



## **Compliance for Access**

The Most Recent (2008-2011) Case Law of the Aarhus Convention Compliance Committee

Legal Analysis

Justice and Environment, 2011

## FOREWORD

The Aarhus Convention is undoubtedly a unique multilateral international environmental agreement in many respects. One of them is its open, publicly accessible and lively, productive compliance mechanism, the Compliance Committee.

The Compliance Committee of the Aarhus Convention (ACCC) has now a long history of remarkable and sometimes groundbreaking recommendations (in the environmental activist jargon often mistakenly called “decisions”). A compilation of these recommendations until 2008 has been prepared already and a new publication was again made public in 2011 on the entire case law of the Compliance Committee until 2011 lately. Both these publications were made with the involvement of the European Eco Forum.

This analysis is not identical with that study and is not its copy or product of its aftermath. Our analysis of the ACCC case law was made upon an independent initiative and using a genuine methodology, focusing on user needs and lay-person interpretation of the case law.

What is included on the following pages is a short summary of each case before the Compliance Committee, the examination of its findings and a brief collection of practical conclusions derived from the case in question.

We hope that access practitioners, environmental activists but also legal professionals will be able to utilize this compilation and will find it useful and supportive of access rights in their practical work.

J&E

## EUROPEAN COMMUNITY (2007) (COMMUNICANT: CAPBV<sup>1</sup>)

### HOW SHOULD ENVIRONMENTAL INFORMATION BE REQUESTED FROM EUROPEAN COMMUNITY BODIES?

#### Background

Case # ACCC/C/2007/21 [[Link to all documents](#)]

This dispute centers on a thermo-power plant (TPP) in Vlora, Albania that is co-financed by the European Investment Bank (EIB). While a previous Compliance Committee recommendation concluded that Albania failed to comply with Article 6 in relation to the same TPP (*see* ACCC/C/2005/12), this dispute focuses on the EIB. According to the communicant, EIB did not allow for sufficient public participation at an early stage and should have conducted an independent Environmental Impact Assessment (EIA).

Furthermore, the communicant requested two documents from the EIB in 2007-2008. The request for the first document, a 2004 Finance Contract between the EIB and Albania, was initially denied because it was deemed to be confidential, but then released because the document was, in fact, already in the public domain. The request for the second document, a 1998 Framework Agreement between the EIB and Albania, was initially denied on the grounds that it was in the public domain already, but when this was found to be untrue, the EIB released the document after requesting authorization from Albania. Neither of CAPBV's requests for information indicated that CAPBV sought environmental information in specific.

#### Alleged Violation of the Aarhus Convention

ARTICLE 4 ◆ ARTICLE 6

CAPBV alleges a breach of Article 4 of the Aarhus Convention because the EIB improperly denied the release of environmental information, although this information was released after some delay.<sup>2</sup> CAPBV also alleges a breach of Article 6 of the Aarhus Convention because EIB failed to provide for sufficient public participation at an early stage of the project when all options were open. Likewise, CAPBV alleges that EIB was also required to conduct an independent EIA but failed to do so.

#### Issues and Outcomes

The Compliance Committee concluded that the European Community is in compliance with Article 4 because the requested documents were in fact provided, albeit delayed. Nonetheless, the Compliance Committee elaborated on several provisions of the Aarhus Convention related to environmental information. For example, a Party that erroneously denies access to environmental information is not per se in breach of Article 4 of the Aarhus Convention unless a review procedure, which is required under Article 9(1), fails to correct the

<sup>1</sup> Civic Alliance for Protection of the Bay of Vlora

<sup>2</sup> Article 5 was not discussed by the Report of the Compliance Committee, so the European Community is presumably not in violation of its obligations.

error within a “reasonable amount of time,” as determined on a case-by-case basis. Also, seeking authorization from a third party, in this case Albania, is *not* a valid exception to the obligation to provide environmental information under the Aarhus Convention. And if access to environmental information is denied because of a “legitimate economic interest” under Article 4(4)(d), this economic interest must be weighed against the interest of the public in receiving the environmental information.

Furthermore, while a request for information is not required to specify that *environmental* information is being sought, nor must such a request mention the Aarhus Convention, the Compliance Committee acknowledges that doing so may help avoid delay because public authorities may know the request falls within the scope of protections arising from the Aarhus Convention. Likewise, without making any conclusions about the specific documents in dispute, the Compliance Committee also noted that the definition of “environmental information” – being “factors and ... activities or measures ... affecting or likely to affect the elements of the environment...” – is quite broad and should be determined on a case-by-case basis.

The Compliance Committee then ruled that the European Community did not breach Article 6 because a loan from a financial institution is not within the scope of Article 6, i.e. it is not a “decision to permit an activity.” Finally, the Compliance Committee noted that the EIB has no power to conduct an EIA within the sovereign of another country.

### Lessons Learned

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- Although not required, clarifying that requested information is “environmental information” under the Aarhus Convention may speed up the process of obtaining such information, especially when the requested information does not obviously pertain to the environment.
- The European Community must comply with the provisions of the Aarhus Convention like any other Party.
- It may be difficult to challenge a denied request for environmental information through the Compliance Committee if the information is provided before the challenge or if the review procedures outlined in Article 9(1) have not first been attempted.
- A loan from a financial institution does not amount to a “permit” of an activity, thus loans are outside the scope of Article 6.

**FRANCE (2007)** (COMMUNICANT: “FARE SUD”<sup>3</sup>)**IS PUBLIC PARTICIPATION AND ACCESS TO JUSTICE REQUIRED FOR A NON-BINDING RESOLUTION THAT IS FOLLOWED UP BY A FINAL PERMITTING DECISION?****Background**Case # ACCC/C/2007/22 [[Link to all documents](#)]

This dispute is over the process that cumulated in the construction of a waste incinerator in Fos-sur-Mer, France. The Communauté Urbaine Marseille Provence Métropole (CUMPM), a regional governmental body, wanted to build a waste management facility, which required various decisions: the type of waste disposal installation, the site of the facility, and who would oversee the construction. In this regard, the CUMPM adopted a 2003 resolution that outlined a plan for a private group (a “concessionaire”) to build a waste incinerator at a particular site at Fos-sur-Mer. A few years later in 2005, the CUMPM adopted a follow-up resolution that chose a specific concessionaire.

But the nonbinding resolution was not the final decision. Waste management facilities require a permit from the Prefect of Bouches-du-Rhône (“Prefect”), a State authority, per France’s Environmental Code. Unlike the CUMPM resolution process, public participation is built into this phase. In the face of much public protest, the Prefect approved the CUMPM resolutions in 2006.

**Alleged Violation of the Aarhus Convention**

ARTICLE 3 ◆ ARTICLE 6 ◆ ARTICLE 9

The Communicant, FARE Sud, alleges that France is in violation of Articles 3, 6, and 9 of the Aarhus Convention because the CUMPM and the Prefect did not allow for sufficient public participation or access to justice. France alleges that the CUMPM resolutions are non-binding, do not exclude consideration of other options, and thus not subject to the Aarhus Convention, while the final decision made by the Prefect conformed to the obligations arising from the Aarhus Convention.

**Issues and Outcomes*****ISSUE #1: 2003 AND 2005 CUMPM RESOLUTIONS***

The Compliance Committee concluded that the CUMPM resolutions are not within the scope of Article 6 and Article 7 because the resolutions neither instill legal rights nor have the effect of precluding the Prefect from considering other options, at which point meaningful public participation *does* occur. Such resolutions must have a legal effect or preclude other options to qualify as a “permit” under Article 6 or a “program or policy” under Article 7. While a resolution may have a de facto legal effect and still fall within Article 6 or Article 7, the evidence here was

<sup>3</sup> L’Association de Défense et de Protection du Littoral du Golfe de Fos-sur-Mer and Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône and Fédération d’Action Régionale pour l’Environnement (FARE Sud).

to the contrary: the Prefect rejects about 50 CUMPM applications per year. Furthermore, because Article 6 and Article 7 do not apply, there is no access to justice requirement under Article 9.

### ***ISSUE #2: PREFECT'S DECISION***

Unlike the CUMPM resolutions, the final permitting decision by the Prefect clearly falls within the scope of both Article 6 and 7, but the Compliance Committee ruled that this process did not violate the obligations arising from the Aarhus Convention. The determinative question was whether all waste management facility options were still open and effective public participation could take place at this stage. The Compliance Committee reasoned that the CUMPM resolutions did not have the effect of reducing available options and public was allowed to effectively participate. Furthermore, notice with sufficient from newspaper and Internet notifications about six weeks in advance. The bottom line is that the Prefect is empowered to consider the viewpoints of both the CUMPM and the public, and does so about 50 times per year. Finally, appeals were granted and duly considered, so Article 9 was not violated, either.

