral by the Secretariat
Indicates the year when the case started
Individual number of the case. Separate numbering for three categories of cases (initiated by communication, submission or referral)

ACCC/C/2006/19

DOCUMENT REFERENCE NUMBERS:


These numbers refer to official report by the Compliance Committee where:
- the first part is UN ECE number of the document (in the example above – report from a meeting by a Compliance Committee)
- the second part means reference is made to a separate document attached to the report, “addendum” (which normally includes Committee’s findings on specific case)
- the last part is the date of the document
CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

The Parties to this Convention,

Recalling principle I of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,
Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

To the extent that a town planning permit should not be considered a permit for a specific activity as provided for in article 6 of the Convention, the decision is still an act by a public authority. As such it may contravene provisions of national law relating to the environment. Thus, Belgium is obliged to ensure that in these cases members of the public have access to administrative or judicial procedures to challenge the acts concerned, as set out in article 9, paragraph 3. This provision is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. When assessing the Belgian criteria for access to justice for environmental organizations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”

(Belgium ACCC/2005/11; ECE/MPP.C.1/2006/4/Add.2, 28 July 2006, para. 34)

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference «Environment for Europe» in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the «Environment for Europe» process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:
**Article 1  OBJECTIVE**

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The communication also includes the allegation as to non-compliance with article 1. The Committee notes that a non-compliance with the operative provisions of the Convention is not in conformity with the objective of the Convention as defined in article 1.


NOTE: There’s nothing in the text of the Aarhus Convention defining part of it as “operative provisions”. International law practice and studies normally use the term “operative” to distinguish main part of a treaty from, normally, preamble and annexes to it.

**Article 2  DEFINITIONS**

For the purposes of this Convention,

1. «Party» means, unless the text otherwise indicates, a Contracting Party to this Convention;

2. «Public authority» means:

(a) Government at national, regional and other level;

The Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection both fall under the definition of a “public authority”, as set out in article 2, paragraph 2 (a).

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 23)

The agencies referred to in the communication with regard to provision of information and public participation in the decision-making process fall under the definition of “public authority” in article 2, paragraph 2 (a), of the Convention.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 19)

NOTE: The information requests were sent to Chairperson of the State Real Estate Cadastre Committee and the Mayor of Yerevan.

... It is therefore the opinion of the Committee that, as public authorities within the meaning of article 2, paragraph 2 (a), the State Real Estate Cadastre Committee and the Office of the Mayor of Yerevan were under an obligation to provide the environmental information requested by the communicants pursuant to article 4, paragraph 1, and that their failure to do so or to respond within the time limits indicated in the article was not in conformity with provisions of article 4, paragraphs 1 and 2.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 21)

The Walloon Government as well as the Mayor and Deputy Mayors of the municipality of Grez-Doiceau constitute public authorities, in accordance with article 2, paragraph 2, of the Convention.


(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

The National Atomic Company Kazatomprom is a legal person performing administrative functions under national law, including activities in relation...
Establishment of a special company for construction of expressways does not in itself constitute a breach of obligations under the Convention, in the Committee’s view. In this regard, the Committee takes note of the fact that the company is established by the Act, is State-owned and would, therefore fall under the definition of the public authority in accordance with article 2, paragraphs 2 (b) and (c). In Committee’s view this in itself limits the scope of application of the commercial confidentiality exemption.

(Hungary ACCC/C/2004/4, ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, para. 10)

Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

The National Atomic Company Kazatomprom is a legal person performing administrative functions under national law, including activities in relation to the environment, and performing public functions under the control of a public authority. The company is also fully owned by the State. Due to these characteristics, it falls under the definition of a “public authority”, as set out in article 2, paragraphs 2 (b) and 2 (c).

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 17)

The issuing of government decrees on land use and planning constitutes “measures” within the meaning of article 2, paragraph 3 (b), of the Convention. In the Committee’s opinion, the information referred to in paragraph 13 above clearly falls under the definition of “environmental information” under article 2, paragraph 3.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 20)

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;
4. «The public» means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

The communicant is a non-governmental organization working in the field of environmental protection and falls under the definitions of the public and the public concerned as set out in article 2, paragraphs 4 and 5, of the Convention. Foreign or international nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.


NOTE: Foreign organizations mentioned here are in fact organizations established and operating in another country.

The communicant is a non-governmental organization working in the field of environmental protection and falls under the definition of “the public”, as set out in article 2, paragraph 4, of the Convention.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 16)

5. «The public concerned» means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

The communicants are NGOs that fall under the definition of “the public” as set out in article 2, paragraph 4, of the Convention. The Committee considers that all the communicants, being registered NGOs and having expressed an interest in the decision-making process, fall within the definition of “the public concerned” as set out in article 2, paragraph 5.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 18)

Article 3  GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

The Committee considers that the underlying reason for non-compliance with the requirements of articles 4 and 9, paragraph 1, as described in paragraphs 16 to 19 and 21 to 22 above, was a failure by the Party concerned to establish and maintain, pursuant to the obligation established in article 3, paragraph 1, a clear, transparent and consistent framework to implement these provisions of the Convention, e.g. by providing clear instructions on the status and obligations of bodies performing functions of public authori-
ties, or regulating the issue of standing in cases on access to information in procedural legislation.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23)

With regard to the argument presented by the representatives of the Party concerned that they do not have authority over courts (paragraph 5 above), the Committee notes that judicial independence, both individual and institutional, is one of the preconditions in ensuring fairness in the access to justice process. Such independence, however, can only operate within the boundaries of law. When a Party takes on obligations under an international agreement, all the three branches are necessarily involved in the implementation. Furthermore, a system of checks and balances of the three branches is a necessary part of any separation of powers. In this regard, the Committee wishes to point out that, the three branches of power need each to make efforts to facilitate compliance with an international agreement. So, for example, bringing about compliance in the field of access to justice might entail analysis and possible additions or amendments to the administrative or civil procedural legislation by bodies usually mandated with such tasks, such as, for example, ministries of justice. Should such legislation be of primary nature, the legislature would have to consider its adoption. In the same way judicial bodies might have to carefully analyze its standards and tests in the context of the Party’s international obligations and apply them accordingly.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 24)

In this context, the Committee notes that the Party concerned, in its reply, makes two points that concern a State's internal law and constitutional structure in relation to its obligation under international law to observe and comply with a treaty. A similar argument was made in its written additional points in response to the questions asked by the Committee. First, the Party concerned holds that the federal structure of the Belgian State sometimes complicates the implementation of the Convention. Second, it argues that the separation of powers between the legislative, executive and judicial branches of government, as a fundamental part of the Belgian State, should be taken into account. The Committee therefore wishes to stress that its review of the Parties’ compliance with the Convention is an exercise governed by international law. As a matter of general international law of treaties, codified by article 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke its internal law as justification for failure to perform a treaty. This includes internal divisions of powers between the federal government and the regions as well as between the legislative, executive and judicial branches of government. Accordingly, the internal division of powers is no excuse for not complying with international law.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 41)

An independent judiciary must operate within the boundaries of law, but in international law the judicial branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government should make an effort to bring about compliance with an international agreement. Should legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. In parallel, however, the judiciary might have to carefully analyze its standards in the context of a Party’s international obligation, and apply them accordingly.

The Committee also recalls that according to article 3, paragraph 1, the Parties shall take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. This too reveals that the independence of the judiciary, which is indeed presumed and supported by the Convention, cannot be taken as an excuse by a Party for not taking the necessary measures. In the same vein, although the direct applicability of international agreements in some jurisdictions may imply the alteration of established court practice, this does not relieve a Party from the duty to take the necessary legislative and other measures, as provided for in article 3, paragraph 1.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 43)

The Committee further finds that the lack of clear regulation and guidance with regard to the obligations of bodies performing public functions to provide information to the public and with regard to the implementation of article 9, paragraph 1, constitutes non-compliance with the obligations established in article 3, paragraph 1, of the Convention.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 27)

While noting that the Convention has direct effect according to Kazakh law, the Committee also notes the obligation under article 3, paragraph 1, on each Party to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. Regulations implementing the Convention’s provisions, including timely, adequate and effective notification of the public concerned, early and effective opportunities for participation, and the taking of due account of the outcome of the public participation, would help to avoid ambiguity in the future. Such regulations could be developed with input from the public. The content of such regulations should also be communicated effectively to public authorities.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 28)

Lack of clarity or detail in domestic legislative provisions, in particular, with regard to issues discussed in paragraphs 30 and 31 above, demonstrate, in the view of the Committee, that the Party concerned has not taken the necessary measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1.

(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 34)

The Committee also finds that the lack of clarity with regard to public participation requirements in EIA and environmental decision-making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, indicates the absence of a clear, transparent and consistent framework for the implementation of the Convention and constitutes non-compliance with article 3, paragraph 1, of the Convention.


The Committee notes that article 2 of the Act establishes precedence of the international agreements over its provisions. The Committee is, however, of the opinion that by enacting, after the entry into force of the Convention, an
Act containing provisions that do not comply with the requirements of the Convention, the Party has not ensured that the provisions of the Convention will be complied with. Thus, it has not established the clear, transparent and consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1, rather the opposite. This opinion is reinforced by the fact that in practice national authorities and courts are often reluctant to directly apply provisions of an international treaty.

(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 22)

In conclusion, the Committee finds that by enacting provisions that are not in compliance with article 3, paragraph 9, and article 3, paragraph 4, of the Convention, the Party concerned is not in compliance with the requirement of article 3, paragraph 1, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.

(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 27)

By failing to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation, the Party concerned was not in compliance with article 3, paragraph 1, of the Convention (para. 87).


2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

... the Committee observes that the Convention does not exclude the possibility for Parties to regulate and monitor to a certain degree Activities of non—governmental organizations within their jurisdiction, and that there is no requirement in it to either regulate or de-regulate activities of non-registered organizations. Thus the matter is within the sovereign powers of each Party. However, any such regulation should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions. Having regard to the arguments set out in paragraph 16 above, it should not prevent members of the public from more effectively exercising their rights under the Convention by forming or participating in NGOs.

(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 20)

In this regard, the combination of a prohibition of non-registered associations with overly difficult registration procedures and requirements existing under the Turkmen Act on Public Associations does appear to present a genuine obstacle to the full exercise of the rights of the public. Indeed, it is difficult to see how this combination is compatible with the requirement under article 3, paragraph 4, of the Convention on each Party to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation. Taking into account the facts presented in paragraph 12 above, the Committee finds sufficient evidence that article 17,
paragraph 3, of the Act and the way in which it has been implemented are not in compliance with article 3, paragraph 4, of the Convention.

(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 21)

5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

Notwithstanding this conclusion, the Committee notes with some concern the fact that while not falling below the level of the Convention, the Act substantially reduces the level and quality of public participation in decision-making of this category in comparison with previous Hungarian legislation. It also appears to provide public participation opportunities, which compare poorly with those established by administrative lex generalis. While certain special provisions might be required due to specifics of various types of decision-making, the rights of the public should not be compromised to accommodate other interests, whether private or public, in particular with regard to projects of such potential environmental significance. The Committee, having in mind the objective of the Convention and the provisions of article 3, paragraphs 5 and 6, expresses its concern about such a tendency.


