



Economic and Social Council

Distr.: General
8 February 2011

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation in
Decision-Making and Access to Justice in
Environmental Matters

Compliance Committee

Twenty-fourth meeting
Geneva, 30 June–3 July 2009

Report of the Compliance Committee on its Twenty-fourth meeting

Addendum

Findings with regard to communication ACCC/C/2007/22 concerning compliance by France

Adopted by the Compliance Committee on 3 July 2009

Summary

These findings were prepared by the Compliance Committee in accordance with its mandate as set out in paragraphs 13, 14 and 35 of the annex to decision I/7 of the Meeting of the Parties. They concern communication ACCC/C/2007/22 submitted by L'Association de Défense et de Protection du Littoral du Golfe de Fos-sur-Mer, Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône and Fédération d'Action Régionale pour l'Environnement (FARE Sud) regarding compliance by France with its obligations under the Convention in relation to decision-making processes and access to justice for a domestic waste disposal plant.

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I. Background

1. On 21 December 2007, the three French associations L'Association de Défense et de Protection du Littoral du Golfe de Fos-sur-Mer, Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône, and Fédération d'Action Régionale pour l'Environnement (hereinafter the communicant), represented by Mr. Jean-Daniel Chetrit of Cabinet Pichavant-Chetrit, submitted a communication to the Committee, alleging non-compliance by France with its obligations under article 3, paragraph 1, article 6, paragraphs 1, 2, 3, 4, 5 and 8, and article 9, paragraphs 2 and 5, of the Convention.

2. The communication alleges that the Party concerned failed to provide for public participation in the decision-making processes that led to the construction by Communauté Urbaine Marseille Provence Métropole (CUMPM) of a centre for the processing of waste by incineration at Fos-sur-Mer. First, in not arranging for the public concerned to participate properly in this decision-making procedure, it is alleged that France failed to comply with its obligations under article 6 of the Convention. Second, France is alleged to have also violated that article by not correctly transposing the list of activities mentioned in article 6, paragraph 1 (a), of the Convention and featuring it in its annex I. Moreover, the communication alleges that in neglecting to take remedial action with respect to the case law of the Conseil d'Etat, which according to the communicant denies the public concerned by a project the opportunity to avail itself directly of the provisions of article 6, paragraphs 4, 5 and 8, and article 9, paragraph 5, of the Convention, France failed to comply with its obligations under the Convention. More specifically, according to the communication:

(a) The CUMPM failed to provide for public participation, as set out in article 6, paragraph 4, of the Convention, before adopting, on 20 December 2003, resolutions which decided (i) on the particular method of processing household wastes, basically through incineration, (ii) on the site for the installations, and (iii) to resort to a public service concession procedure for the construction and management of the installations;

(b) The information made available by CUMPM about the project through a press release in July 2004 was provided at too late a stage and did not reach the public concerned, thus resulting in a violation of article 6, paragraph 4, of the Convention;

(c) The decision of the National Commission for Public Debate on 28 September 2004 to reject a request for a public debate violated article 6 of the Convention;

(d) CUMPM did not provide for public participation in accordance with article 6 of the Convention before adopting the resolution, on 13 May 2005, that approved the choice of concessionaire for the waste treatment project and defined the modalities for the processing of the waste;

(e) In the authorization procedure in 2005 and 2006, the Prefect of Bouches-du-Rhône failed to provide for effective public participation when all options were open, as set out in article 6 of the Convention, by informing members of the public at too late a stage about the authorization procedure, limiting the public inquiry to only three locations and allowing too short a period of time for participation in the decision-making process;

(f) Members of the public did not have access to justice to challenge the resolutions of 20 December 2003;

(g) In violation of article 9 of the Convention, members of the public were not granted access to justice to challenge the omission of not arranging a public debate before the National Commission for Public Debate in 2004;

(h) Members of the public did not have access to justice to challenge the authorization by the Prefect on 12 January 2006, and it is impossible in France to obtain the suspension and/or annulment of a decision taken at the end of a decision-making process;

(i) Members of the public did not have access to justice to challenge the construction permit, given on 20 March 2006;

(j) The lack of clear legislation to implement the provisions of the Convention constitutes a violation of article 3, paragraph 1, of the Convention.