### **Lesson Learned**

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- Consider the *effect* of non-binding governmental decisions on environmental matters. If a decision about a plan, programme, or project has the effect of reducing available options or the chance for meaningful public participation at a later stage, and there is no participation guaranteed in this earlier stage, this may be in non-compliance with Article 6 or Article 7.
- On the other hand, if evidence suggests that the decision maker at the stage that allows for sufficient public participation does not always approve the earlier decision, and if a sufficient amount of options remain open, then this is very likely in compliance with Article 6 and Article 7.

**UNITED KINGDOM (2008)** (COMMUNICANTS: MR. MORGAN & MS. BAKER)**CAN ONE PARTY IN AN ENVIRONMENTAL DISPUTE BE REQUIRED TO PAY COURT FEES EVEN BEFORE THE END OF A TRIAL?****Background**Case # ACCC/C/2007/23 [[Link to all documents](#)]

The communicants, Mr. Morgan & Miss Baker, filed a nuisance claim against Hinton Organics to enjoin their waste composting site from releasing odours a few hundred meters from their homes. During trial, the High Court granted the communicants an interim injunction, but Hinton Organics would not cooperate with the communicants in choosing an independent expert to oversee the injunction. The dispute over the independent expert required two public authorities – Bath & North East Somerset Council and the Environment Agency – to come to court. After the court revoked the injunction because the parties could not agree on an independent expert, the court ordered the communicants to pay not only their own costs, but also the costs of Hinton Organics, totaling £19,190, and costs for the two public authorities, totaling £5,130. Hinton Organics was not ordered to pay any costs. While the Court of Appeals granted the communicants' request to reserve Hinton Organics' costs until judgment, payment of £5,130 plus interest for the public authorities' costs was not reserved until judgment.

**Alleged Violation of the Aarhus Convention**

ARTICLE 9

The communicants allege that the failure to reserve payment of £5,130 plus interest until the end of trial resulted in two breaches of the Aarhus Convention. First, the communicants allege that the United Kingdom breached Article 9(4) of the Aarhus Convention by failing to provide review procedures that are “fair, equitable, timely and not prohibitively expensive.” Second, the communicants allege that the pre-judgment court fees amount to a penalty for accessing their Aarhus Convention rights, which violates of Article 3(8).

**Issues and Outcomes**

First, the Compliance Committee had to decide whether this dispute falls within the scope of Article 9(3), which is a precondition for an Article 9(4) claim. The Compliance Committee found that the private nuisance law in question is part of the law “relating to the environment” under the facts of the dispute, thus Article 9(3), and concurrently Article 9(4), applies.

The Compliance Committee then concluded that the awarded costs amount to a breach of Article 9(4). While the Compliance Committee decided that £5,130 plus interest is not “prohibitively expensive” under the circumstances of this case – although in other situations, it may be – the Compliance Committee found the fee of £5,130 plus interest to be “unfair and inequitable.” The Compliance Committee reasoned that while the lack of cooperation by Hinton Organics resulted in the extra fees, the Court neither required Hinton Organic to pay any of the fees nor reserved the costs until judgment. However, because the communicants did not present sufficient evidence that such inequitable judgments are a widespread or systematic problem, the

Compliance Committee did not make any recommendations to the United Kingdom on remedying this violation of the Aarhus Convention.

On the other hand, the Compliance Committee found that the United Kingdom is in compliance with Article 3(8) because the fact that the public authorities sought payment for its court fees does not amount to a “penalty.” However, the Compliance Committee leaves the door open by noting that in some situations, this could amount to a “penalty.” Furthermore, the Compliance Committee is skeptical about whether the practice of a public authority immediately seeking legal fees is in compliance with Article 3(2), which mandates that the officials and authorities “assist and provide guidance to the public” in seeking access to justice in environmental matters. While the Compliance Committee does not make a finding of non-compliance, this issue may arise in the future.

### **Lessons Learned**

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- Court fees that are assessed before the end of trial may violate Article 9(4), but this seems to depend on the equities of the parties and the amount of the fees, as determined on a case-by-case basis. In this dispute, the court’s decision for the communicant to pay all of the costs before the end of trial and despite not causing the extra court fees was “unfair and inequitable.”
- Some nuisance laws, including the nuisance law from this dispute, clearly “relate to the environment” and are thus within the scope of Article 9(3) and, correspondingly, Article 9(4). However, the Compliance Committee will not likely find that every nuisance law relates to the environment.

**SPAIN (2008)**

(COMMUNICANT: ASSOCIATION OF SENDA DE GRANADA OESTE NEIGHBOURS)

**HOW MIGHT ACCESS RIGHTS RELATE TO A MAJOR HOUSING DEVELOPMENT?****Background**Case # ACCC/C/2007/24 [[Link to all documents](#)]

This dispute is over environmental access rights as they relate to major housing development called “Huerta Tradicional” (traditional garden) near the city of Murcia. Approval of the housing development cumulated from the following stages: first, approximately 110,000 square meters of land was reclassified from non-residential to residential in the Murcia City General Plan (“Modification No. 50”); second, a Land Allotment Plan outlined specifics of the future development; and finally, a 28 April 2005 City Council resolution gave final approval to the development, now called the “Urbanization Project.” While the communicant sought administrative review of all three of the aforementioned decisions, the courts repeatedly refused requests for interim injunctive relief. The communicant even had to pay full costs for both parties, €2,148, after a failed appeal of one such decision.

No Environmental Impact Assessment (EIA) was ever conducted because the Environmental Quality Office exempted the project from requiring an EIA. And while there was an opportunity for public feedback for both the Land Allotment Plan and the Urbanization Project, these processes lasted only 30 days during the summer and 20 days during the winter holidays, respectively. Meanwhile, the City of Murcia charged the communicant about €2.05 per page to obtain copies of planning documents, versus the going rate at local copy centers of €0.03 per page. Requests for copies of the documents on CD-ROM were refused without explanation.

**Alleged Violation of the Aarhus Convention**

ARTICLE 4 ◆ □ ARTICLE 6 ◆ ARTICLE

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First, the communicant alleges that access to information was far too costly and slow in violation of Article 5. The communicant then alleges that public participation was inadequate and did not occur when all options were open, nor were the outcomes of public participation duly accounted for, in violation of Article 6 or 7. The communicant also argues that the screening decision that precluded an EIA was conducted contrary to domestic law in violation of Article 6. Finally, the communicant alleges that access to justice was denied because the courts refused injunctive relief and ordered the communicant to pay full costs in violation of Article 9.

**Issues and Outcomes**

In considering the Land Allotment Plan and the Urbanization Project, the Compliance Committee found several violations of the Aarhus Convention. First, Spain failed to comply with Article 4(1)(b) because the City of Murcia did not provide environmental information in the form requested by the communicant – CD ROM – nor did they provide a reason for their refusal. Furthermore, Spain breached Article 4(2) because governmental authorities failed to provide environmental information within one month, instead taking three to seven months. Finally,

Spain breached Article 4(8) because the City of Murcia's price of €2.05 per page to copy certain planning documents is "unreasonable" with the cost in the local private market being about €0.03 per page.

The Compliance Committee next addressed the lack of an EIA for the housing development. The Compliance Committee concluded that while an EIA must meet certain public participation requirements, the Aarhus Convention does not mandate an EIA in the first place, thus deciding not to conduct an EIA is not a violation of Article 6(1)(a).

Next, the Compliance Committee concluded that the 20 days allocated during the winter holiday season to review and comment on the complex, technical Urbanization Project is not a "reasonable" amount of time, thus Spain breached the obligations arising out of Article 6(3). On the other hand, 30 days during the end of summer to review and comment on the Land Allotment Plan is sufficient. Furthermore, while the Compliance Committee did not have sufficient evidence to conclude that the City of Murcia did not give "due account" to public opinion in violation of Article 6(9), they noted that routine and unexplained disregard for public opinion would be a breach of this obligation.