The Committee does not exclude the possibility when determining issues of noncompliance to take into consideration general rules and principles of international law, including international environmental and human rights law, which might be relevant in context of interpretation and application of the Convention. However, there is an existing provision in the Convention, demonstrating that negotiating parties considered the issue of the relationship between the existing rights and the rights provided by the Convention itself (art. 3, para. 6) but that they did not wish to completely exclude a possibility of reducing existing rights as long as they did not fall below the level granted by the Convention. However, the wording of article 3, paragraph 6, especially taken together with article 1 and article 3, paragraph 5, also indicates that such reduction was not generally perceived to be in line with the objective of the Convention.


7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

As described in paragraph 11 (a) above, the Act in its article 5 largely limits its membership in Turkmen public associations to citizens of Turkmenistan. Non-governmental organisations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights
under the Convention than individual members of the public. Furthermore, certain rights accorded to the 'public concerned' (e.g. under art. 6, paras. 2, 5 and 6, and art. 9, para. 2) are guaranteed to a greater extent with respect to registered environmental NGOs than they are for individual members of the public, who might have to demonstrate that, for example, their material interests are directly affected in order to be recognized as the ‘public concerned’. Thus the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them. The Committee is, therefore, of the opinion that article 5 of the Act is not in compliance with article 3, paragraph 9, of the Convention.

(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 16)

The communicant is a non-governmental organization working in the field of environmental protection and falls under the definitions of the public and the public concerned as set out in article 2, paragraphs 4 and 5, of the Convention. Foreign or international nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.


Article 4  ACCESS TO ENVIRONMENTAL INFORMATION

The Committee considers that the underlying reason for non-compliance with the requirements of articles 4 and 9, paragraph 1, as described in paragraphs 16 to 19 and 21 to 22 above, was a failure by the Party concerned to establish and maintain, pursuant to the obligation established in article 3, paragraph 1, a clear, transparent and consistent framework to implement these provisions of the Convention, e.g. by providing clear instructions on the status and obligations of bodies performing functions of public authorities, or regulating the issue of standing in cases on access to information in procedural legislation.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23)

The Committee finds that, by having failed to ensure that bodies performing public functions implement the provisions of article 4, paragraphs 1 and 2, of the Convention, Kazakhstan was not in compliance with that article.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 25)

The Committee finds that, by failing to ensure that information was provided by the responsible public authorities upon request, Ukraine was not in compliance with article 4, paragraph 1, of the Convention.


The Committee finds that by failing to ensure that bodies performing public functions implement the provisions of article 4, paragraphs 1 and 2, of the Convention, Armenia was not in compliance with that article.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 41)
1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

The Committee stated in its findings and recommendations with regard to communication ACCC/C/2004/3 and submission ACCC/S/2004/1 that article 6, paragraph 6, aimed at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to a requirement to publish an environmental impact statement. Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule. A general exemption of EIA studies from disclosure is therefore not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention.

(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 30)

(a) Without an interest having to be stated;

The Committee has noted the information provided by the Party concerned that it is a general practice for an information request to include reasons for which such information is requested. Article 4, paragraph 1 (a), of the Convention explicitly rules out making such justification a requirement. In this regard, the Committee notes with appreciation the Memo on Processing Public Requests for Environmental Information, prepared by the Ministry of the Environment of Kazakhstan and the Organization for Security and Co-operation in Europe (OSCE), issued in 2004. The Memo clearly states that a request for information does not need to be justified. In the Committee’s opinion, practical implementation of the Memo would be important for changing the current practice and, furthermore, might bring about compliance with all the provisions of article 4.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, par 20)

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

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(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

With regard to the facts described in paragraph 14 above, public authorities should possess information relevant to its functions, including that on which they base their decisions, in accordance with article 5, paragraph 1, and should make it available to the public, subject to exemptions specified in article 4, paragraphs 3 and 4. The issue of ownership is not of relevance in this matter, as information is used in a decision—making by a public authority and should be provided to it for that purpose by the developer. The fact that such misinterpretation took place again points to a lack of clear regulatory requirements in the national legislation.


The Committee stated in its findings and recommendations with regard to communication ACCC/C/2004/3 and submission ACCC/S/2004/1 that article 6, paragraph 6, aimed at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to a requirement to publish an environmental impact statement. Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule. A general exemption of EIA studies from disclosure is therefore not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention.

(Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7 16 April 2008 para. 30)

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

Establishment of a special company for construction of expressways does not in itself constitute a breach of obligations under the Convention, in the Committee’s view. In this regard, the Committee takes note of the fact
the company is established by the Act, is State-owned and would, therefore fall under the definition of the public authority in accordance with article 2, paragraphs 2 (b) and (c). In Committee's view this in itself limits the scope of application of the commercial confidentiality exemption.


(e) Intellectual property rights;

..... EIA studies are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law.

(Romania ACCC/C2005/15; ECE/MP/PP/2008/5/Add.7, 16 April 2008 para. 28)

The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure. This is in particular so in situations where such studies form part of “information relevant to the decision-making” which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure.

(Romania ACCC/C2005/15; ECE/MP/PP/2008/5/Add.7, 16 April 2008 para. 29)

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Finally, information within the scope of article 4 should be provided regardless of its volume. In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for sup-

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...plying such information, in accordance with article 4, paragraph 8, of the Convention.


**Article 5  COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION**

1. Each Party shall ensure that:

   ... With regard to the facts described in paragraph 14 above, public authorities should possess information relevant to its functions, including that on which they base their decisions, in accordance with article 5, paragraph 1, and should make it available to the public, subject to exemptions specified in article 4, paragraphs 3 and 4. The issue of ownership is not of relevance in this matter, as information is used in a decision-making by a public authority and should be provided to it for that purpose by the developer. The fact that such misinterpretation took place again points to a lack of clear regulatory requirements in the national legislation.

   (Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3,14 March 2005, para. 31)

Article 5, paragraph 1, of the Convention requires public authorities to possess and update information relevant to their functions, and requires Parties to establish mandatory systems ensuring an adequate flow of information about proposed and existing activities which may significantly affect the environment. It is the understanding of the Committee that as a minimum this should include EIA studies in their entirety, including specific methodologies of assessment and modeling techniques used in their preparation.

   (Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7 16 April 2008 para. 27)

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:
   
   (i) Publicly accessible lists, registers or files;
   
   (ii) Requiring officials to support the public in seeking access to information under this Convention; and
   
   (iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in elec-
tronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;
(b) Texts of legislation on or relating to the environment;
(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;
(b) International treaties, conventions and agreements on environmental issues; and
(c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;
(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and
(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

**Article 6  PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES**

The decisions have in common that they are crucial for the entire decision-making in relation to these sites, constructions and activities. The Committee will first have to consider whether the relevant decisions amount to decisions on specific activities under article 6 of the Convention, or decisions on plans under article 7. In one of its earlier decisions, the Committee, pointed out that “When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, […] it is
determined by the legal functions and effects of a decision…” (ECE/MP.PP/C.1/2006/4/Add.2, para. 29). Also, as previously observed by the Committee (ECE/MP.PP/C.1/2006/2/Add.1, para. 28), the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions.


NOTE: The two decisions the Committee referred to are the decisions made by the Council of Territorial Adjustment of the Republic of Albania on 19 February 2003, namely Decision No. 8 (approving the site of the proposed industrial and energy park) and Decision No. 20 (approving the construction site).

Decision No. 20 simply designates the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, it is more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant.


NOTE: Decision No 20 concerns the approval of a construction site for a thermal electric power station (TES)

The Committee finds that, by failing to provide for public participation of the kind required by article 6 of the Convention, Ukraine was not in compliance with article 6, paragraph 1 (a), and, in connection with this, article 6, paragraphs 2 to 8, and article 6, paragraph 9 (second sentence).


The Committee considers it to be beyond the scope of its mandate to examine the claim by the communicant and other expert bodies that other regulations were breached through the construction of the power line (see para. 17). However, it notes that if the local residents had had the full opportunities to be involved in the decision-making process as they should have had if article 6 of the Convention had been properly applied, they might then have been better placed to exercise their right to ‘challenge the substantive and procedural legality’ of the decision in accordance with article 9, paragraph 2, of the Convention. In this sense, therefore, the possibility that the decision itself breached other regulations has some relevance, but the violation of those regulations, if established, would not necessarily constitute non-compliance with the Convention.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 29)

Exclusion of environmental authorities from the decision-making on construction permits for expressways, as referred in paragraph 8 (g) above, can potentially have negative effect on the environmental quality of the final decision and various aspects of the construction, moreover as this exclusion also entails a de—facto exclusion of the rights of NGOs under the Hungarian Environmental Protection Act to represent the public concerned vis-à-vis environmental authorities. However, the matter as such falls outside of the scope of the Convention.


1. Each Party:

Taking into account the fact that different interpretations are possible with respect to these issues, the Committee chooses to focus on those aspects of
the case where the obligations of the Party concerned are most clear-cut. In this respect, it notes that the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply. Since each of the decisions is required to meet the public participation requirements that are common to article 6 and article 7, the Committee has decided to examine the way in which those requirements have or have not been met. (Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 70)

The extent to which the provisions of article 6 apply in this case depends inter alia on the extent to which the decrees (or some of them) can be considered "decisions on specific activities", that is, decisions that effectively pave the way for specific activities to take place. While the decrees are not typical of article 6–type decisions on the permitting of specific activities, some elements of them are (as is mentioned in paragraphs 12 and 23 above) more specific than a typical decision on land use designation would normally be. The Convention does not establish a precise boundary between article 6–type decisions and article 7–type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that, in addition to containing article 7–type decisions, some of the decrees do contain decisions on specific activities. (Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 28)

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

The landfill in question belongs to activities covered by annex I, paragraph 5, of the Convention. The full range of public participation procedures under article 6 of the Convention applies to decisions whether to permit such activities. Furthermore, the Vilnius County Waste Management Plan belongs to plans "relating to the environment" to which article 7 of the Convention applies. (Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 55)

As stated above, detailed plans in Lithuanian law have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention. Considering the function and legal effects of the EIA decision and the IPPC decision, these decisions too constitute permitting decisions under article 6 of the Convention. However, bearing in mind that the decision concerning the detailed plan was taken on 5 April, that is, prior to the Convention entry into force for Lithuania, the Committee has evaluated only the EIA and IPPC decisions for the Kazokiskes landfill in the light of article 6 of the Convention. (Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 58)

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and
(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

The Committee is aware that at least one of the two decisions that it has chosen to focus on would need to be followed by further decisions on whether to grant environmental, construction and operating permits (and possibly other types of permits) before the activities in question could legitimately commence. However, public participation must take place at an early stage of the environmental decision-making process under the Convention. Therefore, it is important to consider whether public participation has been provided for at a sufficiently early stage of the environmental decision-making processes in these cases.


