

ACCC/S/2004/01 and ACCC/C/2004/03
Submission by Romania and communication by Ecopravo-Lviv (Ukraine) regarding compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystroe deep-water navigation channel construction.

I. Introduction

1. On 5 May 2004, the Ukrainian non-governmental organization Ecopravo-Lviv submitted a communication to the Committee alleging non-compliance by Ukraine with its obligations under article 6, paragraphs 4 to 9, of the Aarhus Convention.
2. The communication concerned a proposal to construct a navigation canal in the Danube Delta passing through an internationally recognized wetlands area. The communicant claimed that by failing to provide for proper public participation in a decision-making process on state 'environmental expertiza' linked with the technical and economic evaluation of the proposed project and to provide access to documentation relevant to the process, the Party had failed to comply with its obligations under article 6 of the Convention. The communicant had sought redress in two instances of the domestic court system, winning in the first instance and losing in the appellate court. The full text of the communication is available at <http://www.unece.org/env/pp/pubcom.htm>.
3. The communicant submitted supplementary information on 1 December 2004, listing several additional facts of alleged non-compliance, in particular with regard to interpretation by the courts and the Ministry of Environment of the domestic requirements on public participation in the environmental impact assessment process. A reference was also made to the findings of the special fact-finding mission led by the European Commission with regard to the project in question. The text of the report is available at http://europa.eu.int/comm/environment/enlarg/bystroe_project_en.htm.
4. On 7 June 2004, the Government of Romania made a submission alleging failure by Ukraine to comply with the provisions of article 6, paragraph 2 (e), of the Convention by failing, in the opinion of the submitting Party, to ensure that the public affected by the Bystroe Canal project in the Danube Delta was informed early in the decision-making procedure that the project was subject to a national and transboundary environmental impact assessment procedure.
5. In a letter to the Committee dated 26 November 2004, the submitting Party provided further information. It reiterated its claim that the Party concerned was not in compliance with article 6, paragraph 2 (e) when read in conjunction with article 2, paragraph 5, or with article 6, paragraph 7, and article 3, paragraph 9, of the Convention. In support of its position, it cited inter alia the failure of the Party concerned to involve various non-governmental organizations, including Ukrainian, Romanian and international ones, that had expressed interest in or concern about the canal, in the decision-making on any of the phases of the project.
6. The representative of the Romanian Government further clarified during the discussion at the Committee's sixth meeting that the submission was also intended to address Ukraine's failure to comply with article 6 vis-à-vis its own citizens. He also stated that the Ukrainian Government had already been well aware of the concerns of the Romanian public with regard to the project already prior to the final decision on the project's feasibility study.

7. The communication was forwarded to the Government of Ukraine on 18 May 2004 and the submission on 17 June 2004. The secretariat received a letter from the Agency for Protected Areas of Ukraine on 23 September 2004 indicating that the Party would require more time than the initial three-month period to respond. The letter also informed the Committee that public opinion on the project was divided with local population tending to support and some of the NGOs opposing it; the opinions had been transmitted to the contractor developing the EIA of Phase I of the project in 2004. No further correspondence was received from the Party concerned before the expiry of the six-month period, nor did the Party concerned provide information to or participate in the meeting of the Committee at which the matter was discussed.

8. The Committee, having noted that the communication and submission were closely related in their subject matter, considered them side-by-side at its sixth meeting on 15-17 December 2004. However, taking into account the related process of establishing an inquiry commission under the Espoo Convention aimed at determining whether the activity was likely to have a significant transboundary environmental impact, it agreed that it would consider the question of compliance with the part of article 6, paragraph 2 (e), relating to environmental impact assessment in a transboundary context in the light of the findings of the inquiry procedure being undertaken under the Espoo Convention because the findings of this procedure might provide useful guidance to the Compliance Committee on the issue of alleged transboundary effects. It therefore agreed to defer discussions on those aspects of the submission and communication and to restrict its discussions to other aspects.

