Findings and recommendations with regard to communication ACCC/C/2011/63 concerning compliance by Austria[1]

Adopted by the Compliance Committee on 27 September 2013

I. Introduction

1. On 1 December 2011, the non-governmental organization (NGO) *Vier Pfoten – Stiftung für Tiershcutz gemeinnützige Privatstiftung* (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention") alleging that Austria had failed to comply with its obligations concerning the access to justice provisions of the Convention.

2. Specifically, the communication alleges that the Party concerned fails to provide for access to justice for members of the public, including NGOs, in administrative penal and judicial criminal proceedings in respect of contraventions of national law relating to the environment. Therefore, according to the communication, the Party concerned is not in compliance with article 9, paragraphs 3 and 4, of the Convention.

3. At its thirty-fifth meeting (13-16 December 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 22 December 2012.

5. By letter of 10 January 2012, the Party concerned requested the Committee to reconsider the preliminary admissibility of the communication in the light of the Committee's findings on communication ACCC/C/2010/48. By letter of 19 January 2012, the communicant expressed its views on that request of the Party concerned. At its thirty-sixth meeting (27-30 March 2012), the Committee took note of the letters from the Party concerned and the communicant and confirmed its decision on the preliminary admissibility.

6. At its thirty-seventh meeting (26-29 June 2012), the Committee agreed to discuss the content of the communication at its thirty-eighth meeting (25-28 September 2012.

7. The Committee discussed the communication at its thirty-eighth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to both the communicant and the Party concerned and invited them to respond in writing after the meeting.

8. The Party concerned and the communicant submitted their response on 5 and 12 November 2012, respectively. In its response, the Party concerned included an overview of

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the steps taken and to be taken in view of the recommendations on communication ACCC/C/2010/48.

9. The Committee prepared draft findings at its forty-first meeting (25-28 June 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 July 2013. Both were invited to provide comments by 15 August 2013.

10. The Party concerned provided comments on 23 August 2013. The communicant acknowledged receipt of the draft findings on 24 July 2013 but did not provide substantive comments.

11. At its forty-second meeting (24-27 September 2013), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

Administrative penal proceedings – standing

12. The Administrative Penal Act (*Verwaltungsstrafgesetz-VStG)* in conjunction with the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz-AVG*) provide for legal standing in administrative penal proceedings to persons who are involved in the matter on the basis of a legal title or interest (AVG art. 8), the accused (VStG art. 32, para. 1), i.e. the private party and the private prosecutor.

13. The possibility to participate as a private party depends on the applicable sectoral laws.

14. Administrative offences are prosecuted ex officio (VStG art. 25) (*Offizialmaxime* - "principle of investigation ex officio") and in administrative penal proceedings, the competent authority has a dual function ("principle of inquisition"), as a prosecutor and a judge. In case of suspicion, the competent authority is obliged to initiate and conduct proceedings, and has a duty to determine the circumstances of the case.

Judicial criminal proceedings – standing

15. The Code of Criminal Procedure (*Strafprozessordnung*) defines the parties to criminal proceedings (art. 22), including the public prosecutor, the accused, the liable stakeholder, the private prosecutor, the subsidiary prosecutor and the private party. Most of them may appeal the procedure.

16. The objective of the mandatory prosecution principle in judicial criminal proceedings is to guarantee equality of all and to ensure that no political or other discretionary criteria are used. NGOs have the possibility to report contraventions of environmental law to criminal investigation/public prosecution. Based on the circumstances, the evidence and the law, the prosecutor decides whether further prosecution is needed or whether the case should be closed. The principle of publicity ("*Öffentlichkeitsgrundsatz*",

[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

Federal Constitution art. 90, para. 1), applies to the most part of judicial criminal proceedings, such as the hearings, but does not apply to the investigation stage.

17. The definition of the victim (Code of Criminal Procedure 65(1)) encompasses victims that are or have been exposed to a particular emotional burden and victims that have suffered damage and seek for redress. Victims are entitled to participate in the criminal proceedings: they can be informed about their procedural rights, heard during the trial and inspect the files, if relevant interests are affected.

18. Victims and persons that have a legal interest, as defined by law, have access to review procedures, including the possibility to request the continuation of a case that has been suspended (see Code of Criminal Procedure art. 195 in conjunction with art. 190-192).

19. When a victim makes a declaration of participation in the criminal proceedings, then it becomes a private party (*Privatbeteiligter*) and may receive compensation for damages. If there is no apparent legal interest, victims have to demonstrate the correlation between the criminal offence and damage. Private parties have the right to access documentary evidence from criminal investigation/public prosecution.

NGO standing in criminal/penal proceedings

20. Under some environmental laws, such as those concerning wildlife trade or animal welfare, violations are pursued through penal administrative or criminal judicial proceedings only. There is no other avenue in administrative and civil proceedings.

21. Due to the exclusive definition of "parties" in penal administrative or judicial criminal proceedings, NGOs cannot participate in those proceedings following a violation of some environmental laws, and they are not recognized as private parties having a legal interest or as "victims" on behalf of nature, biodiversity or species, even if their objectives are related to the protection of the environment.

B. Facts

22. One of the main activities of the communicant relates to campaigning for animal and endangered species protection. In doing so, the communicant reports contraventions of animal and species protection legislation by individuals to the competent administrative authorities or to the prosecution services, depending on the nature of the offense as an administrative or criminal. The offenses reported by the communicant have, among others, related to:

(a) Section 7 of the Wildlife Trade Act (*Artenhandelsgesetz*) that penalizes among others import and export of wild species without the necessary license;

(b) Sections 9-10 of the Vienna Nature Conservation Act *(Naturschutzegesetz*) that penalize several acts of severe offense to the habitat and species, such as being present in protected habitats without permission or collecting protected plants;

(c) Sections XIV-XVI of the Nature Conservation and Landscape Care Act of one of the provinces (*Burgenland Naturschutz- und Landschaftspflegegesetz*) that penalize acts which may jeopardize habitat and species, such as significantly removing waters and altering moor- and wetlands environment and the surrounding area.