3. The communication was forwarded to the Party concerned on 17 April 2008, together with a number of questions from the Committee, following a preliminary determination by the Committee at its nineteenth meeting (5–7 March 2008) that it was admissible. On 17 April 2008, the secretariat also sent a letter to the communicant with questions on behalf of the Committee.

4. In its reply, dated 17 September 2008, the Party concerned disputed the claim of non-compliance and stated, *inter alia*, that the resolutions adopted by CUMPM in 2003 and 2005 only established the outline for the municipality's plan to build a waste management plant, but did not form a part of the decision-making process; nor did they in any way bind the Prefect in the decision whether or not to grant authorization to the waste management plant.

5. In a letter to the secretariat, received on 17 September 2007, the communicant replied to the questions posed by the Committee. The communicant provided a modified version of this letter on 9 October 2008.

6. The Committee discussed the communication at its twenty-second meeting (17–19 December 2008), with the participation of representatives of both the Party concerned and the communicant.

7. In the discussion, the communicant argued that there were gaps in French environmental law with respect to the requirements of the Convention, since under French law, the principle of independence of legislation applied. Thus, if several laws applied, each one must comply with the Convention. According to the communicant, CUMPM was obliged to provide for a tender, since it decided not to operate the waste management service itself, but to invite a private operator. The communicant also held that once the tender was finalized, by the CUMPM resolution of 13 May 2005 approving the choice of concessionaire for the plant, the municipality was bound to comply with the resolution.

8. The Party concerned disagreed with the communicant, and argued that only the authorization by the Prefect of 12 January 2006 amounted to a decision according to article 6 of the Convention. According to the Party concerned, the preceding acts and decisions made by CUMPM did not imply an authorization of the plant. Moreover, the Party concerned argued that the Prefect's decision of 12 January 2006 was a single act that covered all aspects of the installation, and that it had been preceded by public participation, in accordance with the Convention. Thus, the Party concerned held that at the stage of the Prefect's decision, all options were open, and the application could have been turned down if the Prefect so decided, also taking into account the views of members of the public. During the discussion, the Party concerned pointed out that there were about 50 such refusals by prefects per year in France.

9. At its twenty-second meeting, the Committee confirmed the admissibility of the communication. It requested further information from the communicant and the Party concerned relating to possibilities for injunctive relief. Additional information was provided by the communicant and the Party concerned by letters of 27 and 28 January 2009.

10. The Committee began to prepare draft findings at its twenty-second meeting and completed the preparation of draft findings at its twenty-third meeting (31 March–3 April 2009). In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 15 May 2009. Both were invited to provide any comments by 15 June 2009.

11. The Party concerned and the communicant provided comments on 25 June 2009 and 17 June 2009, respectively.

12. At its twenty-fourth meeting, 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 an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues¹

13. The communication concerns the alleged lack of opportunity for the members of the public to participate in the decision-making processes leading to the construction by CUMPM of a centre for the processing of waste by incineration at Fos-sur-Mer. The complex involves a total incineration capacity of 450,000 tons of waste per year.

A. French law

14. The French Town Planning Code provides for different town planning documents. Integrated land-use plans (*schémas de cohérence territoriale*) establish the basic town planning guidelines for a group of municipalities, with prospects for their development. Local town plans (*plans locaux d'urbanisme*) or land-use plans (*plans d'occupation des sols*) establish the rules and restrictions that are directly applicable to any public or private person executing any works or construction or the opening of classified installations as specified in the plan. Concerted development zones (*zones d'aménagement concerté*) are zones in which a competent public authority or institution decides to intervene to develop and equip sites, often in order to transfer them or grant them on concession to public or private users. In addition, each Department must define its priorities with regard to the disposal of household wastes and related wastes in a particular departmental plan, as set out in the Environmental Code (*code de l'environnement*).

15. Classified installations, such as installations for the storage or management of wastes by incineration, are subject to a particular authorization procedure under the Environmental Code, which contains provisions on public participation (*enquête publique*). Installations such as the waste treatment plant in Fos-sur-Mer require a permit by the Prefect (*Préfecture*), which is a State authority.