The Committee considers that the procedures followed by the Almaty Territorial Environmental Protection Board in January 2002 and July 2002 were not in line with the requirements of article 6, paragraph 2, of the Convention. The residents living along the proposed route of the power line were obviously among the “public concerned” and, as such, they should have received notice of the hearings, including all the details required under article 6, paragraph 2. Despite this, it appears that they were not invited to the July hearings.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 23)

Aside from any consequential problems arising from a failure to implement paragraph 2, some other provisions of article 6 may have been breached even with respect to those members of the public that did receive notification of the hearings in accordance with the requirements of paragraph 2. For example, the fact that construction started before the July hearings were held is clearly not in conformity with the requirement under article 6, paragraphs 3 and 4, for “reasonable time frames” and “early public participation, when all options are open.” Furthermore, it appears that the responsible authorities treated the outcome of the hearings as if it were the outcome of public participation. This would have been more acceptable if the hearings had genuinely involved all key groupings within the public concerned. As it was, the views of those who were not invited to participate in the hearings, which apparently were expressed in other ways and were well known to the authorities, do not appear to have been taken into account.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25)

Considering the nature of the project and the interest it has generated, notification in the nation-wide media as well as individual notification of organizations that explicitly expressed their interest in the matter would have been called for. The Party, therefore, failed to provide for proper notification and participation in the meaning of article 6 of civil society and specifically the organizations, whether foreign or international, that indicated their interest in the procedure. With regard to the Romanian NGOs and individuals, such notification and participation could have been undertaken by Ukraine via the Romanian authorities, as there is sufficient evidence to suggest that the Ukrainian Government was well aware of the concerns expressed to the Romanian authorities by citizens and organizations in Romania. The Committee, however, notes that, generally speaking, there are no provisions or
guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance, seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention.


The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate. Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies.

(Lithuania ACCC/2006/16; ECE/M.P.P.P./2008/5/Add.6, 4 April 2008, para. 67)

The Committee thus concludes that by not properly notifying the public about the nature of possible decisions, and by failing to inform the public in an effective manner, Lithuania has failed to comply with article 6, paragraph 2 of the Convention.

(Lithuania ACCC/2006/16; ECE/M.P.P.P./2008/5/Add.6, 4 April 2008, para. 68)

However, the above reliance on the developer in providing for public participation in fact raises doubts as to whether such an arrangement is fully in line with the Convention. Indeed, it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6). Accordingly, reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention.

(Lithuania ACCC/2006/16; ECE/M.P.P.P./2008/5/Add.6, 4 April 2008, para. 78)

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

At the same time, it has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.

(Lithuania ACCC/2006/16; ECE/M.P.P.P./2008/5/Add.6, 4 April 2008, para. 66)

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:

(i) The commencement of the procedure;

(ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
Indeed, it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6). ...

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

Indeed, it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6)...

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

It is not clear from the information provided to the Committee whether the public was properly notified about the possibility to participate in the “designing the EIA programme” (i.e. the scoping stage) as envisaged in the Lithuanian law. At the same time, it has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.

Considering the nature of the project and the interest it has generated, notification in the nation-wide media as well as individual notification of organizations that explicitly expressed their interest in the matter would have been called for. The Party, therefore, failed to provide for proper notification and participation in the meaning of article 6 of civil society and specifically the organizations, whether foreign or international, that indicated their interest in the procedure. With regard to the Romanian NGOs and individuals, such notification and participation could have been undertaken by Ukraine via the Romanian authorities, as there is sufficient evidence to suggest that the Ukrainian Government was well aware of the concerns expressed to the Romanian authorities by citizens and organizations in Romania. The Committee, however, notes that, generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance, seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.
denied them the possibility to avail of the rights provided for under other provisions of article 6. If a key group of members of the public most directly affected by the activity was not informed of the process and not invited to participate in it, it follows that they did not receive notice in "sufficient time" as required under article 6, paragraph 3, and that in practice they did not have the opportunities for early and effective participation that should have been available in accordance with paragraph 4 or to provide input in accordance with paragraph 7. Similarly, if no public notice of the planned hearings or other participation opportunities was given, and if affected local residents were not invited to the hearing, whatever views they might have had to offer could not have been taken into account as required by article 6, paragraph 8.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 24)

Aside from any consequential problems arising from a failure to implement paragraph 2, some other provisions of article 6 may have been breached even with respect to those members of the public that did receive notification of the hearings in accordance with the requirements of paragraph 2. For example, the fact that construction started before the July hearings were held is clearly not in conformity with the requirement under article 6, paragraphs 3 and 4, for “reasonable time frames” and “early public participation, when all options are open.” Furthermore, it appears that the responsible authorities treated the outcome of the hearings as if it were the outcome of public participation. This would have been more acceptable if the hearings had genuinely involved all key groupings within the public concerned. As it was, the views of those who were not invited to participate in the hearings, which apparently were expressed in other ways and were well known to the authorities, do not appear to have been taken into account.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25)

The requirement to provide “reasonable time frames” implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 69)

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

Another question that arises is whether a further, more detailed permitting process, with public participation, is envisaged for the various specific activities. The information available to the Committee on this point is somewhat ambiguous. The communicants maintain that Armenian legislation requires that an EIA be carried out, with public participation, for such activities (see para. 10). If this takes place, it would certainly help to mitigate the lack of public participation in the formulation of the decrees. However, even if public participation is included at that stage, the scope of the decision on which the public would be consulted would be more limited than should be the case for article 6–type decisions, in the sense that some options (such as the option of not building any watch factory at a particular location) would no longer be open for discussion (cf. article 6, para. 4).

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 29)

The Committee also finds that by failing to ensure effective public participation in decision-making on specific activities, the Government of Armenia
did not comply fully with article 6, paragraph 1 (a); with annex I, paragraph 20, of the Convention; or, in connection with this, with article 6, paragraphs 2–5 and 7–9. It considers that the extent of non-compliance would be somewhat mitigated if public participation were to be provided for in further permitting processes for the specific activities in question, but it notes that the requirement under article 6, paragraph 4, to ensure that early public participation is provided for when all options are open would still have been breached. In this regard, the Committee notes, however, the information provided to it by the Government of Armenia regarding the new draft law on Environmental Impact Assessment and understands that the drafters of the new law will take this opportunity to ensure its approximation with the requirements of the Convention.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 42)

With regard to the issue of reduced environmental impact assessment procedure for modification of existing roads into expressways, the Committee notes that the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region. However, article 6, paragraph 4, requires early participation when all options are open and the participation can be effective. This requirement would clearly apply to the decision—making in question. Indeed, removing this phase might lead to removing the important opportunity for the public to participate in identifying the criteria on which to base the detailed EIA. However, in the absence of practice in implementing Section 4, paragraph 9, of the Act, it is difficult for the Committee to evaluate whether the new abridged procedure meets the requirements of article 6, paragraph 4.


The requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards. Within each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 71)

Lithuanian law envisages public participation in decision-making on plans and programmes. With this in mind and considering the structure of the consecutive decision-making and the legal effect of the different decisions in Lithuania, the fact that certain decisions took place when certain options were already decided upon (e.g. landfill or waste incinerator) and when only two possible locations were discussed does not seem to exceed the above limits of discretion.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 72)
While the information available to the Committee is not sufficient to conclude whether indeed in this particular case the public had a chance to participate in the scoping (i.e. designing the EIA programme), the Committee welcomes the approach of the Lithuanian law which envisages public participation at the stage of scoping. This appears to provide for early public participation in EIA decision-making.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 73)

Bearing in mind the general considerations in paragraphs 73 to 75, a system whereby the IPPC permitting process starts after the construction is finalized, as is the case in Lithuania, need not of itself be in conflict with the requirements of Convention, though in certain circumstances it might be. Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events on the ground” have effectively eliminated alternative options. If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 74)

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

Moreover, article 6, paragraph 6, of the Convention is aimed at providing the public concerned with an opportunity examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to publication of an environmental impact statement. But had some of the requested information fallen outside the scope of article 6, paragraph 6, of the Convention, it would be still covered by the provisions of article 4, regulating access to information upon request.

(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 32)

The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure. This is in particular so in situations where such studies form part of “information relevant to the decision-making” which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure.

(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 29)

The Committee stated in its findings and recommendations with regard to communication ACCC/C/2004/3 and submission ACCC/S/2004/1 that
article 6, paragraph 6, aimed at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to a requirement to publish an environmental impact statement. Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule. A general exemption of EIA studies from disclosure is therefore not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention.

(Romania ACCC/C2005/15; ECE/MP.PP/2008/5/Add.7, 16 April 2008 para. 30)

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

The Committee notes with some concern the fact that the EE [environmental expertise process, being limited to the consideration of waste and pollution issues (see para. 16), does not necessarily address all significant environmental effects. While it is a moot point whether this constitutes non-compliance with article 6, it is certainly within the spirit of article 6 that the permitting process (or the combination of permitting processes) for activities covered by article 6 should address all significant types of effects of such activities on the environment (see, for example, art. 6, para. 6 (b)). Limiting the (combined) scope of the permitting processes to just some types of environmental effects could significantly undermine the efficacy of that article.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 30)

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

With regard to the communicants’ allegations with respect to lack of certain information relevant to the decision-making (para. 45), the Committee does not consider itself in a position to analyse the accuracy of the data which form the basis for the decisions in question. The Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe what alternatives should be studied. Thus, the role of the Committee is to find out if the data that were available for the authorities taking the decision were accessible to the public and not to check whether the data available were accurate.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 79)

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.
7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

Whereas the Convention requires in article 6, paragraph 7, that “public participation procedures shall allow the public to submit any comments, information, analyses or opinions”, Lithuanian legislation limits the right to submit comments to the public concerned, and these comments are required to be “motivated proposals”, i.e. containing reasoned argumentation. In this respect, Lithuanian law fails to guarantee the full scope of the rights envisaged by the Convention.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 80)

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

The timeline, as reflected in paragraphs 15 and 16 above, failed to allow the public to study the information on the project and prepare and submit its comments. It also did not allow the public officials responsible for making the decision sufficient time to take any comments into account in a meaningful way, as required under article 6, paragraph 8.

(Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 29)

NOTE: The decision was taken seven days following publication of the environmental impact statement.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

The Committee finds that by refusing to provide the text of the decision along with the reasons and considerations on which it is based and not indicating how the communicant could have access to it, the Party concerned did not comply with its obligations under the second part of article 6, paragraph 9, to make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.


The Party concerned pointed out at the Committee's eighth meeting that, even though the decrees in question had not been published, they could be now accessed through an electronic database. However, in the Committee's view, such an approach does not satisfy the requirement of article 6, paragraph 9, of the Convention to promptly inform the public of the decision.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 31)

With regard to the allegation as to the failure to publicize the final decision (para. 47), the Committee wishes to underline that the Convention does not require the decision itself to be published. It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based. The public shall be informed “promptly” and “in accordance with the appropriate procedures”. The Convention does not specify here, as opposed to article 6, paragraph 2, any further requirements regarding informing the public about taking the decision thus leaving to the Parties some discretion in designing “the appropriate procedures” in their national legal frameworks. Similarly, the Convention does not set any precise requirements as to documenting “the reasons and considerations on which the decision is based “except for
the requirement to provide evidence of taking due account of “the outcome of public participation” as required under article 6, paragraph 8.

(Lithuania ACCC/2006/16; ECE/MP_PP/2008/5/Add.6, 4 April 2008, para. 81)

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

Article 7 PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

During the discussion on the case which took place at the Committee’s fourteenth meeting, the communicant indicated that the various decisions of the Albanian authorities referred to in the communication were parts of an overall construction and development plan, about the existence of which the public had not been informed. No evidence or further information to substantiate this allegation has been made available to the Committee. Consequently, the Committee has not addressed this issue in its findings and conclusions. However, it notes that where such overall plans exist, they might be subject to provisions of the Convention and that, in any event, meaningful public participation, generally speaking, implies that the public should be informed that the decisions subject to public participation form parts of an underlying overall plan where this is the case.