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

23. After reporting the alleged offenses, the communicant has attempted to enquire with administration or prosecution, as appropriate, whether any action had been taken against the offenders.

24. In case of administrative penal proceedings, the communicant was not able, as a third party, to have access to the proceedings and related information, because the parties are the authority and the offender. In addition, the communicant did not have standing to challenge any action or omission of the public authority, after the reporting.

25. Similarly, in case of judicial criminal proceedings, the communicant attempted to participate in the proceedings as a private party, but it was never granted standing, on the grounds that it had not suffered damages eligible for compensation. As a consequence, the communicant was denied access to documentary evidence relating to the cases it had reported.

26. The communicant also attempted to participate in judicial criminal proceedings and to access the related documentation, as a "victim" (Section 65(1)(c) of the Code of Criminal Procedure). It argued that a "victim" is not only the one who has suffered harm as a result of a criminal offence, but also anyone whose judicially protected interests could be impaired by that offense, and as an environmental organization devoted to animal and species protection, its judicially protected interests were impaired by offenses to species and animal protection. The communicant was never granted standing.

27. The communicant provides a specific example relating to reporting alleged contraventions of Section 7 of the Wildlife Trade Act, i.e. the import of protected Egyptian vultures. On 2 February 2011, the communicant submitted a statement of facts to the Wien [Vienna] Neustadt prosecution service and gave notice of its intention to join the proceedings as a private party, on the basis of the very high costs incurred upon it due to the frequent contraventions by the offender of the Animal Protection Act, the Wildlife Trade Act and the Criminal Code. On 8 June 2011, the communicant filed an application for inspection and transcription of documentation evidence. On 16 June 2011, the prosecution service rejected both the communicant's declaration to join the proceedings as a private party and its application to access documentary evidence. The rejection was based on the grounds that the communicant was not a victim in the meaning of Section 65(1)(c) of the Code of Criminal Procedure as it had not suffered damages eligible for compensation, and it did not have a legitimate interest as required in Section 77(1) of the Code. In the view of the prosecution service, the pursuit of the communicant's objective of animal protection did not represent a legitimate and recognized legal interest under the applicable law of the Party concerned.

28. The communicant appealed this decision of the prosecution service to the provincial (Wien Neustadt) court. It argued that it was a victim as defined in the Code, since its interests in animal and environmental protection were legally protected by Section 7 of the Wildlife Trade Act. Due to the purposes of its activities, as reflected in its by-laws, it was more directly concerned than any other member of the public and the alleged contraventions impaired its legally protected interests.

29. On 19 August 2012, the Wiener Neustadt Provincial Court dismissed the application, on the grounds that the communicant was not a victim under the Code, it had suffered no damages eligible for compensation, and was not otherwise impaired in its judicially protected interests. The Court also found that the communicant did not have a legal interest required to access documentary evidence.

30. On 31 August 2012, the communicant appealed against that decision to the provincial court of appeal. In its appeal, the communicant referred to the obligations arising from article 9, paragraph 3, of the Convention, as well as to the findings of the Committee with regard to communication ACCC/C/2010/48 (ECE/MP.PP/C.1/2012/4). In this context and for the purpose of proceedings concerning provisions of national law relating to the environment, the communicant noted that the definition of the victim under the Code of Criminal Procedure should be interpreted in a manner comprising environmental organizations.

31. The Vienna provincial Court of Appeal dismissed the appeal (decision of 10 October 2011, see annex 1 to the communication – translation provided by the communicant) and confirmed the ruling of the court of first instance. The Court of Appeal also noted that following the "mischief rule" the Parliament did not intend for a broad interpretation of the victim definition under the Code; that international conventions, such as the Aarhus Convention, generally do not apply directly, but must be transposed into national law to be binding on individuals; that no transposition of the European Union (EU) directives relating to the Convention occurred in the sphere of criminal law, including the law relating to judicial procedure, which means that the Convention has no direct effect on the legal status of victims under the Code; and that the Convention and the EU directives were very vague leaving it to the discretion of the Member States to implement them, and thus the definition of the "victim" under the Code remains unaffected.

32. There were no other possibilities for the communicant to challenge the violations, either by challenging the acts by persons or by challenging the omission of the competent authorities to pursue the violations.

C. Domestic remedies and admissibility

33. To illustrate its allegations and also to show that domestic remedies were not available, the communicant provides the example of its attempts to join judicial criminal proceedings for reported contraventions of the Wildlife Trade Act. It also mentions that no further remedies are available.

34. In its response, the Party concerned questions the admissibility of the communication, first because of its relationship to communication ACCC/C/2010/48 and secondly because the communicant failed to use the existing domestic remedies.

35. The Party concerned recalls the Committee's findings on communication ACCC/C/2010/48, which covered standing for NGOs in environmental law with respect to permitting procedures, sectoral administrative procedures and civil law. It asserts that the aspects of administrative proceedings raised in the present communication, were already covered by communication ACCC/C/2010/48, while the issue of participatory rights of NGOs and other members of the public in criminal or administrative penal proceedings is beyond the scope of rights granted under the Convention.

36. The Party concerned also notes that the communicant did not use the existing legal remedies provided under the environmental liability and environmental information laws.

37. The Party concerned first refers to the applicable EU law on environmental liability. According to article 2, paragraph 1(a) of EU Directive 2004/35/CE on environmental liability,[3] "environmental damage" means "damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species". The Directive further defines protected species and natural habitats (art. 2, para. 3) referring to the EU Birds and Habitats Directives.[4] Therefore, the environmental liability Directive covers matters on wild birds, natural habitats and wild fauna and flora. Provincial environmental liability acts, such as the Vienna and the Burgenland Environmental Liability Acts have transposed EU law into domestic legal order and NGOs may submit a request for action and also have access to a

[3] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[4] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended); and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

court of other independent and impartial public body, such as the Independent Administrative Senate (*"Unabhängiger Verwaltungssenat"*). The Party concerned also indicates that it is currently considering to broaden the scope of applicability of the environmental liability directive.