Finally, the Committee concluded that Spain violated denied the communicant sufficient access to justice. The communicant was denied "adequate and effective remedies, including injunctive relief" in violation of Article 9(4) because the communicant's attempts at seeking injunctive relief were routinely denied as being either too early or too late in the process. Furthermore, the court took eight months to decide on whether to suspend the Urbanization Project, at which point construction had already begun. On the other hand, the court Compliance Committee ruled that the costs of €2,148 imposed on the communicant is not in violation Article 9(4) because there is no evidence that that "full costs" awards are commonplace in the courts.

### **Lessons Learned**

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- The Aarhus Convention does not mandate EIA procedures, but if an EIA is conducted, then there must be sufficient public participation in the process.
- The cost for supplying information – such as copying documents – should roughly equal the average market price, otherwise the cost may be deemed unreasonable under Article 4(8). In this dispute, the price of €2.05 per page was clearly exorbitant.
- The courts must provide a fair chance for injunctive relief – being consecutively "too early" and then "too late" to challenge an action violates Article 9(4). The court must also be able to make a ruling before the issue becomes moot, i.e. before the action that may significantly affect the environment is already underway or complete.

**AUSTRIA (2008)** (COMMUNICANT: "NETT"<sup>4</sup>)**CAN INFORMAL DECISIONS VIOLATE THE AARHUS CONVENTION?****Background**Case # ACCC/C/2007/26 [[Link to all documents](#)]

This dispute first involves the decision-making process that considered different road options in an area of the Alps called Enns Vallez. In 25 April 2005, the Regional Planning Council made a decision to endorse a 4-lane variant in Enns Vallez. Meanwhile, NGOs and other stakeholders debated other options for the road in round table discussions. Many favored a smaller road with a lesser impact than the 4-lane variant, including the communicant.

Nonetheless, in 21 April 2008, the Syrian Provincial Government adopted a motion that indicated approval of the 4-lane variant – a nod to the Regional Planning Council's decision. This motion launched a strategic assessment and Environmental Impact Statement (EIS) process. While both of these processes considered public participation and access to justice, many felt that their input was meaningless at this point because a decision had already been made.

The second decision-making process in dispute involves a 7.4 tonnage weight restriction for lorries (i.e. trucks) on a road known as route B 320. Per the practice of the Constitutional Court, hearings must take place before weight restriction regulations are promulgated. Here, the communicant was rejected from participating in the decision-making process.

**Alleged Violation of the Aarhus Convention**

ARTICLE 6 ◆ ARTICLE 7 ◆ ARTICLE 9

The communicant alleges that Austria is in noncompliance of the Aarhus Convention because the actions of the Regional Planning Council and the Syrian Provincial Council denied adequate public participation in violation of Article 6, closed options for public considerations in violation of Article 7 (in conjunction with Article 6(3), 6(4), and 6(8)), and impinged access to justice rights in violation of Article 9 (2)-(4). Austria contends that the Convention does not apply to these pre-permitting stages and that meaningful public participation with all options open will occur at that time. Furthermore, the communicant alleges Austria is in noncompliance with several public participation and access to justice provisions of the Aarhus Convention arising out of the decision-making process for weight restrictions of lorries on route B 320.

**Issues and Outcomes*****ISSUE #1: PROPOSED ROAD IN ENNS VALEZ***

The Compliance Committee first ruled that neither the 25 April 2005 decision by the Regional Planning Council nor the 21 April 2008 motion by the Syrian Provincial Council falls within the scope of Article 6 because neither amounts to a permitting decision – indeed, the road had not yet been authorized. Neither do these actions constitute a plan, programme, or policy

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<sup>4</sup> Enns Valley Transit Route: Organization for a socially and environmentally responsible transport policy (Nein Ennstal Transit-Trassel Verein für menschen- und umweltgerechte Verkehrspolitik)

within the scope of Article 7. The Compliance Committee also acknowledged that the strategic assessment and EIA processes would still allow for sufficient public participation, at least in theory. Finally, because neither action falls within the scope of Article 6, the access to justice provisions of Article 9(2) and 9(4) do not apply, and the communicant did not sufficiently substantiate the alleged breach of Article 9(3).

Although there was not enough evidence to conclude that Austria is in noncompliance, the Compliance Committee nonetheless expressed skepticism about the actions of the Regional Planning Council and the Styrian Provincial Council. For example, the Compliance Committee recognized that the 21 April 2008 motion of the Styrian Provincial government perhaps amounted to a de facto reduction of available options at an early stage. A statement by a member of the provincial government essentially declaring that the 4-lane option was already chosen seemed equally suspect. However, because the road selection is an ongoing process – the strategic assessment and EIA are still being carried out, for example – a finding of noncompliance is premature.

### ***ISSUE #2: PROPOSED INTRODUCTION OF A 7.5 TONNAGE RESTRICTION FOR LORRIES***

The Compliance Committee concluded that the introduction of a 7.5 tonnage restriction for lorries does not “amount to a decision to permit a proposed activity listed in annex I” under Article 6, nor does it “constitute a decision-making process regarding a plan, programme or policy” under Article 7. Concomitantly, the access to justice provisions of Article 9 do not apply.

### **Lessons Learned**

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- The government can make non-binding decisions that do not per se permit an activity without falling within the scope of Article 6 or Article 7 of the Convention. However, in the future, the Compliance Committee may analyze whether informal decisions have the de facto effect of reducing the number of available options or breaching other public participation requirements of the Aarhus Convention.

**UNITED KINGDOM (2008)** (COMMUNICANT: CULTRA RESIDENTS' ASSOCIATION)**WHEN DOES AN ACTION CONSTITUTE A "PLAN," AND HOW MUCH ARE "PROHIBITIVE" COURT COSTS?****Background**Case # ACCC/C/2007/27 [[Link to all documents](#)]

This dispute is over the public participation and access to justice rights afforded in relation to a proposal to expand operations at Belfast City Airport ("airport"). The airport operator wanted to expand its seat capacity from 1.5 million to 2.5 million seats in a twelve-month period, so it inquired with the Department of Environment (DOE). In 2003, the DOE responded that the airport expansion did not require an application for planning permission under the Planning (Northern Ireland) Order 1991 because a seat expansion is not a "development." Review of the proposed expansion would thus be within the framework of the existing 1997 Planning Agreement, which, unlike the more onerous planning permission, does not require an Environmental Impact Assessment (EIA).

Belfast City Airport decided to move forward and thus the DOE reviewed the seat expansion proposal under the 1997 Planning Agreement. During this process, a variety of groups and public representatives made comments, and the communicant and other stakeholders expressed their opinions in an examination in public (EiP). Thereafter an EiP panel issued a 2006 report that recommended increasing the seat capacity at the airport from 1.5 million to 2.0 million in a twelve-month period. In 2008, the DOE adopted an amended 1997 Planning Agreement ("2008 amended Planning Agreement") that reflected the seat increase recommended by the EiP Panel. When the communicant challenged the EiP panel report at the High Court, their case was dismissed, and the communicant was ordered to pay full costs of the DOE, which totaled £39,454.

**Alleged Violation of the Aarhus Convention**

ARTICLE 3 ◆ ARTICLE 6 ◆ ARTICLE 7 ◆ ARTICLE 9

First, the communicant alleges that the Party concerned breached Article 3(1) because the seat increase did not include an EIS, was nontransparent, used a "private" planning agreement, and restricts judicial review. Second, the communicant alleges that the Party concerned breached Article 7 (in conjunction with Article 6(3)) because there was not effective public participation with all options open during the EiP procedure. Finally, the communicant contends that the court fees of £39,454 were both prohibitively expensive in violation of Article 9(4) and a penalty in violation of Article 3(8).

**Issues and Outcomes**

The Compliance Committee focused on the 2008 adoption of the amended Planning Agreement because the 2003 decision of the DOE occurred before the Aarhus Convention entered into force for the United Kingdom. The Compliance Committee concluded that the 2008 amended Planning Agreement does not fall within the scope of Article 6(1) because the increased seat capacity is not an activity listed in Annex I, nor does it have a "significant effect on the environment." Furthermore, the 2008 amended Planning Agreement does not fall within

the scope of Article 7 because, despite being called a *planning* agreement, it is not a “plan” within the meaning of the Aarhus Convention. “Plan” may be defined as “one which sets out how it is proposed to carry out or implement a scheme or a policy,” such as a land use plan that regulates land development.

After determining that the court proceedings in question fall within the scope of Article 9(3) – and thus the provisions of Article 9(4) apply, as well – the Compliance Committee ruled that the court fees of £39,454 are prohibitively expensive in violation of Article 9(4) because they are a major deterrent against environmental litigation. The Compliance Committee further noted that the court fees do not meet the standard of “fairness” under Article 9(4) because the allocation of costs did not consider that a public interest group was representing the environmental concerns of the public. However, the Compliance Committee did not go as far as to rule that the fees amounted to a penalization under Article 3(8).