The decisions have in common that they are crucial for the entire decision-making in relation to these sites, constructions and activities. The Committee will first have to consider whether the relevant decisions amount to decisions on specific activities under article 6 of the Convention, or decisions on plans under article 7. In one of its earlier decisions, the Committee, pointed out that “When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, […] it is determined by the legal functions and effects of a decision…” (ECE/MP_PP/C.1/2006/4/Add.2, para. 29). Also, as previously observed by the Committee (ECE/MP_PP/C.1/2006/2/Add.1, para. 28), the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions.


NOTE: The two decisions the Committee referred to are decisions made by the Council of Territorial Adjustment of the Republic of Albania on 19 February 2003, namely Decision No. 8 (approving the site of the proposed industrial and energy park) and Decision No. 20 (approving the construction site) for a thermal electric power station (TES).
Decision No. 20 simply designates the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, it is more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant.


**NOTE:** Decision No 20 concerns the approval of a construction site for a thermal electric power station (TES)

Decision No. 8 on the industrial and energy park, on the other hand, has more the character of a zoning activity, i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not). This would link it more closely with article 7.


**NOTE:** Decision No 8 is the approval of the site of the proposed industrial and energy park

Taking into account the fact that different interpretations are possible with respect to these issues, the Committee chooses to focus on those aspects of the case where the obligations of the Party concerned are most clear-cut. In this respect, it notes that the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply. Since each of the decisions is required to meet the public participation requirements that are common to article 6 and article 7, the Committee has decided to examine the way in which those requirements have or have not been met.


The Party concerned has informed the Committee that there was “no complex decision taken on the development of industrial park as a whole”. It has emphasized that Decision No. 8 of the Council of Territorial Adjustment of the Republic of Albania “On the Approval of the Industrial and Energy Park – Vlore”, which approved the development of “The Industrial and Energy Park – Vlore”, was just a location (siting) decision. However, this does not detract from its importance, both in paving the way for more specific decisions on future projects and in preventing other potentially conflicting uses of the land. Several ministries were instructed to carry out this decision. The decision came into force immediately. It is clear to the Committee that this was a decision by a public authority that a particular piece of land should be used for particular purpose, even if further decisions would be needed before any of the planned activities could go ahead.


No evidence of any notification of the public concerned, or indeed of any opportunities for public participation being provided during the process leading up to this decision, has been presented to the Committee by the Party concerned, despite repeated requests. The documents provided by the Party concerned do not demonstrate that the competent authorities have identified the public that may participate, as requested under article 7 of the Convention, and that they have undertaken the necessary measures to involve the members of the public in the decision-making. To the contrary, the evidence
provided suggests that the opponents were not properly notified about the possibilities to participate. The Committee is therefore convinced that the decision was made without effective notification of the public concerned, which ruled out any possibility for the public to prepare and participate effectively during the decision-making process.


... Given the nature of the decision as outlined in the previous paragraph, even if public participation opportunities were to be provided subsequently with respect to decisions on specific activities within the industrial and energy park, the requirement that the public be given the opportunity to participate at an early stage when all options are open was not met in this case. Because of the lack of adequate opportunities for public participation, there was no real possibility for the outcome of public participation to be taken into account in the decision. Thus the Party concerned failed to implement the requirements set out in paragraphs 3, 4 and 8 of article 6, and consequently was in breach of article 7.


The government decrees referred to in the communication, in particular decrees 503-A, 745-A (para. 2 and 3) and 1281-A (para. 2), deal with the designation of land for a particular type of commercial activity. Typically, this would be considered as a type of decision falling within the scope of article 7 of the Convention. However, some of the decrees specify not only the general type of activity (e.g. manufacturing, agriculture) that may be carried out in the designated areas but also the specific activity (e.g. watch-making factory, construction of a diplomatic complex) and even the names of the companies or enterprises that would undertake these activities. These elements are more characteristic of a type of decision falling within the scope of article 6 of the Convention. The implications with respect to articles 7 and 6 are considered in turn in paragraphs 24–27 and 28–33 respectively.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 23)

Decree 1941-A, provisions of paragraph 1 of decree 745-A and paragraph 1 of decree 1281-A, and decree 397-A, in the Committee’s opinion, relate to land-use planning. The first three change the designation of land use in the existing zoning plan, while the fourth adopts the territorial zoning plan of the area and modifies the designated use of lands.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 24)

In the Committee’s view, such plans fall under article 7 of the Convention and are subject to the public participation requirements contained therein, including, inter alia, the application of the provisions in paragraphs 3, 4 and 8 of article 6. The Committee therefore finds that the failure to ensure public participation in the preparation of plans such as those referred to in paragraph 21 above constitutes non-compliance with article 7 of the Convention.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 25)

The extent to which the provisions of article 6 apply in this case depends inter alia on the extent to which the decrees (or some of them) can be considered “decisions on specific activities”, that is, decisions that effectively pave the way for specific activities to take place. While the decrees are not typical of article 6–type decisions on the permitting of specific activities, some elements of them are (as is mentioned in paragraphs 12 and 23 above) more specific than a typical decision on land use designation would normally be. The Convention does not establish a precise boundary between article 6–type decisions
and article 7–type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that, in addition to containing article 7–type decisions, some of the decrees do contain decisions on specific activities.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 28)

The Committee also finds that by failing to provide for public participation in decision-making processes for the designation of land use, the Government of Armenia was not in compliance with article 7 of the Convention.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 43)

The communication refers to a number of consecutive decision-making procedures. In such cases, it is possible that more than one decision amounts to a permit decision under article 6 or a decision to adopt a plan under article 7 of the Convention. This must be determined on a contextual basis, taking into account the legal effects of each decision. Moreover, as stated by the Committee in previous findings, when it determines how to categorize the relevant decisions under the Convention, their labels in the domestic law of the Party concerned are not decisive (cf. the findings concerning Belgium, ECE/MP.PP/C.1/2006/4/Add.2, para. 29). In the present case, while the Vilnius County Waste Management Plan clearly constitutes a plan covered by article 7 of the Convention, and has been considered thus by the communicant as well as the Party concerned, the nature of the other decisions relating to the landfill is less clear.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 55)

**Article 8**  PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be fixed;
(b) Draft rules should be published or otherwise made publicly available; and
(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

**Article 9**  ACCESS TO JUSTICE

The Committee notes that the more direct route for the communicants to challenge the contravention of environmental laws would have been to take a lawsuit directly against the polluting company, but the communicants were concerned about the financial risk they could face and therefore opted for the second route of taking a lawsuit against the relevant public authorities. This concern over what is known as strategic lawsuits against public participation also point out to obstacles in access to justice.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 32)
The Committee also considers that there is inconclusive evidence that the public lacked access to justice and therefore finds no basis on which to conclude that article 9 of the Convention was not complied with. Although the communicant was not satisfied with the decisions of the courts, having an adverse court decision does not in itself necessarily translate into a denial of access to justice. While appeal processes in the case in question were indeed overall lengthy, this seems to be primarily due to the different interpretations of the then existing legal provisions by various judicial instances, rather than the procedures being unfair, costly or inequitable. The matter is, in the Committee's opinion, therefore more linked with a lack of a clear legal framework in the context of article 3, paragraph 1, of the Convention, than a lack of access to justice under article 9.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 27)

However, in the Committee's opinion, the problem is not so much with the issue of jurisdiction or standing. Rather, it is connected to the fact that planning decisions whose subject matter is regulated by environmental legislation, and decisions on specific activities which, in accordance with the Convention, should be subject to an administrative or judicial review, were taken through a procedure that provides no possibility for the public to participate and no remedies. The Committee acknowledges that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the Convention. In this case, the Committee has not been made aware of any compelling reason justifying the choice of this form of decision-making.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 38)

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

The Convention, in its article 9, paragraph 1, requires the Parties to ensure that any procedure for appealing failure to access information is expeditious. However, as the time and number of determinations with regard to jurisdiction in this case demonstrate, there appears to be lack of regulations providing clear guidance to the judiciary as to the meaning of an expeditious procedure in cases related to access to information.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 21)
The Committee considers that the underlying reason for non-compliance with the requirements of articles 4 and 9, paragraph 1, as described in paragraphs 16 to 19 and 21 to 22 above, was a failure by the Party concerned to establish and maintain, pursuant to the obligation established in article 3, paragraph 1, a clear, transparent and consistent framework to implement these provisions of the Convention, e.g. by providing clear instructions on the status and obligations of bodies performing functions of public authorities, or regulating the issue of standing in cases on access to information in procedural legislation. 

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 23)

The Committee also finds that the lengthy review procedure and denial of standing to the non-governmental organization in a lawsuit on access to environmental information was not in compliance with article 9, paragraph 1.

(Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 26)

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

The Convention obliges the Parties to ensure access to justice for three generic categories of acts and omissions by public authorities. Leaving aside decisions concerning access to information, the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3). It is apparent that the rationales of paragraph 2 and paragraph 3 of article 9 of the Convention are not identical.


The communicant has attempted to make use of the domestic remedies available at the early stage. The Committee finds some merit in the argument of the communicant that deficiencies in applying public participation procedures effectively deprived it of its rights under article 9, paragraph 2, of the Convention, i.e. the possibility to challenge the decisions taken at the early stage of decision-making.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 63)

The Committee considers it to be beyond the scope of its mandate to examine the claim by the communicant and other expert bodies that other regulations were breached through the construction of the power line (see para. 17). However, it notes that if the local residents had had the full opportunities to be involved in the decision-making process as they should have had if article 6 of the Convention had been properly applied, they might then have been better placed to exercise their right to 'challenge the substantive and procedural legality' of the decision in accordance with article 9, paragraph 2, of the Convention. In this sense, therefore, the possibility that the decision itself breached other regulations has some relevance, but the violation of those regulations, if established, would not necessarily constitute non-compliance with the Convention.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 29)

The Committee notes that in accordance with the Act, the final siting decision is taken by a ministerial decree and that this limits the possibilities of appealing these decisions under article 9, paragraph 2, of the Convention. However, it does not believe that such a system necessarily conflicts with
Since the majority of the regional and national environmental issues naturally concern the local environmental protection interests, the territorial field of operation of the local NGOs seems not to be significantly restricted. If the new legislation were to exclude local NGOs as such from participation in decision-making on projects in other parts of the country or on nationwide projects, programmes, etc., this would not be in conformity with the Convention. However, since there is no sufficient evidence of actual implementation of article 13 in conjunction with article 15, the Committee finds it difficult to establish at this stage whether the provisions as such might constitute non-compliance with article 6 and article 9, paragraph 2, in conjunction with article 2, paragraph 5, of the Convention.

With regard to access to justice, the communicants claim that they were denied access to a review procedure to challenge the substantive and procedural legality of the government decrees which, they argue, should be guaranteed under article 9, paragraph 2, of the Convention. The relevance of article 9, paragraph 2, would depend on the extent to which article 6 is applicable, and, as was stated above (paras 28–32), the Committee considers that, while the decrees primarily concern article 7 decision-making, some of their elements fall within the scope of article 6, and that therefore provisions of article 9, paragraph 2, apply.