38. According to the Party concerned, the communicant could also have filed a request to obtain information on the "natural sites", the "biological diversity and its components" and the "measures or activities designed to protect these elements" under the Environmental Information Act.

D. Substantive issues

39. The communicant alleges that it is completely impossible for NGOs and other members of the public to have access to justice in administrative penal and judicial criminal proceedings concerning contraventions of provisions of national law relating to the environment. The experience of the communicant reveals that in case of administrative penal proceedings, the communicant was not granted access to information relating to the offense it had reported (such as whether and how the competent authorities had followed up); and in case of judicial criminal proceedings, the communicant was neither granted access to related information on the offense it had reported, nor standing as a third party or even as a victim, although the purpose of its activity was closely related to the offense and its legal interest seemed to be evident. Therefore, the communicant alleges that the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

40. The communicant also alleges that due to the complete absence of legal remedies for NGOs in administrative penal and judicial criminal proceedings, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

41. During the discussion before the Committee on 26 September 2012, the communicant also stressed that the environmental ombudsman in Austria cannot be seen as remedy, but as an administrative authority, which does not always have standing in review procedures; and also that environmental liability laws in Austria do not address cases of hunting, nature protection or other mistreatment of a single animal creature, but only address cases of severe negative effects on a species. In illustration of its allegations, the communicant informed the Committee of circumstances where animals were mistreated (killing frog population near a pond, using a cheetah in a fashion show, using a fox for training hunting dogs) or other violations (dumping wastewater from a poultry farm near a Natura 2000 area), but members of the public that had reported the incidents could not verify whether the criminal offense had actually been prosecuted, and were not able to follow up, in the event the files had been dropped.

42. The Party concerned submits that it is not in breach of any of the Convention's provisions with respect to the present case. During the discussion before the Committee, the Party concerned admitted possible flaws in the present system, but noted that these are being addressed in the process of following up on the previous recommendations of the Committee, in the framework of administrative court system of the country, at the federal and provincial levels.

43. Apart from its objections with regard to the admissibility of the communication (see above), the main argument of the Party concerned is that the access to justice provisions under the Convention do not extend to proceedings under criminal law; and do not include matters of animal protection in a sense that goes beyond the protection of animals in their natural habitats (in situ), nor does it cover animal welfare in the stricter sense (such as protection against animal torture). In the view of the Party concerned, there is no provision under the Convention asking Parties to grant specific participatory – or even prosecuting – rights to NGOs in criminal or administrative penal proceedings. In those proceedings, NGOs are heard in court or by the public prosecutors as witnesses, experts or private

accuser. The main purpose of Austrian criminal and penal procedures is to implement the entitlement of the State under public penal law.

44. In particular, the Party concerned draws attention to the language used by the Convention. Article 9, paragraph 3, states that members of the public may "challenge", not "penalize". Article 9, paragraph 4, refers to the procedures in the three previous paragraphs. Article 9, paragraph 1, concerns requests for information. With regard to this aspect the Environmental Information Acts (*Umweltinformationsgesetze*) at federal and provincial levels reflect the obligations of this provision. Article 9, paragraph 2, concerns access to justice for permitting activities under article 6; neither article 6 nor any other provision of the Convention explicitly refer to criminal or administrative penal proceedings.

45. The Party concerned argues that some of the legislation referred to by the communicant, namely the Animal Protection Act and the Wildlife Trade Act, is not covered by the Convention. It notes that the definition of "environmental information" (art. 2, para. 3) indicates that the Convention opts for an understanding of the term "environment" that includes the natural, cultural and built environment and may subsume animal protection in broader terms, especially as species conservation, biological diversity, and conservation of flora, fauna and habitats; but the term does not cover animal protection in the stricter sense, such as domestic animals, or the trade of endangered species. In this sense, the communicant's allegations (including the examples of using a cheetah in a fashion show or a fox to train hunting dogs) fall outside the scope of the Convention.

46. The Party concerned reiterates that access to justice under the Aarhus Convention does not extend to proceedings under criminal law and takes the position that animal protection under the Convention includes only their protection in their natural habitats in Austria. It maintains that, apart from the possibilities offered under the EU liability directive, as transposed into national law, members of the public have the possibility to have access to justice by using civil law remedies and the institution of environmental ombudsman. Nevertheless, the Party concerned admits that the existing situation is not satisfactory and considers that those changes it intends to make, as a follow-up to the Committee's recommendations in ACCC/C/2010/48, will extend the NGOs legal standing so as to respond to the issues raised by the communication.

III. Consideration and evaluation by the Committee

47. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

48. The central allegation of the communication is the possibility for members of the public, including NGOs, to 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, under article 9, paragraph 3, of the Convention. The Committee decides not to consider alleged non-compliance with article 9, paragraph 4, of the Convention on the merits, because in the present case the allegations of absence of *effective* remedies (art. 9, para. 4) are subsumed by the allegations of complete absence of *any* remedies (art.9, para. 3). That is, if the Committee holds that the Party concerned fails to provide any remedy, as under article 9, paragraph 3, this also implies a failure by the Party concerned to comply with article 9, paragraph 4.

49. With respect to the connection of the communication to communication ACCC/C/2010/48, in which standing was considered in the context of the remedies available both under permitting participatory procedures (art. 9, para. 2) and administrative and civil remedies for contraventions of national law relating to the environment, in particular in sectoral and provincial laws, the Committee notes that the present communication goes beyond the scope of ACCC/C/2010/48, because it calls for

consideration of the Committee of access to penal/criminal proceedings in environmental matters.

50. The first question to be addressed is whether the laws invoked by the communicant constitute "national law relating to the environment"; the second is whether members of the public, including NGOs, have any possibility to exercise their rights under the Convention, in cases where the contravention of environmental legislation triggers application of the judicial criminal or administrative penal proceedings.