### Lessons Learned

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- Expanded airport operations and other similar actions may not fall within the scope of the Aarhus Convention. Even if such an action has the word “plan” in its title, this does not mean that it is a plan within the meaning of Article 7.
- If a public interest group bringing an environmental case for the public interest is allocated all of the court fees associated with that case, this may be in violation of the “fairness” standard under Article 9(4).
- £39,454 in court fees was “prohibitively expensive” for a coalition of five groups in this particular circumstances. While there is no definite sum of what is “prohibitively expensive,” this amount under these particular circumstances may be used as a gauge. This Compliance Committee addresses what is “prohibitively expensive” on a case-by-case basis.

**MOLDOVA (2008)** (COMMUNICANT: ECO-TIRAS<sup>5</sup>)**WHEN CAN A GOVERNMENT REJECT A REQUEST FOR ENVIRONMENTAL INFORMATION BASED ON VOLUME OF THE REQUEST OR CONFIDENTIALITY?****Background**Case # ACCC/C/2007/30 [[Link to all documents](#)]

This dispute is about access to information related to the rental of State Forestry Fund land in Moldova. The International Environmental Association of River Keepers (“Eco-TIRAS”), the communicant, made a request to the Moldsilva State Forestry Agency (“Moldsilva”) for copies of every rental contract administered by the State Forestry Fund, but was denied. Moldsilva cited the significant quantity of requested documents – 79 contracts in total – as the basis for denial. Thereafter, the Moldovan government adopted Regulation 187 on Rent of Forestry Fund for Hunting and Recreational Activities (“Regulation 187”), which essentially made the requested rental contracts confidential. Moldsilva denied subsequent requests by the communicant for the rental contracts on the basis of Regulation 187.

Eco-TIRAS appealed these decisions to the Chisinau Court of Appeal on the grounds that Moldsilva violated both Moldovan access to information laws and the Aarhus Convention. The court ruled in the favor of Eco-TIRAS, but Moldsilva ignored the court’s order to provide Eco-TIRAS with copies of the rental contracts for State Forestry Fund lands. Moldsilva also did not reply to several subsequent letters from Eco-TIRAS requesting the rental contracts.

**Alleged Violation of the Aarhus Convention**

ARTICLE 3 ◆ ARTICLE 4 ◆ ARTICLE 9

The communicant claimed that Moldova’s failure to provide the requested environmental information or to comply with the ruling of the Chisinau Court of Appeals violates several articles of the Aarhus Convention, including general obligations arising out of Article 3, access to environmental information obligations arising out of Article 4, and access to justice obligations arising out of Article 9.

**Issues and Outcomes**

The Compliance Committee found several violations of the Aarhus Convention. First, Moldsilva’s failure to provide the rental contracts when first requested by Eco-TIRAS amounts to a violation of both Article 3(2) and Article 4(1) and 4(2) because they denied a request for environmental information without valid grounds. The reasons cited by Moldsilva for denying the communicant’s requests – at first, volume of the request, then later, confidentiality – do not meet any of the exceptions under Article 4(3) and 4(4) under these circumstances, nor did the denials sufficiently weigh the public interest in disclosure. While there is a confidentiality exception under Article 4(4), Regulation 187 does not provide sufficient justification for confidentiality. Regulation 187 also amounts to a violation of Article 3(1).

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<sup>5</sup> International Environmental Association of River Keepers

The Compliance Committee also found violations of the Aarhus Convention in regards to the decision of the Chisinau Court of Appeals, which was largely ignored by Moldsilva. Specifically, Moldsilva's failure to respond in writing to requests for information subsequent to the Chisinau Court of Appeals decision amounts to a violation of Article 4(7). Meanwhile, the Chisinau Court of Appeals' inability to enforce its ruling amounts to a violation of Article 9(1), which implies that a court is able to enforce decisions related to the Aarhus Convention.

Finally, the Compliance Committee makes several recommendations on how Moldova can achieve compliance with the Aarhus Convention, which includes enforcing the Chisinau Court of Appeals decision, ensuring that such court decisions are enforced in future cases, taking steps to guarantee transparency of information in the future, and amending Regulation No. 187, among other measures.

### **Lessons Learned**

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- Confidentiality is not a catchall for denying access to information requests, and the Compliance Committee will scrutinize claims of confidentiality. The Aarhus Convention requires that a high burden is met for environmental information to be confidential, and Regulation No. 187 clearly did not meet that burden.
- A court system must be able to enforce its own rulings, especially against the government, to be in compliance with Article 9.
- In requests for significant amounts of environmental information, the large volume alone does not seem to be a valid reason for denial, especially when weighed against the public interest.

## EUROPEAN COMMUNITY (2008) (COMMUNICANT: CLIENTEARTH)

### WHAT STANDING REQUIREMENTS CAN THE EU COURTS IMPOSE ON ENVIRONMENTAL NGOS?

#### Background

Case # ACCC/C/2007/32 [[Link to all documents](#)]

This dispute regards the allegedly onerous standing requirements for NGOs in the Court of First Instance (CFI) and the European Court of Justice (ECJ) (together “EU Courts”). In a series of cases, various NGOs sought annulment of certain measures by EU Institutions, but the EU Courts routinely refused them standing. Under Article 230, paragraph 3 of the Treaty establishing the European Community (TEC), standing for an annulment of an institutional measure requires “direct and individual concern,” which the EU Courts interpret to mean individual circumstances that are “differentiated from all other persons.” This interpretation is known as the “Plaumann Test.” Note that the EU Courts must comply with the Aarhus Convention because the European Union (EU) acceded to the Aarhus Convention as a group.

In one case, Greenpeace challenged a decision of the European Commission related to the financing of coal-fired power plants, but was denied standing. Under the Plaumann Test, Greenpeace was not differentiated from all other persons because the decision affected a wide array of people, including anyone who lives in the vicinity of the power plant. In another case, World Wildlife Fund sought an annulment of a North Sea RAC Council Regulation about codfish stocks, but was rejected under the Plaumann Test despite having consultative status on the North Sea RAC.

A notable uncertainty to this dispute is that standing requirements under TEC Article 230, paragraph 3 are now implemented under Treaty on the Functioning of the European Union (TFEU) Article 263, paragraph 4, so it remains to be seen how the EU Courts will interpret standing requirements under the new treaty.

#### Alleged Violation of the Aarhus Convention

ARTICLE 3 ◆ ARTICLE 9

The communicants generally contend that the standing requirements under the Plaumann Test constitute a breach of Article 9 of the Aarhus Convention because NGOs are effectively excluded from access to justice. The communicant also alleges that the court fees imposed by the EU Courts are in violation of Article 9(4). Finally, the communicant alleges various violations of Article 3 and Article 6. On the other hand, the European Community (EC) generally contends not only do the standing requirements comply with the Aarhus Convention, but that NGOs can also seek annulments of EU Institution measures through their national courts.

#### Issues and Outcomes

Article 9(2)-(5) applies to decisions, acts, or omissions by public bodies, but not to bodies or institutions acting in a legislative or judicial capacity. Thus, the Compliance Committee first determines that at least some measures of EU Institutions constitute decisions, acts, or omissions by public bodies. However, the Compliance Committee does not decide whether or not the EU

breached the Aarhus Convention because all of the case law submitted to the Compliance Committee occurred under TEC Article 230, which has since been supplanted by TFEU Article 263.

Despite this major limitation, the Compliance Committee still concludes that the EC *would* be in violation of Article 9 if the EU Courts' standing decisions continue along the lines of the Plaumann Test. The Compliance Committee criticizes the Plaumann test because of the burdensome nature of the standing requirements, which severely restricts the ability of NGOs to challenge acts or omissions of EU institutions, which is contrary to the requirements Article 9(3). The Compliance Committee also reasons that, if continued, this would constitute a lack of "adequate and effective remedies" in violation of Article 9(4). On the other hand, the communicants did not provide enough evidence to substantiate the claim that access to justice is prohibitively expensive in violation of Article 9(4) and 9(5).

Finally, the Compliance Committee also rejected the EC's argument that access to justice requirements are satisfied because NGOs can challenge acts and omissions of EU institutions through their own national courts. The Compliance Committee concludes this is an insufficient pathway to justice because it requires both that the NGO has standing in the national court and for the national court to decide to bring the claim to the ECJ.

