DRAFT FINDINGS AND RECOMMENDATIONS

with regard to compliance by Albania with its obligations under the Aarhus Convention in a case concerning public access to information and participation in decision-making on the construction of an industrial park and a thermal power plant (Communication ACCC/C/2005/12 by the Alliance for the Protection of the Vlora Gulf (Albania))

I. INTRODUCTION

1. On 27 April 2005, the Albanian non-governmental organization (NGO) Alliance for the Protection of the Vlora Gulf (also translated as Civil Alliance for the Protection of the Vlora Bay) submitted a communication to the Committee alleging violation by Albania of its obligations under article 3, paragraph 2; article 6, paragraph 2; and article 7 of the Aarhus Convention.

2. The communication alleged that the Party concerned had failed to notify the public properly and in a timely manner or to consult the public concerned in the decision-making on planning of an industrial park comprising of, inter alia, oil and gas pipelines, installations for the storage of petroleum, three thermal power plants and a refinery near the lagoon of Narta, on a site of 560 ha inside the Protected National Park. The communicant also alleged that the Party failed to make appropriate provision for public participation in accordance with article 7 of the Convention. The full text of the communication is available at http://www.unece.org/env/pp/pubcom.htm.

3. The communication was forwarded to the Party concerned on 29 June 2005, following a preliminary determination by the Committee that it was admissible. At the same time, the Committee requested the communicant to present some clarifications and additional information, in particular on any use made of domestic remedies.

4. The Party concerned responded on 25 November 2005, disputing the claim of non-compliance. It stated, inter alia, that:
(a) The government had not made a decision on the development of the proposed industrial park as a whole;
(b) A decision-making process for the establishment of a thermal electric power station (TEP) was under way, but no decision on an environmental permit had been taken;
(c) The public had been provided with timely and adequate access to information about construction of the thermal electric power station;
(d) The government had never received any request for information on the projects from the communicant;
(e) The public had had the possibility to participate in the decision-making process for the TEP, as three public meetings had been organized at different stages of the process (feasibility study, scoping and environmental impact assessment), with participation of local citizens and NGOs;
(f) Since the government had not made any final decisions yet on the projects, there was nothing to be challenged through the courts or other appeal bodies in Albania by the communicant.

5. The Committee discussed the communication at its tenth meeting (5-7 December 2005), with the participation of a representative of the communicant (Mr. Ardian Klosi) who provided additional information. The Party concerned had also been invited to send a representative but had declined to do so. The communicant was asked to provide additional information and to answer several questions in written form within four weeks. The Committee also asked the secretariat to seek certain additional information from the government, which was done by letter of 16 December 2005.

6. The communicant answered the questions by letter of 7 January 2006, providing additional information and several documents in Albanian with summaries in English. In its letter, the communicant alleged that there had been no public participation in decisions concerning the proposed industrial energy park. It maintained that there had been only pro forma public participation in the TEP project, because most of those who had participated were governmental employees and functionaries from one political party. The communicant also alleged that the state-owned Albanian Electrical Energy Corporation (Korporata Elektroenergjetike Shqiptare or KESH) had only announced the public discussion on the construction of the TEP and the documents had only been made available in February 2004, after the Environmental Impact Assessment (EIA) process had already been finished. The communicant further alleged that there had been no public information or public participation with respect to the decision-making processes concerning the proposed Albanian-Macedonia-Bulgaria Oil (AMBO) pipeline (see para. 44 below).

7. The communicant sent a further letter to the Committee on 1 February 2006 containing additional information about alleged plans of the Albanian government to issue a final license to the Italian-Romanian company La Petrofilera which would allow it to start operating a large coastal terminal for the storage of oil and oil by-products in the Bay of Vlora without any public participation having taken place.

8. Having received no response from the Party concerned to its request of 16 December 2005 for additional information by the time of its eleventh meeting (29-31 March 2006), the Committee sent a second request on 12 April 2006, asking for additional information and some clarifications.