51. Before examining these aspects more thoroughly, the Committee recalls that "the criteria, if any, laid down in national law" in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment its findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C/1/2006/4/Add.2, paras. 35-37) and ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4, paras. 29-31).

National law relating to the environment (art. 9, para. 3)

52. Article 9, paragraph 3, is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene laws relating to the environment, and with the means to have existing laws relating to the environment enforced and made effective (see also findings on ACCC/C/2005/11 (Belgium), ECE/MP.PP/C/1/2006/4/Add.2, para. 34). Importantly, the text of the Convention does not refer to "environmental laws", but to "laws relating to the environment". Article 9, paragraph 3 is not limited to "environmental laws", e.g. laws that explicitly include the term "environment" in their title or provisions. Rather, any law is included, which relates to the environment, e.g. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation, maritime affairs, that may relate in general, help protect, harm or otherwise impact on the environment.

53. The scope of "national laws" also extends to the applicable EU law in a member state. In this regard, acts and omissions that may contravene EU regulations or directives, but not national laws implementing those instruments, may as well be challenged under paragraph 3 (ACCC/C/2006/18 (Denmark), ECE/MP.PP/C/1/2008/5/Add.4, para. 27).

54. The broad understanding of "environment" under the Convention is drawn from the broad definition of "environmental information" under article 2, paragraph 2, which also extends to "biodiversity and its components, including genetically modified organisms". The fact that components of biodiversity have been removed from their habitat, does not necessarily mean that they lose their property as biodiversity components.

55. Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also "laws relating to the environment", because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment. In addition, to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to article 9, paragraph 3 of the Convention.

Access to administrative or judicial proceedings and effective remedies (art. 9, paras. 3 and 4)

56. In its findings on communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4) the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, as long as there are other means for challenging these acts

and omissions. In the present case, the Committee therefore looks also at whether the system of the Party concerned provides for any other means for challenging acts and omissions by private persons and public authorities that contravene provisions of its national law relating to the environment.

57. The Party concerned specifically referred to the remedies available to the communicant under the environmental liability and environmental information laws. The Committee notes that the scope of applicability of these laws does not cover all aspects referred to in the present communication. For instance, under environmental liability laws action may be triggered by environmental organizations for alleged damage (as measurable adverse change) to protected species and natural habitats or alleged significant damage to water and land. As already mentioned in the previous section, the scope of the "environment" under the Convention is to be understood as going beyond these aspects of environmental effects. The Party concerned seems to be aware of the inconsistencies in its system and mentioned during the discussion the possibility of amendments to the environmental liability laws to address also the situations subject to the present communication.

58. The Environmental Liability Act, adopted by the Party concerned in the implementation of the EU Directive, allows NGOs to file complaints and acquire legal standing in civil procedures only if there is a specific environmental damage. Even in such cases, NGOs have legal standing only in proceedings concerning precautionary measures and compensation for already occurred environmental damages.

59. Under the law of the Party concerned, at the national and/or provincial level, certain acts and/or omissions that may impact on the environment can be challenged through penal administrative or criminal judicial proceedings. Members of the public, including environmental NGOs, cannot participate in these proceedings, but at the same time, the communicant claims that they have no other means to challenge such acts or omissions of public authorities or private persons in contravention to national laws on environment, as is required under art. 9, paragraph 3, of the Convention.

60. Moreover, members of the public, including NGOs, may not invoke their rights under the environmental liability act in the context of penal/criminal procedures or as effective remedies to challenge acts and omissions contravening provisions of the laws of the Party concerned relating to the environment.

61. The Party concerned refers to the use of the institution of Ombudsperson. The Committee has already reviewed the function of the Ombudspersons for the Environment under the law of the Party concerned (findings on communication ACCC/C/2010/48 (Austria), para. 74) and found that not only may its authority be limited, as it does not have standing in procedures of many sectoral laws relating to the environment, but it has discretion whether or not to bring a case to court, despite the request of a member of the public, including an NGO. The Party concerned points to proposals for changes to the institution currently under discussion. It also mentions that Ombudspersons of some provinces have agreed to act when requested by members of the public, even if they are not obliged by law to do so. Given the limited role of the institution of the Ombudsperson, the Committee does not consider the possibility of bringing complaints to the Ombudsman as providing a means to challenging acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention.

62. On the basis of the information received from the Party concerned on how it intends to address the Committee's recommendations on communication ACCC/C/2010/48, the Committee considers it too early to assess whether the discussed amendments to the environmental liability act, the institution of ombudsperson or to other laws, will effectively address some or all the issues raised in the present communication. The Party concerned has proceeded with inter-ministerial meetings, but there are no advance draft laws, for instance,

tabled that could be considered by the Committee as per their potential compliance with the Convention.

63. The Committee concludes that in certain cases members of the public, including environmental NGOs, have no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national law, including administrative penal law and criminal law, relating to the environment, such as contraventions of laws relating to wildlife trade, nature conservation and animal protection. Whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, para. 3 in conjunction with article 9, para 4 of the Convention. For these reasons, the Committee holds that the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention.

64. The Committee does not exclude that in addressing the recommendations in ACCC/C/2010/48, the Party concerned will also address the issues identified in the present communication. In this respect, the Committee reminds the Party concerned that in proceeding with any amendments, it should take into account that access to justice under article 9, paragraphs 3 and 4, requires more than a right of members of the public to address an administrative authority or the prosecution about an illegal activity. Members of the public should also have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities when they consider that such acts or omissions amount to criminal acts or administrative offences. This may be pursued through avenues within or beyond penal/criminal law procedures.

IV. Conclusions and recommendations

A. Main findings with regard to non-compliance

65. The Committee finds that, because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to wildlife trade, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention (para. 63).