### **Lessons Learned**

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- Standing that requires individual circumstances that are "differentiated from all other persons" seems to be too burdensome to comply with Article 9(3) and 9(4) of the Aarhus Convention. Even if an NGO has a significant interest in the case, merely the widespread effect of a disputed act or omission is enough for an NGO to not be "differentiated from all other persons." Likewise, the EC will seemingly be in violation of Article 9(3) and 9(4) if the standing requirements of the Plaumann Test continue.
- The EU cannot rely on individuals to request a preliminary ruling from the ECJ through their domestic courts as a means to satisfy access to justice requirements.
- For court costs to be "prohibitively expensive" in breach of Article 9, paragraphs 4 and 5, the communicant must present actual rather than theoretical evidence.

## UNITED KINGDOM (2008) (COMMUNICANT: CLIENTEARTH<sup>6</sup>)

### HOW MUCH DISCRETION CAN COURTS BE GIVEN TO PROVIDE ACCESS TO JUSTICE?

#### Background

Case # ACCC/C/2007/33 [[Link to all documents](#)]

This case is about the access to justice in matters related to the environment within the legal system of England and Wales. The Compliance Committee opted to only consider the legal system in general rather than address the case-specific facts submitted by the communicant.

#### Alleged Violation of the Aarhus Convention

◆ ARTICLE 9

The communicant alleges that the United Kingdom is in noncompliance with several provisions of Article 9 of the Aarhus Convention. First, the communicant alleges that courts do not allow for sufficient review of decisions, acts, or omissions that are substantive, as opposed to procedural, which violates Article 9(2) and 9(3). Second, the communicant contends that judicial review – which follows the loser-pays model of “costs follow the event,” albeit with several exceptions – is prohibitively expensive in violation of Article 9(4). Third, the communicant contends that there are insufficient rights to seek action against private individuals who violate environmental law, which is a breach of Article 9(3). Finally, the communicant contends that the general time limit for judicial review under CPR Rule 54 of 3 months from the point at which the potential to make a claim arose – or even less time if a judge does not consider 3 months to be “prompt” – is too short a period to comply with Article 9(4).

#### Issues and Outcomes

The Compliance Committee did not have enough evidence about judicial review of substantive decisions, acts, or omissions by public authorities to find non-compliance with Article 9(2) and 9(3). However, the Compliance Committee recommended that the Wednesbury test, which only allows for substantive review of manifestly unreasonable decisions by public authorities, should be replaced by the proportionality principle, which generally requires that public authorities limit their actions to what is necessary to fulfill the goals of an act or decision.

Next, the Compliance Committee addresses the costs of judicial review. Here the Compliance Committee concluded that the United Kingdom’s “costs follow the event” standard, in which the loser pays court fees for both sides, constitutes a violation of Article 9(4) and 9(5) because claimants are not protected from prohibitive costs, and this constitutes a failure to sufficiently remove or reduce financial barriers. While mechanisms such as legal aid, conditional fee agreements, protective cost order, and judicial discretion curtail these costs to some extent, these mechanisms may be rarely available, unpredictable, or provide insufficient protections.

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<sup>6</sup> Also the Marine Conservation Society and Mr. Robert Latimer.

On the next issue, the Compliance Committee did not have enough evidence to conclude that public individuals were unable to challenge private individuals in matters related to the environment in violation of Article 9(3).

In terms of judicial time limits, the Compliance Committee reasoned that while a time limit of three months for judicial review applications might be acceptable, exceptions and uncertainties regarding this time limit amount to a violation of Article 9(4). For example, a judge may independently decide that three months is not “prompt.” Furthermore, courts are not uniform on the start date of the three months. The Compliance Committee recommends a reliable time limit that begins when the claimant “knew, or ought to have known of the act, or omissions, at stake.” Note that the Compliance Committee also concluded that the United Kingdom is in noncompliance with Article 3(1) – which imposes a duty to have a “clear, transparent and consistent legal framework” – because of the significant judicial discretion in terms of court costs and time limits.

### Lessons Learned

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- The Compliance Committee believes in widespread access to judicial review of substantive decisions related to the environment. However, the Compliance Committee did not conclude that the relatively narrow scope of judicial review in the United Kingdom, including use of the Wednesbury test, was in noncompliance of the Aarhus Convention. While the Compliance Committee prefers the proportionality principle to the Wednesbury test, Parties seem to get some leeway here.
- Parties must ensure that in a “costs follow the event” scheme, in which the loser pays court fees, there are sufficient protections from prohibitive costs.
- Legal systems must be clear in the time limits for judicial review applications without merely leaving the matter up to judicial discretion or interpretation. This includes both when the time period begins and how long it lasts.

**GEORGIA (2008)** (COMMUNICANT: CENN<sup>7</sup>)**WHAT IS A “DE FACTO” ENVIRONMENTAL IMPACT STATEMENT?****Background**Case # ACCC/C/2007/35 [[Link to all documents](#)]

This dispute is about public participation in regards to an auction for long-term forest use licences. Georgia has several legal mechanisms that govern forest use and management. First, the Forest Code mandates public participation and other access rights in forest use and management activities. Second, the 2005 Law on Licences and Permits categorizes and establishes rules for licenses and permits. Finally, Resolution No. 132<sup>8</sup> regulates long-term forest use licences, which includes requiring one-month advance notice in the press to auction off such licences. Unlike the law they supplanted – the 1996 Environmental Permit Law<sup>9</sup> – neither the 2005 Law on Licences and Permits nor Resolution No. 132 requires an EIA, although both mandate certain processes that are common to an EIA.

After two long-term forest use licences went up for auction in May 2007 and October 2008, the communicant questioned whether the government met the requisite public participation requirements under the Aarhus Convention.

**Alleged Violation of the Aarhus Convention**

◆ ARTICLE 6

The communicant alleges that Georgia breached Article 6(2) because the public was not sufficiently informed about the opportunity to participate in the long-term forest use licence decision-making processes. The communicant also claims that Georgia breached Article 6(4) because public participation for the long-term forest use licences was not provided for at an early stage.

**Issues and Outcomes**

The Compliance Committee does not reach the merits of the Article 6(2) and 6(4) claims because they conclude that the decisions involving the long-term forest use licences fall outside the scope of Article 6(1). Under paragraph 20 of Annex I, an EIA with a public participation process – including a “de facto EIA” that goes by a different name but is in essence the same – is subject to Article 6 requirements, but neither the 2005 law on Licences and Permits and Resolution No. 132 amount to a de facto EIA. In making this conclusion, the Compliance Committee gives credence to the intent of the national legislature, which purposefully excluded forest use and management from the scope of a law that requires EIA processes for other activities. Neither did the Compliance Committee did not find sufficient evidence to conclude that the auctioned licences fall within the scope of Article 6(1)(b), which includes decisions that have a “significant effect on the environment.”

<sup>7</sup> Caucasus Environmental NGO Network

<sup>8</sup> Fully titled Resolution No. 132 on approval of the provisions on the rules and conditions for issuance of licences on forest use of 11 August 2005

<sup>9</sup> Fully titled The Law of Georgia on Environmental Permit of 15 October 1996.

Finally, while the facts of this dispute also fall outside the scope of Article 3(1), the Compliance Committee remarks that Georgia's legal framework for public participation in the granting of forest use licenses is "unclear and complicated," and so the Compliance Committee recommends reform in this respect.

### **Lessons Learned**

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- (1) If the lawmaking body of a Party to the Aarhus Convention specifically excludes certain activities from its EIA procedures, the Compliance Committee will likely consider this to be strong evidence that the excluded activities are not "de facto" EIA procedures. Thus, the requirements of Article 6 and Article 3(1), for example, may not apply to such procedures. On the other hand, if a process has all the elements of an EIA but is not called such, then this process may still be considered an EIA under Annex I, paragraph 20.