9. On 12 June 2006, the Party concerned provided the Committee with the text of three decisions of the Council of Territorial Adjustment of the Republic of Albania, all dated 19 February 2003. Decision No. 8 approved the use of the territory for the development of an industrial and energy park; Decision No. 9 approved the construction site for a coastal terminal for the storage of oil and oil by-products and associated port infrastructure in Vlora; and Decision No. 20 approved the construction site of the TEP in Vlora. The Party concerned also sent the Committee a chronology of the participation of the public in the decision-making process for the TEP, stating that the procedures had been in accordance with national and international law.

10. As the Party concerned had not fully answered the Committee's questions, on 5 September 2006, the secretariat wrote on behalf of the Chairperson requesting it to provide additional information before the thirteenth meeting of the Committee (4-6 October 2006). In its response,

sent to the secretariat on 21 October 2006, the Party concerned answered some of the outstanding questions. However, it failed to answer a number of other questions, including questions on public notification and participation procedures in the decision-making process for the industrial energy park; nor did it discuss the time frame for appeal to the court or provide a copy of the decision of the Albanian Parliament on funding of the TEP.

11. On 20 November 2006, the secretariat sent a further letter to the Party concerned on behalf of the Chairperson reiterating the request for the missing information and posing a few additional questions. It was also agreed to return to the discussion phase at the fourteenth meeting of the Committee, and consequently both the Party concerned and the communicant were notified accordingly and invited to participate.

12. On 1 December 2006, the Party concerned answered in some detail a question about the possibilities for access to administrative and judicial review, providing new information about Albania's Ombudsman and the role of the courts in the Constitution and laws of Albania. However, it did not answer a question on whether there was a possibility of appeal before a final decision had been taken. It also failed to answer a crucial question about notification of the public and public participation in decision making on the industrial park. Finally, it did not send four documents requested by the Committee.

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

14. The World Bank office in Tirana responded in a letter dated 2 August 2006 that it was not and had never been involved in the development of the industrial park project, but that it had consistently advised the Government of Albania that the development of any facility planned to be included in such a park should be subject to an appropriate environmental assessment. Regarding the thermal power plant in Vlora, the World Bank, EBRD and the European Investment Bank had agreed to finance the project and consultants funded by the United States Trade and Development Agency had selected the location based on a detailed siting study, taking into consideration environmental issues. According to the above letter, the siting study had been followed by preparation of a full Environmental Assessment, during which several scoping sessions and public consultations had been organized, and public input had been taken into account. The Bank stated that the meetings had been well attended by representatives of governmental agencies, universities, NGOs and the general public and had been publicized by Albanian television. According to the Bank, "The entire process was carried out in accordance with Albanian laws and in compliance with applicable EU and World Bank guidelines." Finally, the World Bank letter stated that no complaint had been registered with the World Bank Inspection Panel regarding the Vlora project.

15. The communicant sent a letter to the Committee on 30 September 2006 commenting on the World Bank response. It stated that even if the World Bank was not directly involved in the

industrial park, the Bank was aware of the other components that were envisaged for the industrial park as well as the intention to expand the TEP itself from a capacity of 100 MW up to a capacity of 300 MW. Despite this, public presentations of the project had only addressed the impact and emissions from a 100 MW power plant, thus failing to take into account the future cumulative environmental impact of these projects. Thus, the information presented by the project's proponents during the public consultation process was, in the view of the communicant, 'oriented to disinformation'.

16. The communicant furthermore stated that there was no evidence that intellectuals and NGOs of Vlora had participated in the meeting on 31 October 2002. Besides, this meeting had taken place after the approval of the Siting Study and Feasibility Study. The communicant argued that at that stage there had been a lack of publication of information. It cited the director of the National Agency for Energy, Mr. Besim Islami, who, in answer to a question from a member of the public at the public meeting on 3 September 2003, admitted that "There were not any views taken on this phase from the local government, as this was not requested from the company for the reason of confidence and prudence. In these days and in the last month we have been passing into these explanatory and indispensable procedural meetings."