B. Recommendations

66. The Committee pursuant to paragraph 35 of the annex to decision I/7 recommends the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned, that, when addressing the recommendations under ACCC/C/2010/48, also to ensure that members of the public, including NGOs, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national laws, including administrative penal laws and criminal laws, relating to the environment.

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Adopted by the Compliance Committee on 27 September 2013

I. Introduction

1. On 1 December 2011, the non-governmental organization (NGO) *Vier Pfoten – Stiftung für Tiershcutz gemeinnützige Privatstiftung* (the communicant), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter "the Aarhus Convention" or "the Convention") alleging that Austria had failed to comply with its obligations concerning the access to justice provisions of the Convention.

2. Specifically, the communication alleges that the Party concerned fails to provide for access to justice for members of the public, including NGOs, in administrative penal and judicial criminal proceedings in respect of contraventions of national law relating to the environment. Therefore, according to the communication, the Party concerned is not in compliance with article 9, paragraphs 3 and 4, of the Convention.

3. At its thirty-fifth meeting (13-16 December 2011), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 22 December 2012.

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the steps taken and to be taken in view of the recommendations on communication ACCC/C/2010/48.

9. The Committee prepared draft findings at its forty-first meeting (25-28 June 2013). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 18 July 2013. Both were invited to provide comments by 15 August 2013.

10. The Party concerned provided comments on 23 August 2013. The communicant acknowledged receipt of the draft findings on 24 July 2013 but did not provide substantive comments.

11. At its forty-second meeting (24-27 September 2013), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document to its forty-fourth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[2]

A. Legal framework

Administrative penal proceedings – standing

12. The Administrative Penal Act (*Verwaltungsstrafgesetz-VStG)* in conjunction with the Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz-AVG*) provide for legal standing in administrative penal proceedings to persons who are involved in the matter on the basis of a legal title or interest (AVG art. 8), the accused (VStG art. 32, para. 1), i.e. the private party and the private prosecutor.

13. The possibility to participate as a private party depends on the applicable sectoral laws.

14. Administrative offences are prosecuted ex officio (VStG art. 25) (*Offizialmaxime* - "principle of investigation ex officio") and in administrative penal proceedings, the competent authority has a dual function ("principle of inquisition"), as a prosecutor and a judge. In case of suspicion, the competent authority is obliged to initiate and conduct proceedings, and has a duty to determine the circumstances of the case.

Judicial criminal proceedings – standing

15. The Code of Criminal Procedure (*Strafprozessordnung*) defines the parties to criminal proceedings (art. 22), including the public prosecutor, the accused, the liable stakeholder, the private prosecutor, the subsidiary prosecutor and the private party. Most of them may appeal the procedure.

16. The objective of the mandatory prosecution principle in judicial criminal proceedings is to guarantee equality of all and to ensure that no political or other discretionary criteria are used. NGOs have the possibility to report contraventions of environmental law to criminal investigation/public prosecution. Based on the circumstances, the evidence and the law, the prosecutor decides whether further prosecution is needed or whether the case should be closed. The principle of publicity ("*Öffentlichkeitsgrundsatz*",

[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

Federal Constitution art. 90, para. 1), applies to the most part of judicial criminal proceedings, such as the hearings, but does not apply to the investigation stage.

17. The definition of the victim (Code of Criminal Procedure 65(1)) encompasses victims that are or have been exposed to a particular emotional burden and victims that have suffered damage and seek for redress. Victims are entitled to participate in the criminal proceedings: they can be informed about their procedural rights, heard during the trial and inspect the files, if relevant interests are affected.

18. Victims and persons that have a legal interest, as defined by law, have access to review procedures, including the possibility to request the continuation of a case that has been suspended (see Code of Criminal Procedure art. 195 in conjunction with art. 190-192).

19. When a victim makes a declaration of participation in the criminal proceedings, then it becomes a private party (*Privatbeteiligter*) and may receive compensation for damages. If there is no apparent legal interest, victims have to demonstrate the correlation between the criminal offence and damage. Private parties have the right to access documentary evidence from criminal investigation/public prosecution.

NGO standing in criminal/penal proceedings

20. Under some environmental laws, such as those concerning wildlife trade or animal welfare, violations are pursued through penal administrative or criminal judicial proceedings only. There is no other avenue in administrative and civil proceedings.

21. Due to the exclusive definition of "parties" in penal administrative or judicial criminal proceedings, NGOs cannot participate in those proceedings following a violation of some environmental laws, and they are not recognized as private parties having a legal interest or as "victims" on behalf of nature, biodiversity or species, even if their objectives are related to the protection of the environment.

B. Facts

22. One of the main activities of the communicant relates to campaigning for animal and endangered species protection. In doing so, the communicant reports contraventions of animal and species protection legislation by individuals to the competent administrative authorities or to the prosecution services, depending on the nature of the offense as an administrative or criminal. The offenses reported by the communicant have, among others, related to:

(a) Section 7 of the Wildlife Trade Act (*Artenhandelsgesetz*) that penalizes among others import and export of wild species without the necessary license;

(b) Sections 9-10 of the Vienna Nature Conservation Act *(Naturschutzegesetz*) that penalize several acts of severe offense to the habitat and species, such as being present in protected habitats without permission or collecting protected plants;

(c) Sections XIV-XVI of the Nature Conservation and Landscape Care Act of one of the provinces (*Burgenland Naturschutz- und Landschaftspflegegesetz*) that penalize acts which may jeopardize habitat and species, such as significantly removing waters and altering moor- and wetlands environment and the surrounding area.

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

23. After reporting the alleged offenses, the communicant has attempted to enquire with administration or prosecution, as appropriate, whether any action had been taken against the offenders.

24. In case of administrative penal proceedings, the communicant was not able, as a third party, to have access to the proceedings and related information, because the parties are the authority and the offender. In addition, the communicant did not have standing to challenge any action or omission of the public authority, after the reporting.