9. The Committee at its fourth meeting (MP.PP/C.2/2004/04, paragraph 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. This determination has not been challenged in any way. The Committee therefore confirms the admissibility of the communication.

II. Summary of facts¹

10. The matter concerns approval by the government of Ukraine of construction of the deep-water navigation canal in the Bystroe arm in the Ukrainian part of the Danube river delta. The permitting process has been divided into three phases: feasibility study, approval of Phase I and approval of Phase 2 of the project. Each stage undergoes an approval process on the basis of a Comprehensive State Expertisa that includes Environmental Expertisa (an evaluation and, where appropriate, approval of the EIA by an authorized public authority). The Communication and the submission relate primarily to the decision-making on the project's feasibility study. However, both the communicant and the submitting Party maintain that subsequent decision-making on the phases of the project, while having certain formal improvements in the procedure, continuously failed to ensure effective participation as required by article 6 of the Convention.

11. The project in question potentially affects a nature conservation area of national and international importance and has clearly generated a great interest among both the Ukrainian and international civil society.

¹ This section includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee.

12. In its letters to the Ministry of Environment dated 30 April 2003 and 3 June 2003, the communicant expressed its interest in the decision-making process in question. The communicant has been in regular contact with the Ministry with regard to the issue of the canal construction since then.
13. The communicant lists several instances where it was refused access to documentation on the project either as a whole or in part. According to the report of the EU fact-finding mission, referred to in the supplementary information and the additional information provided by the submitting Party, several other organizations, including national, foreign and international organizations, both governmental and non-governmental, have been refused access to information of the types referred to in article 6, paragraph 6, of the Convention.
14. The Ministry of Environment, in its reply to a request for information from the communicant dated 18 June 2003, stated that materials developed in the course of an EIA were the property of the developer and therefore the Ministry was not in a position to provide access to such information. A similar response, as the report of the European Commission indicates, was given to subsequent requests for this documentation submitted by various organizations.
15. On 3 July 2003, the project investor published an Environmental Impact Statement in the regional newspaper. No information with regard to the public participation procedure or other relevant information referred to in article 6, paragraph 2, of the Convention was provided.
16. The Ministry of Environment approved the conclusions of the State Environmental Expertise on 10 July 2003, seven days following the first notification about the project.
17. On 7 August 2003, the Ministry of Environment sent a reply to the communicant's request for a copy of the conclusions of the State Environmental Expertise, including a two-page summary of the conclusions and stating that it could not provide the whole document for technical reasons.
18. The Government of Ukraine notified the Government of Romania of the intended project in October 2003, following the conclusion of the decision-making procedure on the project's feasibility study.
19. Phase I of the project was approved in May 2004 and the construction works began immediately. Phase I of the project was concluded in August
20. 2004. As on October 2004, the EIA for Phase II had not been finalised.
21. On 13 October 2004, the Ministry of Environment in its written response to the second appeal filed by the communicant with the High Commercial Court of Ukraine stated that the assertion of the plaintiff that Ukrainian legislation provided for an obligation to ensure public participation in the state environmental expertisa was ungrounded. The court held that in accordance with Ukrainian legislation, the public authorities were not obliged to ensure public participation in decision-making with regard to EIA.

III. Consideration and evaluation

22. Ukraine deposited its instrument of ratification of the Convention on 18 November 1999. The Convention entered into force for Ukraine on 30 October 2001.