17. The EBRD in its response of 25 October 2006 to the letter from the secretariat confirmed that it was providing financing for the construction of the TEP and stated that it was not involved in the industrial park. The EBRD Board of Directors had approved the financing for the TEP following its review of the project documentation, including reports on compliance with the Bank's policies and procedures on public consultation. The project was subject to EIA and public consultations that had been carried out in accordance with Albanian EIA legislation and the World Bank's environmental guidelines, which were comparable to the EBRD EIA requirements.

18. The Compliance Committee at its fourteenth meeting (13-15 December 2006) discussed the case with the participation of representatives of both the Party concerned and the communicant, both of whom answered questions, clarified some issues and presented some new information. The Party concerned provided information about current status of the TEP, namely that no applications for environmental, construction or operating permits had been lodged. As far as the industrial energy park was concerned, the only decision made was about its location. Although some questions remained unanswered, the Committee decided to move to the preparation of draft findings and recommendations.

19. The Committee at its eighth meeting (May 2005) had determined on a preliminary basis that the communication was admissible, subject to review following any comments received from both parties. At its fourteenth meeting (December 2006), the Committee confirmed that the communication was admissible.

20. At its eighth meeting, the Committee also discussed the extent to which use had been made of domestic remedies and requested further information from the communicant on this point. After receiving additional information and answers from the communicant, the Committee at its tenth meeting in December 2005 again discussed the question of domestic remedies in the presence of the communicant. The communicant asserted that its attempt to conduct a

referendum against the industrial park was the use of a domestic remedy. The communicant had collected 14,000 signatures (10% of the electorate in Vlora), which was the amount necessary for a referendum according to the Albanian Constitution. However, on 25 November 2005, the Election Committee had refused the request for a referendum. The communicant had then appealed this decision to the court in Tirana despite having doubts about the prospects of a successful outcome. The Supreme Court rejected the appeal in December 2006.

21. In explaining why it had not pursued more traditional channels of administrative or judicial review, the communicant stated in its letter of 7 January 2006 that the "judiciary system in Albania is very slow and sluggish, in many aspects corrupt" and that "there was not a single case up to this day that would have been decided in favour of an environmental complaint or charge".

22. The Party concerned in its initial response of 25 November 2005 took the position that there were no domestic remedies currently available in the present case: "Since there is no decision taken on the projects, there is nothing to be challenged by courts or other appeal bodies". However, in its letter of 21 October 2006, the Party concerned stated that "the Albanian legislation does provide for possibilities to appeal for cases when there is noticed failure to provide information or inadequate notification. According to Albanian law, the case can be sent to court for violation of procedures… ". The Party did not indicate at what stage this possibility existed – before or after the decision is made.

23. In its response of 1 December 2006, the Party concerned, in addition to providing a detailed explanation of the possibilities for access to administrative review and to the courts in accordance with the Constitution and legislation of Albania, presented information about access to the Ombudsman. At the fourteenth meeting of the Committee, the representative of the Party concerned stated that access to justice was possible both before and after a decision is made. The communicant in response explained that it had not tried to use the Ombudsman or seek administrative review because it considered that to challenge the decision of the Cabinet of Ministers signed by the Chairman of the Council, who also happened to be the then Prime Minister, was "out of the question".

II. SUMMARY OF THE FACTS, EVIDENCE AND ISSUES[1]

24. The communication concerns a proposal to establish an industrial and energy park north of the port of Vlora on the Adriatic coast. The facts relating to proposed energy park itself and some of its envisaged components, notably the TEP, the oil storage facility and the proposed oil and gas pipeline, are summarized in the following paragraphs, taking into account that different components relate to different provisions of the Convention.

Industrial and energy park

25. On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania approved through Decision No. 8 the site of an industrial and energy park immediately to the

[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.

north of the city of Vlora. Through this Decision, signed and stamped by Mr. Fatos Nano, Chairman of the Council, who was the Prime Minister at the time, the Council “Decided: The approval of the territory for the development of ‘The Industrial and Energy Park – Vlore.’” Decision No. 8 furthermore deemed that the Ministry of Industry and Energy “should coordinate work” with various Ministries and other bodies “to include within this perimeter [of the industrial and energy park] the projects of the above mentioned institutions, according to the designation ‘Industrial and Energy Park.’” It stated also that various Ministries “must carry out this decision” and “This decision comes to force immediately.”