25. Similarly, in case of judicial criminal proceedings, the communicant attempted to participate in the proceedings as a private party, but it was never granted standing, on the grounds that it had not suffered damages eligible for compensation. As a consequence, the communicant was denied access to documentary evidence relating to the cases it had reported.

26. The communicant also attempted to participate in judicial criminal proceedings and to access the related documentation, as a "victim" (Section 65(1)(c) of the Code of Criminal Procedure). It argued that a "victim" is not only the one who has suffered harm as a result of a criminal offence, but also anyone whose judicially protected interests could be impaired by that offense, and as an environmental organization devoted to animal and species protection, its judicially protected interests were impaired by offenses to species and animal protection. The communicant was never granted standing.

27. The communicant provides a specific example relating to reporting alleged contraventions of Section 7 of the Wildlife Trade Act, i.e. the import of protected Egyptian vultures. On 2 February 2011, the communicant submitted a statement of facts to the Wien [Vienna] Neustadt prosecution service and gave notice of its intention to join the proceedings as a private party, on the basis of the very high costs incurred upon it due to the frequent contraventions by the offender of the Animal Protection Act, the Wildlife Trade Act and the Criminal Code. On 8 June 2011, the communicant filed an application for inspection and transcription of documentation evidence. On 16 June 2011, the prosecution service rejected both the communicant's declaration to join the proceedings as a private party and its application to access documentary evidence. The rejection was based on the grounds that the communicant was not a victim in the meaning of Section 65(1)(c) of the Code of Criminal Procedure as it had not suffered damages eligible for compensation, and it did not have a legitimate interest as required in Section 77(1) of the Code. In the view of the prosecution service, the pursuit of the communicant's objective of animal protection did not represent a legitimate and recognized legal interest under the applicable law of the Party concerned.

28. The communicant appealed this decision of the prosecution service to the provincial (Wien Neustadt) court. It argued that it was a victim as defined in the Code, since its interests in animal and environmental protection were legally protected by Section 7 of the Wildlife Trade Act. Due to the purposes of its activities, as reflected in its by-laws, it was more directly concerned than any other member of the public and the alleged contraventions impaired its legally protected interests.

29. On 19 August 2012, the Wiener Neustadt Provincial Court dismissed the application, on the grounds that the communicant was not a victim under the Code, it had suffered no damages eligible for compensation, and was not otherwise impaired in its judicially protected interests. The Court also found that the communicant did not have a legal interest required to access documentary evidence.

30. On 31 August 2012, the communicant appealed against that decision to the provincial court of appeal. In its appeal, the communicant referred to the obligations arising from article 9, paragraph 3, of the Convention, as well as to the findings of the Committee with regard to communication ACCC/C/2010/48 (ECE/MP.PP/C.1/2012/4). In this context and for the purpose of proceedings concerning provisions of national law relating to the environment, the communicant noted that the definition of the victim under the Code of Criminal Procedure should be interpreted in a manner comprising environmental organizations.

31. The Vienna provincial Court of Appeal dismissed the appeal (decision of 10 October 2011, see annex 1 to the communication – translation provided by the communicant) and confirmed the ruling of the court of first instance. The Court of Appeal also noted that following the "mischief rule" the Parliament did not intend for a broad interpretation of the victim definition under the Code; that international conventions, such as the Aarhus Convention, generally do not apply directly, but must be transposed into national law to be binding on individuals; that no transposition of the European Union (EU) directives relating to the Convention occurred in the sphere of criminal law, including the law relating to judicial procedure, which means that the Convention has no direct effect on the legal status of victims under the Code; and that the Convention and the EU directives were very vague leaving it to the discretion of the Member States to implement them, and thus the definition of the "victim" under the Code remains unaffected.

32. There were no other possibilities for the communicant to challenge the violations, either by challenging the acts by persons or by challenging the omission of the competent authorities to pursue the violations.

C. Domestic remedies and admissibility

33. To illustrate its allegations and also to show that domestic remedies were not available, the communicant provides the example of its attempts to join judicial criminal proceedings for reported contraventions of the Wildlife Trade Act. It also mentions that no further remedies are available.

34. In its response, the Party concerned questions the admissibility of the communication, first because of its relationship to communication ACCC/C/2010/48 and secondly because the communicant failed to use the existing domestic remedies.

35. The Party concerned recalls the Committee's findings on communication ACCC/C/2010/48, which covered standing for NGOs in environmental law with respect to permitting procedures, sectoral administrative procedures and civil law. It asserts that the aspects of administrative proceedings raised in the present communication, were already covered by communication ACCC/C/2010/48, while the issue of participatory rights of NGOs and other members of the public in criminal or administrative penal proceedings is beyond the scope of rights granted under the Convention.

36. The Party concerned also notes that the communicant did not use the existing legal remedies provided under the environmental liability and environmental information laws.

37. The Party concerned first refers to the applicable EU law on environmental liability. According to article 2, paragraph 1(a) of EU Directive 2004/35/CE on environmental liability,[3] "environmental damage" means "damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species". The Directive further defines protected species and natural habitats (art. 2, para. 3) referring to the EU Birds and Habitats Directives.[4] Therefore, the environmental liability Directive covers matters on wild birds, natural habitats and wild fauna and flora. Provincial environmental liability acts, such as the Vienna and the Burgenland Environmental Liability Acts have transposed EU law into domestic legal order and NGOs may submit a request for action and also have access to a

[3] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

[4] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (this is the codified version of Directive 79/409/EEC as amended); and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

court of other independent and impartial public body, such as the Independent Administrative Senate (*"Unabhängiger Verwaltungssenat"*). The Party concerned also indicates that it is currently considering to broaden the scope of applicability of the environmental liability directive.

38. According to the Party concerned, the communicant could also have filed a request to obtain information on the "natural sites", the "biological diversity and its components" and the "measures or activities designed to protect these elements" under the Environmental Information Act.