The Committee further finds that by failing to ensure that members of the public concerned had access to a review procedure and to provide adequate and effective remedies, the Government of Armenia was not in compliance with article 9, paragraphs 2–4, of the Convention.

The Convention obliges the Parties to ensure access to justice for three generic categories of acts and omissions by public authorities. Leaving aside decisions concerning access to information, the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3). It is apparent that the rationales of paragraph 2 and paragraph 3 of article 9 of the Convention are not identical.

When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.

The situation is more complicated with respect to the legal functions and effects of town planning permits ("permis d’urbanisme"), as defined by Walloon law. Based on the information provided by the Party and the Communicant, it appears to the Committee that in Walloon law some town planning
permits may amount to permit decisions for specific activities where public participation is required (e.g. when an environmental impact assessment is required; cf. annex I, paragraph 20 of the Convention), whereas other do not. Hence, it is not possible for the Committee to generally conclude whether Belgian law on access to justice for these cases should be assessed in light of article 9, paragraph 2 or 3. Therefore, the Committee will assess the case under both provisions.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 32)

In the view of the Committee, the criteria that have been applied by the Council of State with respect to the right of environmental organizations to challenge Walloon town planning permits would not comply with article 9, paragraph 2. As stated, in these cases environmental organizations are deemed to have a sufficient interest to be granted access to a review procedure before a court or an independent and impartial body established by law. Although what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided “with the objective of giving the public concerned wide access to justice” within the scope of the Convention. As shown by the cases submitted by the Communicant with respect to town planning permits this is not reflected in the jurisprudence of the Council of State. Thus, if the jurisprudence is maintained, Belgium would fail to comply with the article 9, paragraph 2, of the Convention.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 33)

Noting the observations made in the communication regarding the existence of different criteria for standing with respect to the procedures for seeking annulment and suspension, respectively, of decisions before the Council of State, the Committee is of the opinion, without, however, having made any in-depth analysis, that the provisions of article 9, paragraphs 2 and 3, of the Convention do not require that there be a single set of criteria for standing for these two types of procedure.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 44)

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

Article 9, paragraph 2, applies to decisions with respect to permits for specific activities where public participation is required under article 6. For these cases, the Convention obliges the Parties to ensure standing for environmental organizations. Environmental organizations, meeting the requirements referred to in article 2, paragraph 5, are deemed to have a sufficient interest to be granted access to a review procedure before a court and/or another independent and impartial body established by law. Although what constitutes a
sufficient interest and impairment of a right shall be determined in accor-
dance with national law, it must be decided “with the objective of giving the
public concerned wide access to justice” within the scope of the Convention.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 27)

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure
before an administrative authority and shall not affect the requirement of exhaustion of administra-
tive review procedures prior to recourse to judicial review procedures, where such a requirement
exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2
above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national
law, members of the public have access to administrative or judicial procedures to challenge
acts and omissions by private persons and public authorities which contravene provisions of its
national law relating to the environment.

The communicants’ standing was not disputed in any of the court instances.
In the Committee’s view, this sufficiently establishes that they meet the crite-
rion under Kazakh law for access to review procedures as stipulated in article
9, paragraph 3, of the Convention. The argument of the Party concerned with
regard to the communicants’ consent to reside in the area (para. 4 above) is
not relevant in this consideration. Leaving aside the fact that the purchase of
property occurred when the facility was not operational, the communicants
do not challenge legitimate operation of the facility, but rather allege failure
of the public authorities to bring about compliance with environmental leg-
islation and their own failure to obtain access to justice in the context of the
Convention.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 22)

While the communication presents a lot of information with regard to vio-
lations that continually occur in the operation of the facility, as illustrated
in paragraphs 9 and 15 above, it is not within the Committee’s mandate to
assess these alleged violations or verify the information. The Committee will
however consider the judicial procedure in question from the point of view
of compliance with article 9, paragraphs 3 and 4.


With regard to the court decision of 27 November 2001, the court had in
front of it three claims: to require the public authorities to take certain actions
(i.e. develop a management plan), to revoke the conclusions of the earlier
environmental assessment and the related permit and to award compensa-
tion of damages. The decision addressed the third claim but failed to address
the request for an environmental management plan to be developed for the
facility to bring its operation into compliance with the national legislation.
It also did not resolve the matter of appeal against the conclusions of the
governmental environmental assessment. Without an indepth analysis of the
domestic legislation the Committee is not able to establish whether an omis-
sion to develop such a plan would be in contradiction with environmental leg-
islation and therefore fall under article 9, paragraph 3, of the Conven-
tion. Should this have been positively established, the failure by the courts to
address this claim would constitute a denial of access to judicial review pro-
cedures in the meaning of article 9, paragraph 3. The Committee therefore
would like to bring the attention of the Party to this situation.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 26)

The judicial procedures referred to in paragraph 17 above were initiated to
challenge the public authorities’ failure to act to bring about compliance with
national environmental law. In this regard, it is important to distinguish three issues:

(a) Whether the communicant had access to a review procedure in order to challenge the alleged failure of enforcement by the public authorities. The Convention clearly applies here, and it appears that the communicants did have such access, even if the courts’ decisions did not go in their favour;

(b) Whether the public authorities were legally obliged (as opposed to merely permitted) to enforce the relevant laws and regulations. The Committee is not in a position to interpret substantive environmental and administrative legislation of the Party where it falls outside the scope of the Convention, nor is it in a position to dispute the court’s opinion that the public authority has a right to judge which of the courses of actions available to it are best suited to achieve effective enforcement. The Committee is, generally speaking, reluctant to discuss the courts’ interpretations of substantive provisions of environmental or other domestic legislation. However, a general failure by public authorities to implement and / or enforce environmental law would constitute an omission in the meaning of article 9, paragraph 3, of the Convention, even though the specific means proposed by the plaintiff to rectify this failure might not be the only ones or the most effective ones;

(c) Whether the public authorities did in fact effectively enforce the relevant laws and regulations. There is certainly, in the view of the Committee, a freedom for the public authorities to choose which enforcement measures are most appropriate as long as they achieve effective results required by the law. Public authorities of the kind referred to in paragraph 17 above often have at their disposal various means to enforce standards and requirements of law, of which initiation of legal action against the alleged violator is but one. The Committee notes however, that actions with regard to the facility undertaken by the public authorities in the course of the past seven years (e.g. imposing fines) consistently failed to ensure effective results, as demonstrated by the information presented in paragraphs 4 (e), 10 and 16 above.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 30)

It is the Committee’s opinion that the procedures fall under article 9, paragraph 3, of the Convention, triggering also the application of article 9, paragraph 4. Furthermore, it appears that there were significant problems with enforcement of national environmental law. Even though the communicants had access to administrative and judicial review procedures on the basis of the existing national legislation, this review procedure in practice failed to provide adequate and effective remedies and, therefore, was out of compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 31)

The Committee finds that the failure by Kazakhstan to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken constitutes a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 35)

The communicants also point out that they were denied access to review procedures to challenge the land designation aspect of the decrees. In this respect the Committee notes that the subject matter of the decrees is regu-
lated in detail by both Armenian environmental laws (such as the Law on Environmental Impact Assessment) and laws regulating urban planning. Moreover, these laws require that the public be consulted in the process of such decision-making. It is therefore the Committee’s opinion that the communicants, in accordance with article 9, paragraph 3, should have had access to a review procedure to challenge the decisions, which deal with such subject matter and which they believed to contradict their national law relating to the environment.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 36)

The lawsuit challenging the legality of the decrees and petitioning for a writ to declare them null and void was dismissed by the district court for lack of jurisdiction. The decision of the court points out that the Civil Procedure Code prevents courts from declaring null and void for any reason decisions whose constitutionality is subject to review by the Constitutional Court. It further notes that the Constitution of Armenia provides for a review of the constitutionality of government decisions by the Constitutional Court only. However, as the communicants point out, only three institutions have standing in the Constitutional Court (see para. 15 above). Two of these represent the executive that issues government decrees, and the third constitutes a large proportion of the national legislative body. In the Committee’s opinion, such an approach does not ensure that members of the public have access to review procedures.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 37)

The Convention obliges the Parties to ensure access to justice for three generic categories of acts and omissions by public authorities. Leaving aside decisions concerning access to information, the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3). It is apparent that the rationales of paragraph 2 and paragraph 3 of article 9 of the Convention are not identical.


Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public “where they meet the criteria, if any, laid down in its national law” have access to administrative or judicial procedures to challenge the acts and omissions concerned. Contrary to paragraph 2 of article 9, however, paragraph 3 does not refer to “members of the public concerned”, but to “members of the public”.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 28)

When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 29)

Relevant in this case is also article 9, paragraph 4, according to which the procedures for challenging acts and omissions that contravene national law relating to the environment shall provide adequate and effective remedies,
including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 30)

Based on the information received from the Party concerned and the Communicant, the Committee understands that decisions concerning area plans ("plan de secteur") do not have such legal functions or effects as to qualify as decisions on whether to permit a specific activity. Therefore, article 9, paragraph 3, is the correct provision to review Belgian law on access to justice with respect to area plans, as provided for in Walloon legislation.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 31)

The situation is more complicated with respect to the legal functions and effects of town planning permits ("permis d'urbanisme"), as defined by Walloon law. Based on the information provided by the Party and the Communicant, it appears to the Committee that in Walloon law some town planning permits may amount to permit decisions for specific activities where public participation is required (e.g. when an environmental impact assessment is required; cf. annex I, paragraph 20 of the Convention), whereas other do not. Hence, it is not possible for the Committee to generally conclude whether Belgian law on access to justice for these cases should be assessed in light of article 9, paragraph 2 or 3. Therefore, the Committee will assess the case under both provisions.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 32)

To the extent that a town planning permit should not be considered a permit for a specific activity as provided for in article 6 of the Convention, the decision is still an act by a public authority. As such it may contravene provisions of national law relating to the environment. Thus, Belgium is obliged to ensure that in these cases members of the public have access to administrative or judicial procedures to challenge the acts concerned, as set out in article 9, paragraph 3. This provision is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. When assessing the Belgian criteria for access to justice for environmental organizations in the light of article 9, paragraph 3, the provision should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 34)

While referring to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action ("actio popularis") in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment.

Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action ("actio popularis") in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice.”

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 36)

When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, namely to what extent national law effectively has such blocking consequences for environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. As mentioned, Belgian (Walloon) law does not provide for administrative appeals or remedies for third parties to challenge town planning permits or decisions on area planning. The question therefore is whether sufficient access is granted to the Council of State. This evaluation is not limited to the wordings in legislation, but also includes jurisprudence of the Council of State itself.