26. The Party concerned informed the Committee that the decision had been subject to an EIA procedure; however, the EIA was not detailed, because it was considered that the separate components of the proposed park would each carry their own more demanding EIA requirements.

27. The Committee has not been provided with any evidence of public participation, including notification or public announcement, in the process leading up to Decision No. 8.

28. In October 2005, following a change of government the Prime Minister established an ad hoc commission to consider the economic and environmental aspects of Vlora industrial and energy park project. Three meetings were held with stakeholders, two in Tirana (22 and 29 October 2005) and one in Vlora (11 November 2005). The communicant has not contested that these meetings took place and that they enabled the concerned stakeholders to participate, and it has confirmed that its representatives did indeed participate in them. Its objections relate rather to the perception that there was a lack of willingness to from the proponents of the project, including the Government, to “listen and to take into consideration the opinion and the will of the people”, thereby reducing the decision-making process to “a mere rubber stamp”.

29. The communicant states that it submitted several requests for information regarding the plans for the industrial park to the Ministry of Energy and to the Ministry of the Environment, but that it has never received any answer from them. However, the communicant did not present any evidence to substantiate that statement (e.g. copies of letters, proof of receipt). The Party concerned maintains that no such requests from the communicant have been ‘registered’ by the Ministry of the Environment. The communicant did present a copy of a letter from Ekolevizja (the most well known network of environmental organizations in Albania) to the Ministry of Environment dated 3 March 2005 asking for information about the proposed TEP and oil storage facility in Vlora, to which it had received no response. The communicant did not present proof of receipt of the request.

Thermal electric power plant (TEP)

30. On 19 February 2003, the Council of Territorial Adjustment approved through Decision No. 20 on the construction site of the TEP in Vlora. Through this Decision, signed and stamped by Mr. Fatos Nano, Chairman of the Council, who was the Prime Minister at the time, the Council “Decided: to approve the construction site with a surface of 14 hectares for the facility of the new Prot of Vlora, within the industrial Energy Park… according to the attached layout”. It stated also that the Council of the District of Vlora and the Ministry of Energy and industry should carry out this decision” and “This decision comes to force immediately.”

31. The Committee has not been provided with any evidence of public participation including notification or public announcement in the process leading up to Decision No. 20.

32. The Party concerned informed the Committee that in order to address the problem with electricity supply in Albania, the Ministry for Industry and Energy and KESH began to study the technical and financial viability of installing new base load thermal generation facilities in Albania. KESH asked for funding from EBRD, the World Bank and EIB.

33. The United States Trade and Development Agency (USTDA) awarded a grant to the Government of Albania to assist in the development of the new thermal generation facility. The Albanian Ministry of Industry and Energy hired international consultants Montgomery Watson Harza (MWH) to select the best site and technology, to conduct a feasibility study, and to conduct an environmental impact assessment (EIA) of the proposed facility.

34. Site selection was undertaken during the period April-September 2002. A draft Siting Report was completed on 6 June 2002 recommending Vlora as the best site and distillate oil-fired, base load, combined cycle generation allowing for conversion to natural gas as the best generation technology. On 21 June 2002, the Ministry of Energy and KESH approved the recommendation. MWH then conducted a detailed feasibility study to evaluate the technical requirements and the financial, environmental, and social viability of the proposed generation facility with an installed capacity range of 90 to 130 MW at the selected site. On 21 October 2002, the feasibility study was completed and 'introduced in Vlora'.

35. On 31 October 2002, the Ministry of Energy and Industry convened a public meeting in Vlora to introduce the project and begin the public consultation process. On 21 December 2002, the Council of Territorial Adjustment (Vlora District) approved the choice of the site for the TEP. On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania confirmed the site of the TEP through Decision No. 20.

36. On 2 April 2003, a public meeting was held in Vlora to discuss the terms of reference for the EIA study (scoping). On 23 July 2003, copies of the draft EIA study were delivered in Vlora for public consultation purposes. On 3 September 2003, a further public meeting was held to discuss the draft EIA study.