16. In addition to the environmental permit mentioned in paragraph 14, construction permits (*permis de construire*) are required under French law. However, these only govern the construction of the buildings of an installation, and do not deal with the environmental impact of the operations.

17. In addition to the standard procedures mentioned under paragraphs 14 and 15, the Environmental Code also provides for the establishment of a National Commission for Public Debate (*Commission nationale du débat public*, CNDP) in cases where the estimated

¹ 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.

cost of the buildings and infrastructure is more than €150 million. This is an independent administrative authority responsible for ensuring public participation in the process of preparation of development and infrastructure projects of national importance relating to certain categories of operations, as listed by a decree of the Conseil d'Etat, whenever substantial socio-economic interests are at stake or the impact on the environment or land use is likely to be significant. In such cases, public participation may take the form of a public debate on the desirability, objectives and main characteristics of the project.

B. Procedures, decisions and resolutions

18. On 20 December 2003, CUMPM adopted two resolutions for the purpose of implementing a project for the construction and management of a complex for the disposal of household and related wastes with a total incineration capacity of 450,000 tons of waste per year, together with a sorting-methanization centre for about 150,000 tons per year. Thereby, the municipality chose the method of processing its household wastes as well the location for the installations. Finally, it decided to resort to the public service concession procedure, i.e. to have a private operator carry out public services. At the time of the resolutions, a land-use plan of 1991 and a zone development plan for the industrial and port zone of 1993 were in place. Neither of these plans forbade the construction of the incinerator.

19. As mentioned in paragraph 2, the communicant alleges that the public was never invited to participate in the procedure leading up to the 2003 resolutions. One of the non-governmental organizations (NGOs) subscribing to the communication therefore applied to the Chairman of CUMPM to have the resolutions reconsidered. The Chairman rejected this application, and on 24 June 2004 the association filed an application to the Administrative Court of Marseille to have the resolutions set aside. On 12 July 2005, the Administrative Court of Marseille dismissed the application, and the association then lodged an appeal with the Administrative Court of Appeal of Marseille.

20. In the summer of 2004, CUMPM informed the public about the project through the press. According to the communicant, this was too late in the procedure to comply with the Convention. Due to the lack of public debate, two NGOs (not the communicant) requested the CNDP to arrange a public debate, according to the procedure set out in the Environmental Code. However, that request was turned down by CNDP because the estimated costs for the buildings and infrastructure were below the threshold mentioned in paragraph 16. Legal proceedings were instituted against the decisions not to provide for public debate, but the Conseil d'Etat dismissed this action on 28 December 2005.

21. By a resolution of 13 May 2005, CUMPM approved the choice of concessionaire for the waste treatment public service together with a draft concession contract, authorizing the Chairman of CUMPM to sign the contract. The resolution also defined the modalities for the processing of the waste. On 4 July 2005, the contract between CUMPM and the private operator was signed. According to the communicant, the decision to choose the concessionaire was made without due public participation and, once passed, the resolution prevented CUMPM from modifying the project's technical options and geographic location. Moreover, according to the communicant, the signing of the contract precluded any effective remedy for the communicant.

22. By a notice in two local daily papers on 30 August 2005, the Prefect of Bouches-du-Rhône announced that a public inquiry was to take place between 19 September and 19 October 2005, with regard to the application by the private company to operate the waste treatment plant in Fos-sur-Mer. The Prefect chose three places for the inquiry: Fos-de-Mer, Port-Saint-Louis-du-Rhône and Saint-Martin-de-Crau.

23. On 12 January 2006, the Prefect of Bouches-du-Rhône granted the authorization of the waste treatment centre.

24. As mentioned in paragraph 2, the communicant alleges that in many respects the decision-making of the Prefect failed to provide for public participation as required by the Convention. Three appeals were lodged against the Prefect's authorization. One sought to have the interim relief judge of the Administrative Court of Marseille to suspend the authorization on the grounds that members of the public should have been better informed. This appeal was dismissed, and the judgement was later upheld by the Conseil d'Etat. Another appeal was made by two of the NGOs comprising the communicant, applying to the interim judge of the Administrative Court of Marseille to have the authorization suspended by ruling on the ordinary suspension of administrative decisions. On 24 May 2006, the interim judge decided to suspend the authorization. This decision was appealed against by the Minister of Environment and Sustainable Development to the Conseil d'Etat, which, on 15 February 2007, set aside the suspension. Finally, an appeal was lodged against the Prefect's authorization to the Administrative Court of Marseille, seeking the annulment of the 12 January 2006 decision. The court dismissed this appeal on 13 November 2007.