**SPAIN (2008)**

(COMMUNICANT: PLATAFORMA CONTRA LA CONTAMINACIÓN DEL ALMENDRALEJO)

**WHAT HAPPENS IF AN NGO IS DENIED INFORMATION IN THE FORM REQUESTED AND PUBLIC OFFICIALS CRITICIZE THE NGO PUBLICLY?****Background**Case # ACCC/C/2007/36 [[Link to all documents](#)]

This dispute involves three polluting projects – a waste disposal site, a wine distillery, and an oil refinery – in the autonomous community (or “junta”) of Extremadura. The dispute over the waste disposal site involves the communicant’s rejected requests for information about the site’s operations from public authorities. The dispute over the wine distillery involves potentially harmful levels of methane in the air and the communicant’s rejected attempts to gather information about a denied permit. This dispute is also notable because the Mayor of Almendralejo, a town located within the junta of Extremadura, publicly criticized the communicants in the mass media, generally alleging they were making unfounded requests to gain attention and stir up trouble. The dispute over the oil refinery regards the 30-day period granted to review documents pertaining to the oil refinery project, which the communicant claims is not enough time to review thousands of pages of documents located 30 to 200 kilometres away from Almendralejo. Requests by the communicant to extend this period or receive the documents on CD-ROM or DVD failed.

**Alleged Violation of the Aarhus Convention**

ARTICLE 3 ◆ ARTICLE 4 ◆ ARTICLE 6 ◆ ARTICLE 9

The communicant alleges that Spain breached Articles 3, 4, 6, and 9 of the Aarhus Convention by failing to uphold sufficient access to environmental information, public participation, and access to justice. This includes claims of false statements from the Mayor of Almendralejo in violation of Article 3(8), a failure to provide information in a timely manner and without an interest stated in violation of Articles 4(1) and 4(2), short and restrictive public participation in violation of Article 6(4) and 6(5), and a failure to provide NGOs with sufficient legal aid in violation of Articles 9(1) and 9(5).

**Issues and Outcomes**

The Compliance Committee finds that Spain violated several access to information obligations under Article 4. First, the Compliance Committee concludes that Spain violated Article 4, paragraph 1(a) by denying information simply because the communicant did not state an interest in requesting the information. Next, Spain breached Article 4(2) because requests for information went unanswered for over a month or were not answered at all. Spain also breached Article 4(1)(b), in conjunction with Article 6(6), because copies of documents related to the oil refinery were not given in the form requested, being CD-ROM or DVD, without providing sufficient reasons for providing the information in another form.

The Compliance Committee also finds Spain to be in noncompliance with the public participation requirements of Article 6. Specifically, the Compliance Committee finds violations of Article 6(3) and 6(6) because authorities located thousands of pages of documents about the oil refinery project at a distance of 30 to 200 kilometres away from Almendralej, viewable on a mere two computers and for only a timespan of one month, while authorities denied requests to copy the information to CD-ROM or DVD.

Next, the Compliance Committee finds the Mayor of Almendralejo's critical statements of the communicants to the media constitute a violation of Article 3(8), which states that individuals shall not be "penalized, persecuted or harassed" for exercising their Aarhus Convention rights.

Finally, the Compliance Committee finds the failure of Spain to fully consider small NGOs in their provisions for free legal aid – particularly when larger NGOs with bigger budgets *are* included – is in contradiction to the spirit of the Aarhus Convention to protect weaker public entities, and thus violates Article 9(4) and 9(5).

### Lessons Learned

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- (1) While a delay in responding to an environmental information request does not always constitute a breach of the Aarhus Convention, a failure to respond at all seems to be a de facto breach of Article 4.
- (2) A public authority must provide information in the form requested unless it is reasonable to provide the information in another form *and* the public authority provides a reason for doing so.
- (3) Public authorities must make access to information as it relates to public participation activities readily available and for a sufficient amount of time, which includes locating the information in a reasonably close proximity to affected communities.
- (4) Public authorities should be careful about publicly criticizing those who request environmental information; they may be in violation of Article 3(8) if they penalize, persecute, or harass those exercising their Aarhus convention rights. The Compliance Committee generally seems to consider speaking to the media against those who request environmental information to be a violation of Article 3(8).
- (5) If a party to the Aarhus Convention provides free legal aid to larger NGOs but not smaller NGOs, this may be in violation of Article 9(4) and 9(5).

**BELARUS (2009)** (COMMUNICANT: [CONFIDENTIAL])**CAN PUBLIC AUTHORITIES HAND OVER ACCESS RIGHTS TO PRIVATE DEVELOPERS?****Background**Case # ACCC/C/2009/37 [[Link to all documents](#)]

This dispute is over the access to information and public participation in relation to the proposed construction of a hydrological power plant on the Neman River (hereinafter “HPP Project”), which provides habitat to an array of imperiled bird species. The regulatory framework of Belarus required the HPP Project to go through two main stages before being permitted: the OVOS<sup>10</sup> process and the environmental *expertiza* stage. While public participation is mandatory during the developer-led OVOS process, public participation may occur during the public authority-led *expertiza* stage but is not mandatory. Furthermore, the developer was solely in possession of information for both stages, rather than the public authorities. While there were some public hearings, they were either not announced in the press or were announced but occurred after a positive *expertiza* conclusion was already issued. The developer of the HPP also had discretion to over how to inform the public about the public consultation process.

**Alleged Violation of the Aarhus Convention**

ARTICLE 4 ◆ ARTICLE 6

The communicant first alleges that the developer violated Article 4 and Article 6 of the Aarhus Convention because the developer did not provide sufficient access to information. The communicant also alleges several other violations of Article 6. Specifically, the communicant alleges that the public was not sufficiently informed about how to acquire the OVOS Statement; information provided was often too vague to answer specific requests, or else denied; the *Expertiza* Law does not require public participation to be considered in the outcome of the process; and *Expertiza* law does not guarantee that the conclusions of the environmental *expertiza* are transmitted to the public, as occurred in this dispute.

**Issues and Outcomes**

The Compliance Committee made several findings of noncompliance in terms of both the HPP in specific and the legislation of Belarus in general.

***ISSUE #1: HYDROLOGICAL POWER PLANT***

The Compliance Committee first concluded that the Party concerned violated Article 4(1) (or else Article 6(6)) of the Aarhus Convention because public authorities failed to sufficiently respond to requests for information – either by denying it or providing information that is too vague. Neither did the Party concerned inform the public of public hearings in a timely, adequate, and effective manner in violation of Article 6(2) because notice only gave summaries of previous meetings or provided notice before relevant documentation was prepared.

<sup>10</sup> An acronym that is translated to mean “assessment of impact upon the environment.”

The Compliance Committee also notes that giving private developers complete control of the public participation process, as occurred here, is contrary to the Aarhus Convention. In this light, noting that the private developer was able to dictate the terms of public discussion, the Compliance Committee concluded that the Party concerned breached Article 6(7) because the public did not have sufficient opportunity to submit comments, information, analyses, or opinions relevant to the HPP project before the permit was issued. Finally, the Party concerned violated Article 6(9) because they did not promptly inform the public about the conclusions of the environmental *expertiza*.

### ***ISSUE #2: LEGAL FRAMEWORK OF BELARUS***

Aside from the events related to the HPP project, the Compliance Committee finds many violations pertaining to the legal framework of Belarus. First, the Compliance Committee finds that the legal framework of Belarus violates Article 4(1) because an interest must be stated to access environmental information. The Compliance Committee also finds noncompliance with Article 6(2) because the developer has discretion on how to inform the public of public hearings, which includes methods that do not satisfy the Aarhus Convention. Furthermore, the time limit of one month for public hearings violates Article 6(3) because the length of public hearings must be flexible based on the nature, complexity, and size of a proposal.

In terms of Article 6(6), the Compliance Committee noted that allowing the developer to be solely responsible for providing information to the public is not in line with the Aarhus Convention. Furthermore, allowing the developer to dictate the terms of public discussions is not compliant with Article 6(7) (in conjunction with Article 6(2)(d)(v)).

The Compliance Committee also concluded that the law of Belarus does not comply with Article 6(8) of the Aarhus Convention because, while public comments must be considered during the OVOS stage, they are not mandatory to consider during the *expertiza* stage. The Compliance Committee finally concluded that the law of Belarus violates Article 6(9) of the Aarhus Convention because it does not require the public to be informed about the outcome or the reasoning of the *expertiza*.

### **Lessons Learned**

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- (1) A Party cannot entrust the obligations of the Aarhus Convention to the discretion of a private developer. As seen in this case, a private developer may curtail sufficient public participation and access to information procedures. They also have an inherent conflict of interest. Providing wide discretion to a private body on how to shape the public participation and access to information processes further exacerbates this problem and will very unlikely result in a violation of the Aarhus Convention.