D. Substantive issues

39. The communicant alleges that it is completely impossible for NGOs and other members of the public to have access to justice in administrative penal and judicial criminal proceedings concerning contraventions of provisions of national law relating to the environment. The experience of the communicant reveals that in case of administrative penal proceedings, the communicant was not granted access to information relating to the offense it had reported (such as whether and how the competent authorities had followed up); and in case of judicial criminal proceedings, the communicant was neither granted access to related information on the offense it had reported, nor standing as a third party or even as a victim, although the purpose of its activity was closely related to the offense and its legal interest seemed to be evident. Therefore, the communicant alleges that the Party concerned fails to comply with article 9, paragraph 3, of the Convention.

40. The communicant also alleges that due to the complete absence of legal remedies for NGOs in administrative penal and judicial criminal proceedings, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

41. During the discussion before the Committee on 26 September 2012, the communicant also stressed that the environmental ombudsman in Austria cannot be seen as remedy, but as an administrative authority, which does not always have standing in review procedures; and also that environmental liability laws in Austria do not address cases of hunting, nature protection or other mistreatment of a single animal creature, but only address cases of severe negative effects on a species. In illustration of its allegations, the communicant informed the Committee of circumstances where animals were mistreated (killing frog population near a pond, using a cheetah in a fashion show, using a fox for training hunting dogs) or other violations (dumping wastewater from a poultry farm near a Natura 2000 area), but members of the public that had reported the incidents could not verify whether the criminal offense had actually been prosecuted, and were not able to follow up, in the event the files had been dropped.

42. The Party concerned submits that it is not in breach of any of the Convention's provisions with respect to the present case. During the discussion before the Committee, the Party concerned admitted possible flaws in the present system, but noted that these are being addressed in the process of following up on the previous recommendations of the Committee, in the framework of administrative court system of the country, at the federal and provincial levels.

43. Apart from its objections with regard to the admissibility of the communication (see above), the main argument of the Party concerned is that the access to justice provisions under the Convention do not extend to proceedings under criminal law; and do not include matters of animal protection in a sense that goes beyond the protection of animals in their natural habitats (in situ), nor does it cover animal welfare in the stricter sense (such as protection against animal torture). In the view of the Party concerned, there is no provision under the Convention asking Parties to grant specific participatory – or even prosecuting – rights to NGOs in criminal or administrative penal proceedings. In those proceedings, NGOs are heard in court or by the public prosecutors as witnesses, experts or private

accuser. The main purpose of Austrian criminal and penal procedures is to implement the entitlement of the State under public penal law.

44. In particular, the Party concerned draws attention to the language used by the Convention. Article 9, paragraph 3, states that members of the public may "challenge", not "penalize". Article 9, paragraph 4, refers to the procedures in the three previous paragraphs. Article 9, paragraph 1, concerns requests for information. With regard to this aspect the Environmental Information Acts (*Umweltinformationsgesetze*) at federal and provincial levels reflect the obligations of this provision. Article 9, paragraph 2, concerns access to justice for permitting activities under article 6; neither article 6 nor any other provision of the Convention explicitly refer to criminal or administrative penal proceedings.

45. The Party concerned argues that some of the legislation referred to by the communicant, namely the Animal Protection Act and the Wildlife Trade Act, is not covered by the Convention. It notes that the definition of "environmental information" (art. 2, para. 3) indicates that the Convention opts for an understanding of the term "environment" that includes the natural, cultural and built environment and may subsume animal protection in broader terms, especially as species conservation, biological diversity, and conservation of flora, fauna and habitats; but the term does not cover animal protection in the stricter sense, such as domestic animals, or the trade of endangered species. In this sense, the communicant's allegations (including the examples of using a cheetah in a fashion show or a fox to train hunting dogs) fall outside the scope of the Convention.

46. The Party concerned reiterates that access to justice under the Aarhus Convention does not extend to proceedings under criminal law and takes the position that animal protection under the Convention includes only their protection in their natural habitats in Austria. It maintains that, apart from the possibilities offered under the EU liability directive, as transposed into national law, members of the public have the possibility to have access to justice by using civil law remedies and the institution of environmental ombudsman. Nevertheless, the Party concerned admits that the existing situation is not satisfactory and considers that those changes it intends to make, as a follow-up to the Committee's recommendations in ACCC/C/2010/48, will extend the NGOs legal standing so as to respond to the issues raised by the communication.

III. Consideration and evaluation by the Committee

47. Austria ratified the Convention on 17 January 2005. The Convention entered into force for Austria on 17 April 2005.

48. The central allegation of the communication is the possibility for members of the public, including NGOs, to 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, under article 9, paragraph 3, of the Convention. The Committee decides not to consider alleged non-compliance with article 9, paragraph 4, of the Convention on the merits, because in the present case the allegations of absence of *effective* remedies (art. 9, para. 4) are subsumed by the allegations of complete absence of *any* remedies (art.9, para. 3). That is, if the Committee holds that the Party concerned fails to provide any remedy, as under article 9, paragraph 3, this also implies a failure by the Party concerned to comply with article 9, paragraph 4.

49. With respect to the connection of the communication to communication ACCC/C/2010/48, in which standing was considered in the context of the remedies available both under permitting participatory procedures (art. 9, para. 2) and administrative and civil remedies for contraventions of national law relating to the environment, in particular in sectoral and provincial laws, the Committee notes that the present communication goes beyond the scope of ACCC/C/2010/48, because it calls for

consideration of the Committee of access to penal/criminal proceedings in environmental matters.

50. The first question to be addressed is whether the laws invoked by the communicant constitute "national law relating to the environment"; the second is whether members of the public, including NGOs, have any possibility to exercise their rights under the Convention, in cases where the contravention of environmental legislation triggers application of the judicial criminal or administrative penal proceedings.

51. Before examining these aspects more thoroughly, the Committee recalls that "the criteria, if any, laid down in national law" in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment its findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C/1/2006/4/Add.2, paras. 35-37) and ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4, paras. 29-31).