25. On 20 March 2006, the Prefect of Bouches-du-Rhône granted the company a construction permit for the incinerator.

26. Applications were made to the interim judge of the Administrative Court of Marseille to suspend the construction permit, in part because the decision had been made in violation of the Convention. In two orders of 16 June 2006, the applications were rejected. The decisions by the interim judge were upheld by the Conseil d'Etat in a judgment of 15 February 2007. On 29 June 2007, the Administrative Court of Marseille dismissed the applications for annulment on the merits.

III. Consideration and evaluation by the Committee

A. General considerations

27. France deposited its instrument of approval of the Convention on 8 July 2002. The Convention entered into force for France on 6 October 2002.

28. Waste treatment installations such as the one in Fos-sur-Mer are listed in annex I, paragraph 5, of the Convention and thus decisions on whether to permit such installations are subject to the requirement for public participation in article 6 of the Convention. Moreover, decisions, acts and omissions related to permit procedures for such installations are subject to the review procedure set out in article 9, paragraph 2, of the Convention.

29. For the Committee, when examining whether the Party concerned complied with the Convention, it is essential to consider the legal implications of the resolutions adopted by CUMPM on 20 December 2003 and on 13 May 2005 in order to establish whether they amounted to decisions under article 6 or 7 of the Convention. The Committee also needs to examine whether the authorization by the Prefect on 12 January 2006, in accordance with the Environmental Code, meets the requirements of article 6 of the Convention. However, the Committee will not consider whether the procedure before the National Commission for Public Debate (CNDP) as such satisfies the requirements of the Convention in cases when it is applied. The reason for not doing so is that, as stated below, compliance by the Party concerned in the given case does not depend on that participatory procedure. The relevance of examining whether the judicial procedures fulfilled the criteria of article 9, paragraphs 2 and 5, depends on the assessments of the examination of the 2003 resolutions and the 2006

authorization. The Committee limits its review concerning access to justice to the decisions that fall under the scope of article 6 of the Convention.

30. The Committee observes that in the Department of Bouches-du-Rhone there was no plan for disposal of household and related waste (PDEDMA) in the period when the decisions were taken (from 2003 to 12 January 2006). If such a plan had been in place, it could have provided guidance on whether new installations for waste incineration would be constructed, and if so, indicated their possible locations. According to the Convention, such a plan should have been elaborated with the participation of the public concerned and the public would thereby have been given the right to a say at an earlier stage of the decision-making process. Focusing on plans and programmes as a useful tool in the hierarchy of governmental decisions is an advantage in any decision-making process. However, the Committee finds that the lack of a PDEDMA does not entail any violation of the Convention.

31. According to the communicant, because of the lack of clear legislation in conformity with the provisions of the Convention, the Party concerned failed to comply with article 3, paragraph 1, of the Convention. However, the Committee finds that there is no information provided in this case that substantiates such a violation by the Party concerned.

B. Resolutions of 20 December 2003 and 13 May 2005

32. By the two resolutions of 20 December 2003, CUMPM chose the method of processing its household wastes and the location for the installations, and decided to resort to the public service concession procedure, i.e. to a tender in order to have a private operator carry out public services. While the resolutions to choose modalities and location were instrumental to the formation of the installation and for the municipality's work on the management of household wastes, in no way did they as such permit the waste treatment centre. Nor did the resolution to launch a tender procedure imply a permit for the installation or the operator *in spe*. Rather, for such classified installations, the Environmental Code sets out that a permit is required by the Prefect. Thus, while there may be many good reasons to provide for public participation before adopting municipal resolutions of this kind, they did not amount to decisions on whether to permit the activity, as set out in article 6 and annex I of the Convention. The Committee is fully aware that different types of decisions and acts, regardless of whether they amount to a decision under article 6, may narrow down the scope of options for the final decision. Whether that is the situation in this case will be considered when examining the 2006 authorization by the Prefect. In any case, the Party concerned did not fail to comply with article 6 of the Convention, by not ensuring public participation before the adoption of the resolutions of 20 December 2003.