## UNITED KINGDOM (2009) (COMMUNICANT: ROAD SENSE)

### MUST THE GOVERNMENT RELEASE INFORMATION ABOUT THE LOCATION OF IMPERILED SPECIES AFFECTED BY AN ACTIVITY?

#### Background

Case # ACCC/C/2009/38 [[Link to all documents](#)]

This dispute is about environmental access rights in relation to the decision-making process for the construction of a 46-kilometre route in Scotland called the Aberdeen Western Peripheral Route (AWPR). After a 2004 study commissioned by the Minister of Transportation, public authorities showcased their preferred route along with four alternatives to the public in 2005, and the public responded by submitting 7,000 comments. Two of these alternatives were combined into what the Minister of Transport announced as the best strategic route.

Two planning documents, the draft Special Road Orders and an Environmental Statement, were published, and corresponding public consultations took place in 2007. Then Transport Scotland commissioned an Appropriate Assessment, a study of environmental impacts that was required because of the presence of the Dee Special Area of Conservation (SAC) in the proximity of the proposed road. The study was completed in April 2008 and found no adverse impact on certain protected species, including freshwater pearl mussels and otters, and no adverse effects on the Dee SAC. In July 2008, the communicant requested the reports about freshwater pearl mussels from the Scottish Natural Heritage (SNH), who advised the government, but the communicant was denied under a regulation that protects information that jeopardizes the environment. A report on badgers was denied on similar grounds.

The communicants appealed this decision to the Scottish Information Center, and the Scottish Information Center ruled on 25 May 2010 that the SNH should have released all information except for the location of the freshwater pearl mussels. Meanwhile, the Scottish Ministers released revised Schemes and Trunk Orders in December 2009, which included the exact mapping of the route and other information, which the Scottish Parliament approved.

#### Alleged Violation of the Aarhus Convention

PREAMBLE AND ARTICLES 1, 3, 4, 5, 6, 7, & 9

The communicant argues that the failure to provide access to information, public participation, and access to justice in relation to the AWPR process results in noncompliance with the Preamble and Articles 1, 3, 4, 5, 6, 7, and 9. This includes but is not limited to claims related to the failure of public authorities to provide sufficient access to information such as the location of freshwater pearl mussels and badgers; that there was insufficient public participation in decision-making because all options were not open and the decided route was never considered by the public; and that access to justice was insufficient because the communicant could not effectively challenge AWPR in an open and inexpensive manner in front of a independent and impartial body.

## Issues and Outcomes

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### *ISSUE #1: FRESHWATER PEARLS LOCATION AND BADGER REPORT*

First, the Compliance Committee concludes that a party is not capable of violating the preamble. Next, the Compliance Committee does not find that a violation of the Aarhus Convention resulted from the refusal to release the location of the freshwater pearls or the badger report. The Compliance Committee reasoned that while most of the information related to the freshwater pearls should have been released, the Scottish Information Commissioner (SIC) also decided as much, thus the applicant's claim is a moot point. In terms of the location of the freshwater pearls, the Compliance Committee finds that Article 4(4)(h) exempts the duty to provide environmental information if it includes "breeding sites of rare species." Although this exception should be interpreted in a restrictive way and consider the public interest served by disclosure, the exception is valid in this dispute because other members of the public, such as illegal harvesters, could have accessed the breeding sites. The Compliance Committee also does not find noncompliance with Article 3(2) and Article 5(1)(c). As for the badger report, the Compliance Committee finds that the communicant did not exhaust all domestic remedies.

### *ISSUE #2: PUBLIC PARTICIPATION IN CHOSING THE ROAD*

After establishing that a road of four or more lanes and of over 10 kilometres falls within Annex I paragraph 8(c), or alternatively paragraph 20 of Annex I, the Compliance Committee concluded that the public was generally able to give their views on the AWPR when all options were open and have those views considered in compliance with Article 6(4). The Compliance Committee also did not find noncompliance with Article 6(6) and (7) because, although the chosen road was a unique combination of two roads and was not itself considered during the 2005 informal consultations, the overall public participation process in conjunction with the Draft Schemes and Orders was sufficient to satisfy these provisions. Finally, the Compliance Committee deferred its decision on Article 9 until a domestic judgment is made under the Roads (Scotland) Act 1984.

## Lessons Learned

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- (1) Public authorities get some level of discretion in deciding not to release the specific location of imperiled species if doing so would mean general public access to the information and subsequently cause a risk to the species in question, for example from illegal harvesting.
- (2) A Party to the Aarhus Convention cannot violate the preamble, which serves to give context to the Aarhus Convention rather than being a source of separate obligations.
- (3) If there are several stages at which the public had the chance to consider and comment on a certain activity, the Compliance Committee may look at the public participation as a whole to decide whether there is effective public participation when all options are open.

**SLOVAKIA (2009)** (COMMUNICANT: GLOBAL 2000/FRIENDS OF THE EARTH AUSTRIA)**WHAT LEVEL OF PUBLIC PARTICIPATION IS REQUIRED WHEN AN EXPIRED NUCLEAR REACTOR PERMIT IS RENEWED?****Background**Case # ACCC/C/2009/41 [[Link to all documents](#)]

This dispute involves public participation in the decision-making process and access to justice related to permits for the Mochovce Nuclear Power Plant (“Mochovce NPP”) in Slovakia. The two reactors at issue received permits in the 1980s and were partially constructed until work stopped in the early 1990s. In August 2008, the Slovak Nuclear Regulatory Authority (“UJD”) approved three additional permits – one each for reactor construction, reactor safety-equipment, and for an updated safety report document (“2008 UJD permits”) – in order for the developer to complete construction. Two organizations – Greenpeace Slovakia and Za Matku Zem – filed statements under the Code of Administrative Procedures insisting that an EIA be conducted before the permits are granted, but the UJD responded that these groups are not within the scope of organizations entitled to participate because they did not have a sufficient interest, and also because the 2008 UJD permits do not constitute a new activity or a major change. The UJD also determined that an EIA is required before operation of the facility but not before the 2008 UJD permits are issued. Appeals to the UJD were denied, and an appeal to the regional court in Bratislava is ongoing. Construction is slated to finish in February 2012.

**Alleged Violation of the Aarhus Convention**

ARTICLE 6 ◆ ARTICLE 9

The communicant claims that the Party concerned violated Article 6(1), 6(4), and 6(10) of the Aarhus Convention because the 2008 UJD permits consider updated safety and technological requirements that implicates the public participation requirements of the Aarhus Convention, which were unsatisfied. Slovakia argues that this permit was a mere formality that does not implicate the Aarhus Convention. The communicant also claims that a de facto denial of early and effective public participation occurred by not allowing public participation until after the 2008 UJD permits and a construction permit were issued, which amounts to a violation of Article 6(4). Finally, the communicant alleges various violations of Article 9 for not allowing appeals of the permitting decisions.

**Issues and Outcomes**

The Compliance Committee finds several violations of the public participation requirements arising out of Article 6. First, the Compliance Committee determines that the 2008 UJD permits constitute a “reconsideration or update” because of new EU nuclear power plant laws and other changes, which means that Article 6(2) through 6(9) are applied “mutatis mutandis” and “where appropriate.” Had the 2008 permits constituted a “change or extension of activities” under Annex I(22), then all of the public participation requirements of Article 6 would

have applied unconditionally. Nonetheless, the Compliance Committee then determines that requirements of Article 6(2) through 6(9) *are* “appropriate” to apply because the environmental effects from a nuclear power plant are very significant; the legal requirements for nuclear power plants are stricter than when the permit was first issued; and there is significant public concern over nuclear power plants.

The Compliance Committee next determines that because the public was unable to participate in the decision-making process leading up to the 2008 UJD permitting decisions, instead only allowing public participation after the construction permit was issued (i.e. after the nuclear reactor is built before it is running), constitutes a lack of early and effective public participation when all options are open in violation of Article 6(4). Even if the State alleges that all options are open at this stage, the money, time, and political pressure to continue with the existing permit is overwhelming, thus public participation should have occurred at the permitting stage.

On the other hand, the Compliance Committee does not find that the legal framework of Slovakia is itself in noncompliance with the Aarhus Convention, concluding that the renewal of this 1986 permit is a “special case.” Finally, the Compliance Committee decides not to address Article 9 issues because an appeal to the Bratislava regional court case is ongoing.

## Lessons Learned

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- (1) Updated permits may fall within the scope of the Aarhus Convention. “Appropriate” provisions apply to new permits that are considered a “reconsideration or update.” On the other hand, all of the provisions apply to permits that constitute a “change or extension of activities.” The application of “appropriate” provisions still seems to uphold fairly robust public participation, and the Compliance Committee was not hesitant to determine that upholding Article 6 public participation standards was “appropriate” in this case.
- (2) If domestic remedies have not yet been exhausted, then the Compliance Committee will not likely consider an alleged violation of access to justice provisions.
- (3) If there is vast political and financial pressure to go forth with a permitted activity, and public participation follows, such pressure may per se prevent effective public participation when all options are open.