National law relating to the environment (art. 9, para. 3)

52. Article 9, paragraph 3, is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene laws relating to the environment, and with the means to have existing laws relating to the environment enforced and made effective (see also findings on ACCC/C/2005/11 (Belgium), ECE/MP.PP/C/1/2006/4/Add.2, para. 34). Importantly, the text of the Convention does not refer to "environmental laws", but to "laws relating to the environment". Article 9, paragraph 3 is not limited to "environmental laws", e.g. laws that explicitly include the term "environment" in their title or provisions. Rather, any law is included, which relates to the environment, e.g. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation, maritime affairs, that may relate in general, help protect, harm or otherwise impact on the environment.

53. The scope of "national laws" also extends to the applicable EU law in a member state. In this regard, acts and omissions that may contravene EU regulations or directives, but not national laws implementing those instruments, may as well be challenged under paragraph 3 (ACCC/C/2006/18 (Denmark), ECE/MP.PP/C/1/2008/5/Add.4, para. 27).

54. The broad understanding of "environment" under the Convention is drawn from the broad definition of "environmental information" under article 2, paragraph 2, which also extends to "biodiversity and its components, including genetically modified organisms". The fact that components of biodiversity have been removed from their habitat, does not necessarily mean that they lose their property as biodiversity components.

55. Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also "laws relating to the environment", because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment. In addition, to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to article 9, paragraph 3 of the Convention.

Access to administrative or judicial proceedings and effective remedies (art. 9, paras. 3 and 4)

56. In its findings on communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/C/1/2008/5/Add.4) the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, as long as there are other means for challenging these acts

and omissions. In the present case, the Committee therefore looks also at whether the system of the Party concerned provides for any other means for challenging acts and omissions by private persons and public authorities that contravene provisions of its national law relating to the environment.

57. The Party concerned specifically referred to the remedies available to the communicant under the environmental liability and environmental information laws. The Committee notes that the scope of applicability of these laws does not cover all aspects referred to in the present communication. For instance, under environmental liability laws action may be triggered by environmental organizations for alleged damage (as measurable adverse change) to protected species and natural habitats or alleged significant damage to water and land. As already mentioned in the previous section, the scope of the "environment" under the Convention is to be understood as going beyond these aspects of environmental effects. The Party concerned seems to be aware of the inconsistencies in its system and mentioned during the discussion the possibility of amendments to the environmental liability laws to address also the situations subject to the present communication.

58. The Environmental Liability Act, adopted by the Party concerned in the implementation of the EU Directive, allows NGOs to file complaints and acquire legal standing in civil procedures only if there is a specific environmental damage. Even in such cases, NGOs have legal standing only in proceedings concerning precautionary measures and compensation for already occurred environmental damages.

59. Under the law of the Party concerned, at the national and/or provincial level, certain acts and/or omissions that may impact on the environment can be challenged through penal administrative or criminal judicial proceedings. Members of the public, including environmental NGOs, cannot participate in these proceedings, but at the same time, the communicant claims that they have no other means to challenge such acts or omissions of public authorities or private persons in contravention to national laws on environment, as is required under art. 9, paragraph 3, of the Convention.

60. Moreover, members of the public, including NGOs, may not invoke their rights under the environmental liability act in the context of penal/criminal procedures or as effective remedies to challenge acts and omissions contravening provisions of the laws of the Party concerned relating to the environment.

61. The Party concerned refers to the use of the institution of Ombudsperson. The Committee has already reviewed the function of the Ombudspersons for the Environment under the law of the Party concerned (findings on communication ACCC/C/2010/48 (Austria), para. 74) and found that not only may its authority be limited, as it does not have standing in procedures of many sectoral laws relating to the environment, but it has discretion whether or not to bring a case to court, despite the request of a member of the public, including an NGO. The Party concerned points to proposals for changes to the institution currently under discussion. It also mentions that Ombudspersons of some provinces have agreed to act when requested by members of the public, even if they are not obliged by law to do so. Given the limited role of the institution of the Ombudsperson, the Committee does not consider the possibility of bringing complaints to the Ombudsman as providing a means to challenging acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention.

62. On the basis of the information received from the Party concerned on how it intends to address the Committee's recommendations on communication ACCC/C/2010/48, the Committee considers it too early to assess whether the discussed amendments to the environmental liability act, the institution of ombudsperson or to other laws, will effectively address some or all the issues raised in the present communication. The Party concerned has proceeded with inter-ministerial meetings, but there are no advance draft laws, for instance,

tabled that could be considered by the Committee as per their potential compliance with the Convention.

63. The Committee concludes that in certain cases members of the public, including environmental NGOs, have no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national law, including administrative penal law and criminal law, relating to the environment, such as contraventions of laws relating to wildlife trade, nature conservation and animal protection. Whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, para. 3 in conjunction with article 9, para 4 of the Convention. For these reasons, the Committee holds that the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention.

64. The Committee does not exclude that in addressing the recommendations in ACCC/C/2010/48, the Party concerned will also address the issues identified in the present communication. In this respect, the Committee reminds the Party concerned that in proceeding with any amendments, it should take into account that access to justice under article 9, paragraphs 3 and 4, requires more than a right of members of the public to address an administrative authority or the prosecution about an illegal activity. Members of the public should also have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities when they consider that such acts or omissions amount to criminal acts or administrative offences. This may be pursued through avenues within or beyond penal/criminal law procedures.

IV. Conclusions and recommendations

A. Main findings with regard to non-compliance

65. The Committee finds that, because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to wildlife trade, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention (para. 63).

B. Recommendations

66. The Committee pursuant to paragraph 35 of the annex to decision I/7 recommends the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned, that, when addressing the recommendations under ACCC/C/2010/48, also to ensure that members of the public, including NGOs, have access to adequate and effective administrative or judicial procedures and remedies in order to challenge acts and omissions of private persons and public authorities that contravene national laws, including administrative penal laws and criminal laws, relating to the environment.