33. When the resolutions were adopted, on 20 December 2003, there was already a land-use plan of 1991 and a zone development plan of the industrial and port zone of 1993 in force for the location in Fos-sur-Mer. According to the information given to the Committee, none of these plans forbade the construction of the waste treatment centre. The resolutions neither had any legal effect on these plans, nor conferred any right to construct or operate the waste treatment centre or to use the site, nor in any other respect did they entail legal effects amounting to that of the applicable planning instruments. Moreover, they did not take the form of programmes or policies. Thus, the Party concerned did not fail to comply with article 7 of the Convention either, by not ensuring public participation before the 2003 resolutions were adopted.

34. The resolution adopted by CUMPM on 13 May 2005 approved the municipality's choice of concessionaire for the waste treatment project. In the resolution, the municipality also defined the modalities for the processing of the waste. While this resolution was also

instrumental for the formation of the installation as well as for the permit application to be examined at a later stage by the Prefect, it did not imply or amount to a permit for the waste treatment plant or the means of processing the waste that would fall within the scope of article 6 of the Convention. Thus, the adoption of the resolution as such without public participation did not result in a violation of article 6 of the Convention. As stated in paragraph 32, the Committee realises that different formal and informal decisions, regardless of whether they amount to a decision under article 6 of the Convention, may narrow down the scope of options for the final decision. This issue will be considered when examining the 2006 authorization by the Prefect, however.

C. Authorization of 12 January 2006 and related decisions

35. According to the Committee, the decision of the Prefect of Bouches-du-Rhône on 12 January 2006 to authorize the application for the waste treatment centre in Fos-sur-Mer amounts to a decision on a specific activity according to article 6 in conjunction with annex I of the Convention. Thus, the procedure leading to the authorization must fulfil all the requirements of article 6 of the Convention.

36. Whether all options were in fact open to the Prefect and effective public participation could take place in the decision-making procedure, as required under article 6, paragraph 4 of the Convention, depends on many factors. The first issue to consider is whether the Prefect was in any way constrained by earlier decisions, so that all options were no longer open and, for that reason, effective public participation could not take place.

37. As shown by the communicant, the authorization by the Prefect was preceded by several acts by CUMPM and the private operator. Leaving aside the plans from 1991 and 1993, respectively, the resolutions by CUMPM had the effect of narrowing down what was considered by CUMPM as only relevant method and site for treatment of household wastes. When deciding to establish a public tender, to approve the choice of concessionaire and to enter into a contract with the private operator, CUMPM in practice also narrowed down its scope of considerations of relevant forms of waste treatment. However, the question is whether any of these steps and decisions, together or in isolation, had the effect of “closing” different options in the decision-making process. As stated by the Committee in its findings with regard to communication ACCC/C/2006/17 (European Community), where several permit decisions are required in order for an activity covered by article 6, paragraph 1, to proceed, it is not necessarily sufficient to apply the public participation procedures of article 6 to just one of the permitting decisions (ECE/MP.PP/2008/5/Add.10, para. 42). When deciding whether public participation is required in several procedures for one activity, the legal effects of each decision, and whether it amounts to a permit, must be taken into account.

38. According to the communicant, when examining the application the Prefect is in no circumstance in the position of questioning the usefulness of the activity for which the permit is required. While in many national laws, the question of whether an application for a permit concerning an activity that is potentially harmful to the environment should be approved may, at least in part, depend on the usefulness of the project, this is not a requirement of the Convention. The Convention Parties may apply different criteria for approving and dismissing an application for authorization, for instance with regard to the standard of technology, the effects on health and the environment, and the usefulness of the activity in question. However, these issues are not addressed by the Convention. Rather, from the viewpoint of compliance with article 6, paragraph 4, of the Convention, the decisive issue is whether “all options are open and effective participation can take place” at the stage of decision-making in question. This implies that when public participation is provided for, the permit authority must be neither formally nor informally prevented from

fully turning down an application on substantive or procedural grounds. If the scope of the permitting authority is already limited due to earlier decisions, then the Party concerned should have also ensured public participation during the earlier stages of decision-making.