NOTE: The council of State is an administrative court in Belgium

Up to the point of entry into force of the Convention for Belgium, the general criteria for standing of environmental organizations before the Council of State have not differed from those of natural persons. According to this practice, to be able to challenge a town planning permit or a plan before the Council of State, an environmental organization must thus claim a direct, personal and legitimate interest. It must also prove that, when acting in accordance with its statutory goals, the goals do not coincide with the protection of a general interest or a personal interest of its members. Hence, federations of environmental organizations have generally not been able to meet this criterion, since their interest is not seen as distinct from the interests of its members. Moreover, according to this practice, two criteria must be fulfilled in order to appreciate the general character of the organization’s statutory goal, a social and a geographical criterion. The case is not admissible if the objective of the organization is so broadly defined that it is not distinct from a general interest. As to the geographical criterion, an act cannot be challenged by an organization if the act refers to a well-defined territory and the activities of organization are not territorially limited or cover a large geographical area, unless the organization also has a specifically defined social objective. Furthermore, an organization whose objective expands to a large territory may only challenge an administrative act if the act affects the entire or a great part of the territory envisaged by the organization's statutes.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 38)

The Convention does not explicitly refer to federations of environmental organizations. If, in the jurisdiction of a Party, standing is not granted to such federations, it is possible that, to the extent that member organizations of the federation are able to effectively challenge the act or omission in question,
this may suffice for complying with article 9, paragraph 3. If, on the other hand, due to the criteria of a direct and subjective interest for the person, no member of the public may be in a position to challenge such acts or omissions, this is too strict to provide for access to justice in accordance with the Convention. This is also the case if, for the same reasons, no environmental organization is able to meet the criteria set by the Council of State.


The Convention does not prevent a Party from applying general criteria of the sort found in Belgian legislation. However, even though the wordings of the relevant Belgian laws do not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as reflected in the cases submitted by the Communicant, implies a too restrictive access to justice for environmental organizations. In its response, the Party concerned contends that the Communicant “presents an unbalanced image by its ‘strategic use’ of jurisprudence,” and that “the difficulties that the BBL experiences by the Communicant to bring an action in court are not representative for environmental NGOs in general”. In the view of the Committee, however, the cases referred to show that the criteria applied by the Council of State so far seem to effectively bar most, if not all, environmental organizations from challenging town planning permits and area plans that they consider to contravene national law relating to the environment, as under article 9, paragraph 3. Accordingly, in these cases, too, the jurisprudence of the Council of State appears too strict. Thus, if maintained by the Council of State, Belgium would fail to provide for access to justice as set out in article 9, paragraph 3, of the Convention. By failing to provide for effective remedies with respect to town planning permits and decisions on area plans, Belgium would then also fail to comply with article 9, paragraph 4.


NOTE: BBL is the communicant Bond Beter Leefmilieu Vlaanderen VZW. BBL is a federation of environment organizations in Belgium.

Noting the observations made in the communication regarding the existence of different criteria for standing with respect to the procedures for seeking annulment and suspension, respectively, of decisions before the Council of State, the Committee is of the opinion, without, however, having made any in-depth analysis, that the provisions of article 9, paragraphs 2 and 3, of the Convention do not require that there be a single set of criteria for standing for these two types of procedure.

(Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 44)

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

The Committee indeed has some concerns with regard to the effect of the combination of some of the Expressway Act provisions, in particular, those described in paragraphs 8 (e) and (f) above, might have on the adequacy and effectiveness of remedies, in accordance with article 9, paragraph 4, of the Convention. Where individual provisions are not in themselves in conflict with the requirements of the Convention, one cannot exclude a possibility that their cumulative effect might lead to non-compliance. However, in this particular case the Committee is not convinced that the cumulative effect provides sufficient grounds for establishment of noncompliance.

With regard to the decision of the court of first instance of 27 June 2002 and the subsequent developments described in paragraph 13 above, the Committee is of the opinion that a procedure which allows for a court hearing to commence without proper notification of the parties involved (including a confirmation that notifications have indeed been received), cannot be considered a fair procedure in the meaning of article 9, paragraph 4, of the Convention. Although the court decision refers to the multiple notifications being sent to the plaintiffs, no evidence was presented in support of this by the Party. In absence of such evidence the Committee considers that the claim of the communicants that they were not duly notified has not been reputed. In the view of the Committee the shortcoming lies with the compliance by the courts with the existing requirements of procedural legislation, rather than the legislation itself.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 28)

The Committee also finds that the failure to communicate the court decision to the parties, as described in paragraph 15, constitutes a lack of fairness and timeliness in the procedure. At the Committee’s eighth meeting, the representatives of the Party concerned argued that even if the decision was not communicated directly to the plaintiffs, they still had a possibility to access the text of the decision in the court records. Clearly, while public accessibility of decisions is commendable, it does not in itself satisfy the fairness of the procedure. A fair and timely procedure requires that a decision should be communicated to the parties within a short time to enable them to take further actions, including filing an appeal.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 29)

It is the Committee’s opinion that the procedures fall under article 9, paragraph 3, of the Convention, triggering also the application of article 9, paragraph 4. Furthermore, it appears that there were significant problems with enforcement of national environmental law. Even though the communicants had access to administrative and judicial review procedures on the basis of the existing national legislation, this review procedure in practice failed to provide adequate and effective remedies and, therefore, was out of compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 31)

The Committee finds that the failure by Kazakhstan to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken constitutes a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

(Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 35)

The Convention does not prevent a Party from applying general criteria of the sort found in Belgian legislation. However, even though the wordings of the relevant Belgian laws do not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as reflected in the cases submitted by the Communicant, implies a too restrictive access to justice for environmental organizations. In its response, the Party concerned contends that the Communicant “presents an unbalanced image by its ‘strategic use’ of jurisprudence,” and that “the difficulties that the BBL experiences by the Communicant to bring an action in court are not representative for environmental NGOs in general”. In the view of the Committee, however, the cases referred to show...
that the criteria applied by the Council of State so far seem to effectively bar most, if not all, environmental organizations from challenging town planning permits and area plans that they consider to contravene national law relating to the environment, as under article 9, paragraph 3. Accordingly, in these cases, too, the jurisprudence of the Council of State appears too strict. Thus, if maintained by the Council of State, Belgium would fail to provide for access to justice as set out in article 9, paragraph 3, of the Convention. By failing to provide for effective remedies with respect to town planning permits and decisions on area plans, Belgium would then also fail to comply with article 9, paragraph 4.


5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

**Article 10  MEETING OF THE PARTIES**

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

   (a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

   (b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

   (c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

   (d) Establish any subsidiary bodies as they deem necessary;

   (e) Prepare, where appropriate, protocols to this Convention;

   (f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

   (g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

   (h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

   (i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization
qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

**Article 11  RIGHT TO VOTE**

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

**Article 12  SECRETARIAT**

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

**Article 13  ANNEXES**

The annexes to this Convention shall constitute an integral part thereof.

**Article 14  AMENDMENTS TO THE CONVENTION**

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit
of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.

7. For the purposes of this article, «Parties present and voting» means Parties present and casting an affirmative or negative vote.

**Article 15  REVIEW OF COMPLIANCE**

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

**Article 16  SETTLEMENT OF DISPUTES**

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

   (a) Submission of the dispute to the International Court of Justice;

   (b) Arbitration in accordance with the procedure set out in annex II.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

**Article 17  SIGNATURE**

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

**Article 18  DEPOSITARY**

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

**Article 19  RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION**

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.
2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization’s member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Article 20  ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 21  WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

Article 22  AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

Annex I  LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:
   - Mineral oil and gas refineries;
1. Installations for gasification and liquefaction;
- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
- Coke ovens;
- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissile and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
- Installations for the reprocessing of irradiated nuclear fuel;
- Installations designed:
  - For the production or enrichment of nuclear fuel;
  - For the processing of irradiated nuclear fuel or high-level radioactive waste;
  - For the final disposal of irradiated nuclear fuel;
  - Solely for the final disposal of radioactive waste;
  - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:
- Metal ore (including sulphide ore) roasting or sintering installations;
- Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
- Installations for the processing of ferrous metals:
  (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
  (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
  (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
- Ferrous metal foundries with a production capacity exceeding 20 tons per day;
- Installations:
  (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
  (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
- Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m³.

3. Mineral industry:
- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m³ and with a setting density per kiln exceeding 300 kg/m³.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):
(a) Chemical installations for the production of basic organic chemicals, such as:
   (i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
   (ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
   (iii) Sulphurous hydrocarbons;
   (iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
   (v) Phosphorus-containing hydrocarbons;
   (vi) Halogenic hydrocarbons;
   (vii) Organometallic compounds;
   (viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
   (ix) Synthetic rubbers;
   (x) Dyes and pigments;
   (xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:
   (i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;
   (ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
   (iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
   (iv) Salts, such as ammonium chloride, potassium chloride, potassium carbonate, sodium carbonate, perborate, silver nitrate;
   (v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;

(c) Chemical installations for the production of phosphorous-, nitrogen— or potassium-based fertilizers (simple or compound fertilizers);

(d) Chemical installations for the production of basic plant health products and of biocides;

(e) Installations using a chemical or biological process for the production of basic pharmaceutical products;

(f) Chemical installations for the production of explosives;

(g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.

5. Waste management:
   – Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
   – Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
   – Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
   – Landfills receiving more than 10 tons per day or with a total capacity exceeding 25,000 tons, excluding landfills of inert waste.

6. Waste-water treatment plants with a capacity exceeding 150,000 population equivalent.

7. Industrial plants for the:
   (a) Production of pulp from timber or similar fibrous materials;
   (b) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (a) Construction of lines for long-distance railway traffic and of airports with a basic runway length of 2,100 m or more;
   (b) Construction of motorways and express roads;
   (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tons;
The decision-making process in question concerns construction of a deep-water navigation canal of a type that falls under paragraph 9 of annex I to the Aarhus Convention and therefore falls under article 6, paragraph 1 (a), of the Convention, triggering also the application of other provisions of that article.


(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2,000 million cubic metres/year and where the amount of water transferred exceeds 5 per cent of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

(a) 40,000 places for poultry;

(b) 2,000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;

- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;

(a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

(b) Treatment and processing intended for the production of food products from:

(i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

(ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;

- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, clean-
ing or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;

– Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

Annex I, paragraph 20, requires that, if public participation is provided under an EIA procedure in accordance with national legislation, the provisions of article 6 shall apply. Article 15, paragraph 2, of the Law on Ecological Expertise of Kazakhstan requires the results of taking public opinion into account, according to a procedure to be adopted by the central executive body in the sphere of environmental protection, to be presented as part of an ecological expertise, among other documents. The Ministry in its letter of 17 December 2004 argued that the specific procedure of the central executive body did not exist in 2002 (at the time that the EE in question was being undertaken). However, article 15 of the Law itself does, in the view of the Committee, provide for public participation in the sense of annex I, paragraph 20. The fact that the Ministry itself recognized, in December 2001 and then in May 2002, that both the first and the second ecological expertises violated article 15 of the Law on Ecological Expertise because “the project was accepted for assessment without the results of a survey of public opinion,” and that the Almaty Territorial Environmental Protection Board, under instruction from the Ministry, subsequently introduced some elements of public participation into the process, bears this out. The Committee therefore considers that such an EIA procedure does exist in Kazakh legislation, as part of the 1997 Law on Ecological Expertise; that consequently the activity in question does fall within the scope of annex I, paragraph 20; and that a decision to permit such an activity does therefore fall within the scope of article 6, paragraph 1.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 22)

Finally, the Committee notes with appreciation the efforts of the Ministry in December 2001 and May-June 2002 to attempt to introduce some elements of public participation in a process that was defective in that respect. It further notes that Kazakhstan’s failure to comply with the Convention in this particular case stems directly from the fact that public participation was, in the view of the Committee, required under the Law on Environmental Expertise, thereby bringing the activity in question within the scope of annex I, paragraph 20. Because the applicability of paragraph 20 is contingent on there being national requirements for public participation, it is one of those provisions of the Convention that does not necessarily contribute to a level playing field or a common set of standards. In other words, a country which had no public participation requirement with respect to EIA for such an activity would not be in non-compliance in such a case, and yet its system would be less in harmony with the objective of the Convention than that of Kazakhstan. This is certainly an important mitigating factor in considering the gravity of any non-compliance arising with respect to that particular provision.

(Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 31)
permitting processes for the specific activities in question, but it notes that
the requirement under article 6, paragraph 4, to ensure that early public
participation is provided for when all options are open would still have been
breached. In this regard, the Committee notes, however, the information
provided to it by the Government of Armenia regarding the new draft law
on Environmental Impact Assessment and understands that the drafters of
the new law will take this opportunity to ensure its approximation with the
requirements of the Convention.

(Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, para. 42)

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above
projects undertaken exclusively or mainly for research, development and testing of new methods
or products for less than two years unless they would be likely to cause a significant adverse
effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the
criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this
Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1
(b) of this Convention.

Notes
1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all
nuclear fuel and other radioactively contaminated elements have been removed permanently
from the installation site.

2/ For the purposes of this Convention, «airport» means an airport which complies with the defi-
nition in the 1944 Chicago Convention setting up the International Civil Aviation Organization
(Annex 14).

3/ For the purposes of this Convention, «express road» means a road which complies with the defi-

Annex II  ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of
this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration
and indicate, in particular, the articles of this Convention whose interpretation or application is
at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and
the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so
appointed shall designate by common agreement the third arbitrator, who shall be the president
of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor
have his or her usual place of residence in the territory of one of these parties, nor be employed
by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appoint-
ment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe
shall, at the request of either party to the dispute, designate the president within a further
two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the
receipt of the request, the other party may so inform the Executive Secretary of the Economic
Commission for Europe, who shall designate the president of the arbitral tribunal within a further
two-month period. Upon designation, the president of the arbitral tribunal shall request the party
which has not appointed an arbitrator to do so within two months. If it fails to do so within that
period, the president shall so inform the Executive Secretary of the Economic Commission for
Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provi-
sions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own
rules of procedure.
7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:
   (a) Provide it with all relevant documents, facilities and information;
   (b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

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DECISION I/7
review of compliance

adopted at the first meeting of the Parties
held in Lucca, Italy, on 21-23 October 2002

The Meeting,
Determined to promote and improve compliance with the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and recalling its article 15,
Recognizing the necessity for rigorous reporting by the Parties on their compliance with the Convention,
1. Establishes the Compliance Committee for the review of compliance by the Parties with their obligations under the Convention.
2. Decides that the structure and functions of the Compliance Committee and the procedures for the review of compliance shall be those set out in the annex to this decision.

Annex STRUCTURE AND FUNCTIONS OF THE COMPLIANCE COMMITTEE AND PROCEDURES FOR THE REVIEW OF COMPLIANCE

I. STRUCTURE
1. The Committee shall consist of eight members, who shall serve in their personal capacity.
2. The Committee shall be composed of nationals of the Parties and Signatories to the Convention who shall be persons of high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience.
3. The Committee may not include more than one national of the same State.
4. Candidates meeting the requirements of paragraph 2 shall be nominated by Parties, Signatories and non-governmental organizations falling within the scope of article 10, paragraph 5, of the Convention and promoting environmental protection, for election pursuant to paragraph 7.
5. Unless the Meeting of the Parties, in a particular instance, decides otherwise, the procedure for the nomination of candidates for the Committee shall be the following:
   (a) Nominations shall be sent to the secretariat in at least one of the official languages of the Convention not later than 12 weeks before the opening of the meeting of the Parties during which the election is to take place;
   (b) Each nomination shall be accompanied by a curriculum vitae (CV) of the candidate not exceeding 600 words and may include supporting material;
   (c) The secretariat shall distribute the nominations and the CVs, together with any supporting material, in accordance with rule 10 of the Rules of Procedure.
6. Committee members shall be elected on the basis of nominations in accordance with paragraphs 4 and 5. The Meeting of the Parties shall give due consideration to all nominations.
7. The Meeting of the Parties shall elect the members of the Committee by consensus or, failing consensus, by secret ballot.
8. In the election of the Committee, consideration should be given to the geographical distribution of membership and diversity of experience.
9. The Meeting of the Parties shall, as soon as practicable, elect four members to the Committee to serve until the end of the next ordinary meeting and four members to serve a full term of office. At each ordinary meeting thereafter, the Meeting of the Parties shall elect four members for a full term of office. Outgoing members may be re-elected once for a further full term of office, unless in a given case the Meeting of the Parties decides otherwise. A full term of office commences at the end of an ordinary meeting of the Parties and runs until the second ordinary meeting of the Parties thereafter. The Committee shall elect its own Chairperson and Vice-Chairperson.

10. If a member of the Committee can no longer perform his or her duties as member of the Committee for any reason, the Bureau of the Meeting of the Parties shall appoint another member fulfilling the criteria in this chapter to serve the remainder of the term, subject to the approval of the Committee.

11. Every member serving on the Committee shall, before taking up his or her duties, make a solemn declaration in a meeting of the Committee that he or she will perform his or her functions impartially and conscientiously.

II. MEETINGS

12. The Committee shall, unless it decides otherwise, meet at least once a year. The secretariat shall arrange for and service the meetings of the Committee.

III. FUNCTIONS OF THE COMMITTEE

13. The Committee shall:
   (a) Consider any submission, referral or communication made in accordance with paragraphs 15 to 24 below;
   (b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention; and
   (c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention; and act pursuant to paragraphs 36 and 37.

14. The Committee may examine compliance issues and make recommendations if and as appropriate.

IV. SUBMISSION BY PARTIES

15. A submission may be brought before the Committee by one or more Parties that have reservations about another Party's compliance with its obligations under the Convention. Such a submission shall be addressed in writing to the secretariat and supported by corroborating information. The secretariat shall, within two weeks of receiving a submission, send a copy of it to the Party whose compliance is at issue. Any reply and supporting information shall be submitted to the secretariat and to the Parties involved within three months or such longer period as the circumstances of a particular case may require but in no case later than six months. The secretariat shall transmit the submission and the reply, as well as all corroborating and supporting information, to the Committee, which shall consider the matter as soon as practicable.

16. A submission may be brought before the Committee by a Party that concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations under the Convention. Such a submission shall be addressed in writing to the secretariat and explain, in particular, the specific circumstances that the Party considers to be the cause of its noncompliance. The secretariat shall transmit the submission to the Committee, which shall consider the matter as soon as practicable.

V. REFERRALS BY THE SECRETARIAT

17. Where the secretariat, in particular upon considering the reports submitted in accordance with the Convention’s reporting requirements, becomes aware of possible noncompliance by a Party with its obligations under the Convention, it may request the Party concerned to furnish necessary information about the matter. If there is no response or the matter is not resolved within three months, or such longer period as the circumstances of the matter may require but in no case later than six months, the secretariat shall bring the matter to the attention of the Committee, which shall consider the matter as soon as practicable.
VI. COMMUNICATIONS FROM THE PUBLIC

18. On the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Convention with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party’s compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received. During the four-year period mentioned above, the Party may revoke its notification thereby accepting that, from that date, communications may be brought before the Committee by one or more members of the public concerning that Party’s compliance with the Convention.

Noting that some of the activities described in the communication took place prior to the Convention’s entry into force for Kazakhstan, the Committee will only address the activities that took place after 30 October 2001.

(Kazakhstan ACCC/C/2004/6; ECE/MPP/PC.1/2006/4/Add.1, 28 July 2006, para. 21)

The Convention, as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. All the provisions of the Convention are directly applicable, including by the courts.

(Kazakhstan ACCC/C/2004/1; ECE/MPP/PC.1/2005/2/Add.1, 11 March 2005, para. 14)

The Committee does not exclude the possibility when determining issues of noncompliance to take into consideration general rules and principles of international law, including international environmental and human rights law, which might be relevant in context of interpretation and application of the Convention. However, there is an existing provision in the Convention, demonstrating that negotiating parties considered the issue of the relationship between the existing rights and the rights provided by the Convention itself (art. 3, para. 6) but that they did not wish to completely exclude a possibility of reducing existing rights as long as they did not fall below the level granted by the Convention. However, the wording of article 3, paragraph 6, especially taken together with article 1 and article 3, paragraph 5, also indicates that such reduction was not generally perceived to be in line with the objective of the Convention.

(Hungary ACCC/C/2004/1 ECE/MPP/PC.1/2005/2/Add.4, 14 March 2005, para. 18)

While the communication presents a lot of information with regard to violations that continually occur in the operation of the facility, as illustrated in paragraphs 9 and 15 above, it is not within the Committee’s mandate to assess these alleged violations or verify the information. The Committee will however consider the judicial procedure in question from the point of view of compliance with article 9, paragraphs 3 and 4.

(Kazakhstan ACCC/C/2004/6; ECE/MPP/PC.1/2006/4/Add.1, 28 July 2006, para. 25)

The communicant and the Party concerned both consider that the approval of the technical project and construction permit should not be treated as decisions subject to article 6. The Committee has decided not to address this issue in the present case. This approach is in line with the Committee’s understanding, set out in its first report to the Meeting of the Parties (ECE/MPP/PC.2005/13, para. 13), that decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. On the other hand, in these findings the Committee is addressing also some general features of the Lithuanian legal framework, despite the indication by the communicant in its letter of 21 September 2007, that the communication was not aiming at the compliance of the Lithuanian legal framework in general, but only concerned its deficient application in the case of the landfill in question.

(Lithuania ACCC/2006/16; ECE/MPP/PC.2008/5/Add.6, 4 April 2008, para. 59)
19. The communications referred to in paragraph 18 shall be addressed to the Committee through the secretariat in writing and may be in electronic form. The communications shall be supported by corroborating information.

With regard to communication ACCC/C/2005/14 (Poland), the Committee noted that no further information had been received from the communicant. Noting the requirement in paragraph 19 of the annex to decision I/7 that communications be supported by corroborating information, the Committee determined that the communication was inadmissible.

(Poland ACCC/2005/14, report of the 11th meeting, ECE/MP.PP/C.1/2006/2, para. 23)

20. The Committee shall consider any such communication unless it determines that the communication is:

(a) Anonymous;
(b) An abuse of the right to make such communications;
(c) Manifestly unreasonable;
(d) Incompatible with the provisions of this decision or with the Convention.

The Committee determined that communication ACCC/C/2004/10 was inadmissible because it did not appear to relate to the procedures and obligations regulated by the Aarhus Convention, but rather dealt with substantive environmental issues. The only provision that might have been of some relevance was article 9, paragraph 3, but the Committee considered that the communication did not relate to a denial of access to administrative or judicial procedures but rather reflected dissatisfaction with their outcome. As it was not the first time that a communicant had appealed to the Committee out of dissatisfaction with court decisions, the Committee considered that it would be worthwhile to include some examples in the information sheet on communications of cases which would not be admissible.

(Kazakhstan ACCC/2004/10, report of the 7th meeting, ECE/MP.PP/C.1/2005/2, para. 15)

The Committee determined on a preliminary basis that communication ACCC/C/2004/07 was inadmissible. In its view, to determine otherwise would set a precedent for the Convention's compliance mechanism being used to review cases of unsuccessful environmental litigation, which was clearly not its purpose. It did however agree to offer the communicant the opportunity to provide additional information clearly indicating the relevance of the matter to the Convention, in which case it would consider the communication further. If no such information were provided or if, following the provision of further information, the Committee remained unconvinced, the determination of inadmissibility would be confirmed by default at its next meeting.