**ARMENIA (2009)**

(COMMUNICANT: NGO TRANSPARENCY INTERNATIONAL ANTI-CORRUPTION CENTER)

**ARE ACCESS RIGHTS REQUIRED WHEN RENEWING A LICENCE TO EXTRACT MINERALS?****Background**Case # ACCC/C/2009/43 [[Link to all documents](#)]

This dispute involves public participation and access to justice related to permits to extract copper and molybdenum deposits in Lori, an area with rich biodiversity. A mining company called Armenian Copper Programme (“ACP,” original called Manex & Vallex CJSC) received a 25-year licence in 2001 to extract these deposits. Because of changes under the 2002 Law of Concessions, the licence had to be renewed as a “special mining licence” in 2004, but under the same terms. After the government approved a “concept” to extract the resources, but before the new licence was issued, there were two 2006 EIA procedures with public participation. The first was announced in a newspaper and took place six days later. The second was announced in two newspapers for two consecutive days and took place two weeks after the first announcement. Television and the Internet were also used to give notice. About a year later, in 2007, the government granted a special mining licence to ACP that permitted 50 years of mining and logging rights.

**Alleged Violation of the Aarhus Convention**

ARTICLE 6 ◆ ARTICLE 9

The communicant contends that the Party concerned failed to comply with the public participation requirements of Article 6 in relation to the special mining licence issued to ACP because an EIA was not conducted before the approval of the “concept”; the public was not informed early enough or given sufficient information to effectively participate in the public hearings; and the Party concerned did not sufficiently consider the public opinion. The communicant also alleges a violation of Article 9(2) because they were denied access to administrative proceedings.

**Issues and Outcomes**

First, the Compliance Committee concludes that Armenia violated Article 3(1) of the Aarhus Convention because they did not “establish and maintain a clear, transparent and consistent framework” to implement public participation requirements. More specifically, the legal framework of Armenia allows wide discretion over which “planned activities” require an EIA; does not clarify what legal effect a “concept” has and thus what Aarhus Convention protections it should receive; is unclear whether a developer or public authority is responsible for certain EIA public participation requirements; lacks of guidelines on how to conduct and give notice for a public hearing; and is ambiguous on when an EIA is to be conducted.

The Compliance Committee then determines that several activities fall within the scope of Article 6, such as renewing the mineral licence – which constitutes a reconsideration or update of an Article 6(1) activity and thus Article 6(2) through Article 6(9) apply “mutatis mutandis”

and “where appropriate” – and an expertise conclusion regarding the EIA documentation. With Article 6 in play, the Compliance Committee concludes that the six days allocated to review lengthy, technical EIA documentation for a mining project, and subsequently two weeks for even more lengthy EIA documentation, does not inform the public of the decision-making procedure in an “adequate, timely, and effective manner” in violation with Article 6(2).

Furthermore, the Party concerned failed to allow public participation when all options were open in violation of Article 6(4) because there was not meaningful public participation until the EIA procedure in 2006, which was two years after the licence to exploit minerals was issued in 2004. On the other hand, with the Compliance Committee did not find noncompliance with Article 6(8), which requires that the public opinion be duly considered, noting that public opposition was not very strong and an “Environmental Management Plan” was conducted with an NGO as a result of a public hearing. Finally, the Compliance Committee concludes that the Party concerned violated Article 6(8) because the conclusions of the expertise were never published, nor were interested parties notified about the conclusions.

### **Lessons Learned**

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- (1) The amount of time that authorities must allow the public to consider project documentation before a public hearing depends on how long it reasonably takes for the public to be “reasonably informed” based on the complexity and volume of the documentation. One or two weeks is not enough for lengthy, complex documentation.
- (2) A framework in which the government has wide discretion over when an EIA is required, and in which public participation laws are ambiguous and contradictory, is in violation of Article 3(1) of the Aarhus Convention.
- (3) A licence that excludes the option to take no action at all before there is sufficient public participation is a per se failure to allow for early and effective public participation when all options are open.

**BELARUS (2009)** (COMMUNICANT: EUROPEAN ECO FORUM)**HOW DOES PUBLIC PARTICIPATION AND ACCESS TO INFORMATION RELATE TO A PREEXISTING DECISION TO BUILD A NUCLEAR POWER PLANT?****Background**Case # ACCC/C/2009/44 [[Link to all documents](#)]

This case is about public participation and access to information as it relates to the proposal to build a nuclear power plant (NPP) in Belarus.<sup>11</sup> In 2005, a Presidential Decree implemented a “Strategy” that identified particulars of a nuclear power plant. The Strategy was materialized by a series of decisions by various public authorities that chose the State developers, energy output, amount of nuclear reactors, and construction schedule.

During this time, the communicants made several requests for information about the NPP, and while the information was sometimes given, the communicant’s request for an electronic copy of an EIA report was denied because of economic interests. Instead, the communicant was only allowed to access the full EIA report at the developer’s headquarters during business hours but could not make copies. Meanwhile, there was notice of public hearings on the Internet and in a newspaper of three months and one month, respectively. Also, while authorities provided the EIA report to the public for the hearings, this EIA report was merely a 100-page overview document of rather than the full 1,000-page report. Meanwhile, public authorities took possible retributory actions against the communicants, including spreading brochures about their personal lives and detaining them.

**Alleged Violation of the Aarhus Convention**

◆ ARTICLES 3, 4, 7, &amp; 8

The communicant generally contends that the public was not given complete and accurate information regarding the NPP in violation of Article 4 of the Aarhus Convention. The communicant further alleges several violations of Article 6 because the public was not informed in an early and effective manner when all options were open; early public participation was not ensured; the authorities did not provide the necessary information for decision-making; and NGOs could not submit their views during public hearings. Finally, the communicant made various claims arising out of Articles 3, 7, and 8.<sup>12</sup>

**Issues and Outcomes**

The Compliance Committee first concludes that denying the communicant’s request for an electronic copy of the EIA Report constitutes a violation of Article 4(1)(b) (in conjunction with Article 6(6)), noting that an economic interest is not a valid Article 4(4) exception. The Compliance Committee also concludes that requiring the communicant to access environmental

<sup>11</sup> A different dispute, ACCC/C/2009/37, uses essentially the same set of facts, but this case addresses unique issues and thus is admissible.

<sup>12</sup> The Compliance Committee decides not to consider Article 3 because of ongoing considerations in the law of Belarus, nor do they consider the harassment charges of Article 6(8) because there is not enough information available.

information only on location in another city and only during normal business hours without being able to make copies constitutes a violation of Article 4(1)(b) and Article 6. In this regard, the Compliance Committee interprets the obligation to provide “copies” of environmental information on request to mean that copies are located near the communicant’s residence or that the information is in electronic form.

Furthermore, while the Compliance Committee found that the public notice in local and national printed media and on the Internet notice was sufficient to meet the Article 6(2) public notice requirements, they concluded that the failure to duly inform the public about the full EIA Report instead of just the overview document constitutes a violation of Article 6(2)(vi). The Compliance Committee also concluded that the Party concerned failed to provide early and effective public participation when all options are open in violation of Article 6(4) because the decision to build an NPP had already been made at the time of public hearings in 2009. The Compliance Committee also concluded that only having one public hearing that occurs during working hours and without other means to participate (e.g. the ability to submit comments later) constitutes a violation of Article 6(7).

Finally, the Compliance Committee concluded that the Belarusian legal framework is in violation of Article 6(7) because it allows developers to control public participation instead of public authorities (note that this same conclusion was made in ACCC/C/2009/37, another case involving Belarus).

### Lessons Learned

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- (1) When applying Article 6 or Article 7, the public must be given notice of the *full* EIA documentation in order to sufficiently prepare for a public hearing, as opposed to a summary or abridged version.
- (2) Public authorities cannot limit access to information to one location where copies cannot be made and simultaneously deny access to electronic copies. Instead, they must either provide access to information near the residences of the public requesting the information or else provide it in electronic form.
- (3) If the decision to construct a NPP is made without public participation, even most of the details are still to be decided, this denies early and effective public participation when all options because the NPP will inevitably be built. Thus, public participation should occur before the decision to build an NPP occurs.

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