39. In the present case, to meet the criteria that all options are open and effective public participation can take place, it is not sufficient that there is a formal possibility, *de jure*, for the Prefect to turn down the application. If the practice in the jurisdiction of the Party concerned is such that, despite the possibility of the permit authority to reject an application, this never or hardly ever happens, then *de facto* all options would not be open at the stage in question. Thus, there would be no room for effective public participation as required by the Convention. The information given to the Committee does not suggest that this is the case with the authorization procedures before the French Prefects. According to the Party concerned, about 50 applications before the Prefects are refused in France each year. While the communicant argued that the Prefect could not question the usefulness of the activity, it neither confirmed nor contested the figure of refusals given by the Party concerned. It thus appears to the Committee that at the stage of deciding on the application, the Prefect indeed was in a position to reject the application on environmental or other grounds, as set out in French law. For that reason, the Committee cannot see that the Prefect was already constrained during the procedures for public participation or was unable to take due account of the views of members of the public on all aspects raised. Thus, the Party concerned did not fail to comply with article 6, paragraph 4, of the Convention on this ground.

40. Related to this question is whether any of the other decisions referred to by the communicant were such that they would also require public participation in accordance with article 6, paragraph 1, of the Convention. As held in paragraphs 28 and 29, the CUMPM resolutions of 20 December 2003 did not entail such legal effects that they amounted to permit decisions. Nor was the resolution of 13 May 2005 by the municipality to choose the concessionaire such as to entail the legal effects of a permit for the concessionaire. While it was not for the Prefect to try the application on its usefulness, in the Committee's view the decision-making procedure before the Prefect appears as a single act that covers all aspects of the location, design and operation of the installation. Thus, the fact that no provision was made for public participation with respect to the other decisions referred to does not constitute failure to comply with article 6, paragraph 1, of the Convention. However, while the Committee does not find that the Party concerned failed to comply with article 6 of the Convention, it notes that the French decision-making procedures, as reflected in the present case, involve several other types of decisions and acts that may *de facto* affect the scope of options to be considered in a permitting decision under article 6 of the Convention.

41. The next question is whether the public was duly informed about the decision-making procedures. According to article 6, paragraph 2, of the Convention, the public concerned shall be informed, either by public notice or individually as appropriate, "early in an environmental decision-making procedure and in an adequate, timely and effective manner". The communicant alleges that the public notice of the decision-making before the Prefect did not meet the requirements of the Convention. While the public was informed about the project by CUMPM through the press in 2004, that was not related to the decision-making procedure before the Prefect. Provided that all options were open and effective participation could take place in the decision-making before the Prefect, the question is rather whether the public concerned was informed early enough about the authorization procedure. As held by the Committee with regard to communication ACCC/C/2006/16 (Lithuania) (ECE/MP.PP/2008/5/Add.6), the requirement for the public to be informed in an "effective manner" means that the public authorities should seek to provide a means for informing the public which ensures that all those who could potentially

be concerned have a reasonable chance to learn about decision-making on proposed activities and their possibilities to participate.

42. In the present case, the Prefect informed the public by a public inquiry notice in two local daily newspapers, *la Provence* and *la Marseillaise*, on 30 August 2005. Information about the decision-making procedure was also put on the Internet site of the prefecture of Bouches-du-Rhône and Saint Martin-de-Crau. The notice contained information about the dates and locations for the inquiries in Fos-sur-Mer, Port-Saint-Louis-du-Rhône and Saint-Martin-de-Crau, as well as the places where the information was publicly available. It also provided information on the time frames. While the Committee stresses the importance of adequate public notice, based on the information provided by the communicant and the Party concerned, the Committee cannot conclude that the Party concerned failed to comply with the Convention. This form of public notice appears to the Committee to satisfy the requirements of article 6, paragraph 2, of the Convention.