(Poland ACCC/2004/7, report of the 5th meeting, MP.PP/C.1/2004/6, para. 27)

Since all the court decisions submitted by the Communicant refer to cases initiated before the entry into force of the Convention for Belgium, they cannot be used to show that the practice has not been altered by the very entry into force of the Convention. Therefore, the Committee is not convinced that Belgium fails to comply with the Convention. However, as evidenced by the consideration and evaluation of the Committee, if the jurisprudence of the Council of State is not altered, Belgium will fail to comply with article 9, paragraphs 2 to 4, of the Convention by effectively blocking most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans, as provided for in the Walloon region.

prior to the Convention’s entry into force for Lithuania, the Committee is focusing on the activities that took place after 28 April 2002. However, as pointed out by the Committee, in determining whether or not to consider certain domestic procedures initiated before the entry into force of the Convention for the Party concerned, it considers whether significant events of those processes had taken place since the entry into force (cf. ECE/MP.PP/C.1/2005/2/Add.2, para. 4). In this regard the Committee noted that the significant events of the EIA procedure relating to implementation of article 6, in the Committee’s understanding, came after the entry into force of the Convention for Lithuania, with notification of the public concerned taking place in May 2002 and the decision itself being made on 12 June 2002.

(Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para. 56)

21. The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress.

As mentioned under paragraph 20 above, the Committee found the communication to be admissible. Nonetheless, the Committee does have some concerns about the limited extent to which the communicant made use of domestic remedies. The communicant did not try to apply to a court or another independent or impartial body established by law, either about the alleged refusal of the information requests (as entitled under art. 9, para. 1), or about the alleged failure of the public authorities to notify the public concerned about the proposed activities in an adequate, timely and effective manner and to take into account its concerns (under the article 9, para. 2).


The communicant attempted to justify this at one point by asserting that Albanian legislation did not provide domestic judicial or similar remedies of the kind envisaged under article 9; at another stage, by reference to its lack of confidence in the ability of the Albanian courts to safeguard its interests in an effective way. Furthermore, it considered its efforts to raise signatures and thereby precipitate a referendum to be a form of domestic remedy, albeit not in a conventional sense.


Decision I/7 of the First Meeting of the Parties of the Aarhus Convention says that the Committee should “take into account any available domestic remedy” (emphasis added). As previously noted by the Committee (MP.PP/C.1/2003/2, para. 37), this is not a strict requirement to exhaust domestic remedies. The Party concerned said in November 2005 that there was no domestic judicial remedy that could be used before the decision was taken, as there was nothing that a court could consider. One year later, the Party concerned presented general information to the effect that according to the Constitution and laws of Albania, there was access to administrative review, the Ombudsman and the courts. The first statement of the Party concerned could be seen to imply that the three decisions the text of which it submitted to the Committee in June 2006 (see para. 9 above) were not subject to appeal, which was also the position of the communicant (see para. 23); by contrast, its second statement indicated that they could have been appealed. In any event, there appears to be a certain lack of clarity with regard to possibilities to appeal certain decisions.


The Committee regrets the failure of both the Party concerned and the communicant to provide, in a timely manner, more detailed and comprehensive
information on the possibilities for seeking domestic remedies. Furthermore, it does not accept the communicant’s assertion that it has tried all possible domestic remedies. Nonetheless, in the face of somewhat incomplete and contradictory information concerning the availability of remedies, also from the side of the Party concerned, the Committee cannot reject the allegations of the communicant that domestic remedies do not provide an effective and sufficient means of redress.


With regard to communication ACCC/C/2004/09, although the Committee considered that the criteria of paragraph 20 of the annex to decision I/7 were met, it decided to exercise the discretion given to it under paragraph 21 of the annex to decision I/7 not to consider the communication further, as the matter has just been submitted for review by the domestic court of appeals. It noted, however, that if in the future the communicant still wished to bring the matter before the Committee due to the outcome or length of the review procedure, the communicant could ask for the file to be reopened.

(Armenia ACCC/2004/09 (Armenia), report of the 5th meeting, MP.PP/C.1/2004/6, para. 28)

With regard to communication ACCC/C/2007/19 (United Kingdom), further information had been received from the communicant, which pointed out that an inquiry on the matter in question was currently under way. The Committee therefore agreed that although it considered that the criteria of paragraph 20 of the annex to decision I/7 had been met, it would exercise the discretion given to it under paragraph 21 of the annex to decision I/7 not to consider the communication further, as the matter was subject to an ongoing inquiry. The file would therefore be closed. It noted, however, that if in the future the communicant still wished to bring the matter before the Committee due to the outcome or length of the review procedure, he could do so.

(United Kingdom ACCC2007/19, report of the 18th meeting, ECE/MP.PP/C.1/2007/8, para. 15)

22. Subject to the provisions of paragraph 20, the Committee shall as soon as possible bring any communications submitted to it under paragraph 18 to the attention of the Party alleged to be in non-compliance.

23. A Party shall, as soon as possible but not later than five months after any communication is brought to its attention by the Committee, submit to the Committee written explanations or statements clarifying the matter and describing any response that it may have made.

24. The Committee shall, as soon as practicable, further consider communications submitted to it pursuant to this chapter and take into account all relevant written information made available to it, and may hold hearings.

The Committee decided to concentrate primarily on the issue of public participation with regard to the two decisions made by the Council of Territorial Adjustment of the Republic of Albania on 19 February 2003, namely Decision No. 8 (approving the site of the proposed industrial and energy park) and Decision No. 20 (approving the construction site of the proposed TES). This approach is in line with the Committee’s understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that Decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. This procedural decision by the Committee to focus on these issues does not prevent it from addressing other aspects of the case.

(Albania ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para. 64)

The Committee takes note of the communicant’s allegations concerning the
failure of the authorities to respond to its requests for information made in 2007 (see para. 51). The Committee, using its discretionary power to focus on what it believes is most important in any given case, does not find it necessary to investigate this matter in any great detail. It does however note that if confirmed, such refusal to provide response to a request for information would be in breach of provisions of article 4, paragraph 1, of the Convention.


As a general remark on the processing of the communication, the Committee is concerned by the fact that it has taken more than two years to prepare findings and recommendations in this case. This is at least partly attributable to the initial lack of engagement in the process of the Party concerned (as evidenced not least by the fact that it did not accept the invitation to participate the discussion at the eleventh meeting of the Committee), and to the difficulties in obtaining timely, accurate and comprehensive answers from both the Party concerned and the communicant. Indeed, right up to the time of commenting on these findings and recommendations in draft form, i.e. May–June 2007, and despite specific and sometimes repeated requests by the Committee, the Party concerned failed to provide information crucial for correct interpretation of relevant events. The Committee therefore does not exclude a possibility that there is other information relevant to the case that has as yet not been made available to it at this stage.


The Committee notes however that the process of compliance review is forward-looking and that its aim is to begin facilitating implementation and compliance at the national level once a need for such is established. It therefore prefers to put forward those conclusions and recommendations which it can make at this stage.


VII. INFORMATION GATHERING

25. To assist the performance of its functions, the Committee may:

(a) Request further information on matters under its consideration;

At its eleventh meeting, the Committee had decided to seek information from the World Bank and the European Bank for Reconstruction and Development (EBRD), as they were two of the main financing institutions for the TES. It noted that the project was subject to their procedures, including procedures related to information and participation issues. The secretariat sent letters to both institutions on 27 July 2006 inviting them to provide any relevant information, including on whether the World Bank's Inspection Panel was or had been addressing the issue.


(b) Undertake, with the consent of any Party concerned, information gathering in the territory of that Party;

(c) Consider any relevant information submitted to it; and

In establishing the facts of the case, the Committee, in addition to examining the information provided in the communication, also considered some other information in the public domain, such as an analysis done by the International Center for Non-profit Act (ICNL).

(Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add.5, 14 March 2005, para. 14)
(d) Seek the services of experts and advisers as appropriate.

VIII. CONFIDENTIALITY

26. Save as otherwise provided for in this chapter, no information held by the Committee shall be kept confidential.

27. The Committee and any person involved in its work shall ensure the confidentiality of any information that falls within the scope of the exceptions provided for in article 4, paragraphs 3 (c) and 4, of the Convention and that has been provided in confidence. 28. The Committee and any person involved in its work shall ensure the confidentiality of information that has been provided to it in confidence by a Party when making a submission in respect of its own compliance in accordance with paragraph 16 above.

29. Information submitted to the Committee, including all information relating to the identity of the member of the public submitting the information, shall be kept confidential if submitted by a person who asks that it be kept confidential because of a concern that he or she may be penalized, persecuted or harassed.

30. If necessary to ensure the confidentiality of information in any of the above cases, the Committee shall hold closed meetings. 31. Committee reports shall not contain any information that the Committee must keep confidential under paragraphs 27 to 29 above. Information that the Committee must keep confidential under paragraph 29 shall not be made available to any Party. All other information that the Committee receives in confidence and that is related to any recommendations by the Committee to the Meeting of the Parties shall be made available to any Party upon its request; that Party shall ensure the confidentiality of the information that it has received in confidence.

IX. ENTITLEMENT TO PARTICIPATE

32. A Party in respect of which a submission, referral or communication is made or which makes a submission, as well as the member of the public making a communication, shall be entitled to participate in the discussions of the Committee with respect to that submission, referral or communication.

33. The Party and the member of the public shall not take part in the preparation and adoption of any findings, any measures or any recommendations of the Committee. 34. The Committee shall send a copy of its draft findings, draft measures and any draft recommendations to the Parties concerned and the member of the public who submitted the communication if applicable, and shall take into account any comments made by them in the finalization of those findings, measures and recommendations.

X. COMMITTEE REPORTS TO THE MEETING OF THE PARTIES

35. The Committee shall report on its activities at each ordinary meeting of the Parties and make such recommendations as it considers appropriate. Each report shall be finalized by the Committee not later than twelve weeks in advance of the meeting of the Parties at which it is to be considered. Every effort shall be made to adopt the report by consensus. Where this is not possible, the report shall reflect the views of all the Committee members. Committee reports shall be available to the public.

XI. CONSIDERATION BY THE COMPLIANCE COMMITTEE

36. Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may:

(a) In consultation with the Party concerned, take the measures listed in paragraph 37 (a);

(b) Subject to agreement with the Party concerned, take the measures listed in paragraph 37 (b), (c) and (d).

XII. CONSIDERATION BY THE MEETING OF THE PARTIES

37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:
(a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
(b) Make recommendations to the Party concerned;
(c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
(d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;
(e) Issue declarations of non-compliance;
(f) Issue cautions;
(g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;
(h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

XIII. RELATIONSHIP BETWEEN SETTLEMENT OF DISPUTES AND THE COMPLIANCE PROCEDURE

38. The present compliance procedure shall be without prejudice to article 16 of the Convention on the settlement of disputes.

XIV. ENHANCEMENT OF SYNERGIES

39. In order to enhance synergies between this compliance procedure and compliance procedures under other agreements, the Meeting of the Parties may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties on relevant developments between the sessions of the Meeting of the Parties.
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