23. The Convention, as an international treaty ratified by Ukraine, has direct applicability in the Ukrainian legal system. All the provisions of the Convention are directly applicable, including by the courts.
24. The decision-making process in question concerns construction of a deep-water navigation canal of a type that falls under paragraph 9 of annex I to the Aarhus Convention and therefore falls under article 6, paragraph 1 (a) of the Convention, triggering also the application of other provisions of that article.
25. The communicant is a non-governmental organization working in the field of environmental protection and falls under the definitions of the public and the public concerned as set out in article 2, paragraphs 4 and 5 respectively, of the Convention. Foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.
26. With regard to the facts included in paragraph 6 above, there is, in the opinion of the Committee, sufficient evidence that there were members of the public, both in Romania and in Ukraine, interested in or concerned about the project that had to be notified in accordance with article 6, paragraph 2 of the Convention.
27. Considering the nature of the project and the interest it has generated, notification in the nation-wide media as well as individual notification of organizations that explicitly expressed their interest in the matter would have been called for. The Party, therefore, failed to provide for proper notification and participation in the meaning of article 6 of civil society and specifically the organizations, whether foreign or international, that indicated their interest in the procedure. With regard to the Romanian NGOs and individuals, such notification and participation could have been undertaken by Ukraine via the Romanian authorities, as there is sufficient evidence to suggest that the Ukrainian Government was well aware of the concerns expressed to the Romanian authorities by citizens and organizations in Romania. The Committee, however, notes that, generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance, seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention.
28. The timeline, as reflected in paragraphs 15 and 16 above, failed to allow the public to study the information on the project and prepare and submit its comments. It also did not allow the public officials responsible for making the decision sufficient time to take any comments into account in a meaningful way, as required under article 6, paragraph 8.
29. In this regard, the information provided in the report of the EU-led fact-finding mission (Annex 10) as to what seems to be a regular practice of short-cutting the decision-making procedure by providing parts of the EIA for evaluation and approval by the decision-making authority in the course of EIA development and prior to any information being publicly available is of particular concern. Lack of clear domestic regulation of the timeframes and procedures for commenting seem to be at the heart of this problem.
30. With regard to the facts described in paragraph 14 above, public authorities should possess information relevant to its functions, including that on which they base their decisions,

in accordance with article 5, paragraph 1, and should make it available to the public, subject to exemptions specified in article 4, paragraphs 3 and 4. The issue of ownership is not of relevance in this matter, as information is used in a decision-making by a public authority and should be provided to it for that purpose by the developer. The fact that such misinterpretation took place again points to a lack of clear regulatory requirements in the national legislation.

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

32. Finally, information within the scope of article 4 should be provided regardless of its volume. In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information, in accordance with article 4, paragraph 8, of the Convention.

33. Lack of clarity or detail in domestic legislative provisions, in particular, with regard to issues discussed in paragraphs 27 and 28 above, demonstrate, in the view of the Committee, that the Party concerned has not taken the necessary measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1.

34. The Committee did not find that the communicant has substantiated sufficiently its claim with regard to non-compliance by Ukraine with the provisions of article 6, paragraph 9.

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

IV. Conclusions

36. Having considered the above, the Committee adopts the following findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

Main findings with regard to non-compliance

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

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

39. The Committee also finds that lack of clarity with regard to public participation requirements in EIA and environmental decision-making procedure on projects, such as, inter

alia, time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, indicate the absence of a clear, transparent and consistent framework for implementation of the Convention and constitute non-compliance with article 3, paragraph 1 of the Convention.

Recommendations

40. The Committee, taking into account the cause and degree of the non-compliance, and noting with regret that no response to either the submission or the communication was provided by the Party concerned pursuant to the requirements set out in the annex to decision I/7, recommends to the Meeting of the Parties pursuant to paragraph 35 of decision I/7 to:

- (a) Request the Party concerned to bring its legislation and practice into compliance with the provisions of the Convention and include information on the measures taken to that effect in its report to the next Meeting of the Parties;
- (b) Pursuant to paragraph 37 (b) of the annex to decision I/7, request the Party concerned to submit to the Compliance Committee, not later than the end of 2005, a strategy, including time-schedule, for transposing the Convention's provisions into the national law and developing practical mechanisms and implementing legislation that sets out clear procedures for implementation of various requirements under the Convention. The strategy might also include capacity building activities, in particular for the judiciary and public officials involved in environmental decision-making;
- (c) Mandate the Working Group of Parties to develop for consideration at the third Meeting of the Parties guidance to assist Parties in identifying, notifying and involving the public concerned in decision-making on projects in border areas affecting the public in other countries but not requiring transboundary environmental impact assessment under the Espoo Convention **which includes procedures for public participation.**