43. The communicant also alleges that by only providing for public inquiries in the three aforementioned communes in the decision-making before the Prefect, the Party concerned failed to provide for effective public participation. According to the Committee, however, whether effective participation can take place does not only depend on the number of inquiries. Provided that adequate information had been given about the inquiries and that they were held in an open and transparent manner, limiting the number of inquiries to three locations in this case does not as such amount to a failure to comply with the Convention. Based on the information given to the Committee, these three hearings seem to have been open to anybody and duly announced, so that they provided adequate opportunities for the public concerned to give its views about the project. Thus, the Committee cannot conclude that the Party concerned failed to comply with article 6, paragraphs 3, 4 or 7, on these grounds.

44. When examining the time frame, the Committee recalls that the 2003 resolutions did not amount to permit decisions under article 6 of the Convention, nor did the decision to choose the private operator or establish the contracts with the operator. Therefore, the timing for public participation cannot be related to the entire timespan since the 2003 CUMPM resolutions. Thus, the question is whether the time frames given in the decision-making before the Prefect as such were sufficient for allowing the public to prepare and participate effectively, and to allow the public to submit any comments, information, analyses or opinions it considered relevant, as set out in article 6, paragraphs 3 and 7, of the Convention. The Committee notes that the announcement of the public inquiry, made on 3 August, provided a period of approximately six weeks for the public to inspect the documents and prepare itself for the public inquiry. Furthermore, the public inquiry held from 19 September to 3 November 2005 provided 45 days for public participation and for the public to submit comments, information, analyses or opinions relevant to the proposed activity. The Committee is convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention.

45. The communicant implies that the fact that the report of the inquiry commission was filed on 7 December 2005 and the authorization was made about a month later shows that there was no room for effective participation. The communicant also argues that the timespan during the procedure before the Prefect was too tight to ensure adequate public participation. In the view of the Committee, however, the fact that the authorization was made on 12 January 2006, about a month after the inquiry report was filed, does not as such amount to a failure to comply with the requirement for reasonable time frames as specified in article 6, paragraph 3, of the Convention. Nor is there any other information that shows

that the timespan of the decision-making before the Prefect as such was too tight to ensure effective public participation. As already stated, it is also the impression of the Committee that all options were open at the stage of the decision-making before the Prefect, as required under article 6, paragraph 4.

46. In all, the Committee does not find that the Party concerned failed to comply with article 6 of the Convention in the decision-making before the Prefect of Bouches-du-Rhône.

D. Access to Justice

47. The communicant also alleges that, in different respects and with regard to different decisions, in particular the 2003 resolutions, the Party concerned failed to comply with article 9, paragraphs 2 and 5, of the Convention. Since the Committee did not find that the 2003 resolutions amounted to permit decisions under article 6, it will limit its examination to consider whether the Party concerned complied with article 9 with respect to the authorization by the Prefect.

48. Three appeals were lodged against the authorization by the Prefect, two of which sought the suspension of the authorization and one of which sought the annulment of the authorization. Whereas the interim judge of the Administrative Court of Marseille rejected one of the applications for interim measures, the other application was approved, thus resulting in a decision to suspend the authorization. However, upon appeal by the Ministry of Environment and Sustainable Development, the Conseil d'Etat reversed the decision. Thus it set aside the suspension on the grounds that the urgency requirement had not been met, in particular because the incinerator was unlikely to start operating before July 2008. While in the Committee's view refusing interim measures can amount to non-compliance with article 9, paragraph 4, of the Convention, the Committee is not convinced that the reasoning of the Conseil d'Etat in the given case implies such a violation.

49. The Administrative Court of Marseille rejected the application to annul the authorization on the merits, stating that when considering which provisions have a direct effect according to French law, paragraphs 2 and 3 of article 6 have such effect, but that this is not the case with paragraphs 4 and 5 of article 6. The Committee notes that while the Parties may implement the Convention in different ways, e.g. by fully transforming the provisions through national legislation or by, to some extent relying on notions of direct effect, it is apparent that paragraph 5 of article 6 cannot be complied with unless it is fully reflected in the national law of the Parties.

IV. Conclusions

50. Having considered the above, the Committee does not find that the matters examined by it in response to the communication establish non-compliance by France with its obligations under the Convention. However, as stated in paragraph 40, the Committee notes that, while the Committee does not find that the Party concerned failed to comply with the Convention, the French decision-making procedures, as reflected in the present case, involve several other types of decisions and acts that may de facto affect the scope of options to be considered in a permitting decision under article 6 of the Convention.