37. As regards the participation of the public in the three public meetings referred to in the previous paragraphs, varying degrees of information are available to the Committee:

(a) The introductory meeting on 31 October 2002 was attended by various representatives of national and local authorities as well as, according to the Party concerned, intellectuals and NGOs of Vlora. The communicant disputes the claim that intellectuals and NGOs of Vlora participated. The Committee has repeatedly requested[2] the Party concerned to provide specific information concerning the process of notification for the meeting (for residents, NGOs and other stakeholders) and a list of participants, but no such information has been forthcoming.

[2] Initially by letter of 16 December 2005.

(b) The meeting on 2 April 2003 to review the scope of the EIA was attended by more than 100 people, 40 of whom signed an attendance sheet a copy of which was made available to the Committee. The communicant commented that “there was not a single NGO represented or any important environmental activist in this meeting” and that public opinion was not taken into account in the decision. It stated that those considered to represent the public presence at this meeting and at the third meeting were mostly members of the local government and the Socialist Party who were promoting the construction of the industrial and energy park. Without directly disputing this, the Party concerned maintained that among those actors it had identified as potential participants in the meeting were environmental and public information NGOs. However, it did not provide the Committee with any details of which of these were invited to participate, or more generally of the steps taken to notify the public concerned.

(c) The meeting on 3 September 2003 to review the draft EIA was attended by some 35 people, a list of whom was included in the EIA study (Appendix E). Of these, five appear to have been technical experts, 15 represented various public authorities, five represented various local enterprises, the affiliation of six was not indicated and four appear to have been associations, including two environmental organizations. Again, information requested from the Party concerned regarding the process of notification of the public concerned which might help to shed light on this apparent imbalance in participation has not been forthcoming.

(d) The Party concerned states that notifications of these meetings "were made available one month prior (according to the information given by the consulting company)."[3] No further information on the manner or content of the notifications has been forthcoming.

(e) The final EIA document, published on 6 October 2003, five weeks after the third public meeting, states that all three meetings ‘were covered by Albanian television stations and broadcast through a segment on the nightly news’.

(f) A document entitled ‘Summary of Environmental Impacts Associated with the Vlore Thermal Power Station’, prepared [by ...] for the purposes of meeting the requirements of EBRD’s public disclosure and consultation procedure, states that “The public was well engaged in a dialogue concerning the project early on in the EIA process. Public announcements were thorough, transparent and well distributed.” It maintains that “direct invitations to attend public meetings were sent to institutions and individuals” and that the process was coordinated closely with (among others) “citizens of Vlore, Vlore University students and faculty, local and national television stations, more than 20 non-governmental organizations (NGOs) and others associated with social and environmental issues.” However, the document does not go into detail as to who was notified or invited to which meeting, and while it does provide some more information concerning the meetings (to some extent reflected in subparagraphs (a) to (c) above) information concerning the first meeting is particularly sparse.

38. The EIA study was finalized on 6 October 2003. On 18 October 2003, KESH issued a press release launching a public discussion on the evaluation of the EIA. It invited all interested parties to participate in an open consultation process and provided information on where the relevant documents could be obtained.

[3] Letter of 25 November 2005.

39. On 10 February 2004 KESH issued a further press release along similar lines though providing more specific details on where and by what date comments should be submitted and indicating that the suggestions from the public would be included in an annex to the EIA. Specifically, the EIA materials would be available for a 120-day period from 9 February 2004 to 7 June 2004 for public review and comment, in a number of public locations, including in Vlora, in accordance with EBRD's public consultation and disclosure procedure. Announcements containing this information were also placed in various newspapers.

40. The public meetings held in late 2005 referred to in paragraph 28 above, while established to consider the economic and environmental aspects of the industrial and energy park project, appear to have focused on the TEP and should therefore be taken into consideration in reviewing the overall decision-making process for the TEP.

41. No application for an environmental permit, construction permit or operating permit for the TEP has yet been lodged. The only decision that has been taken concerns the location of the TEP.

Oil storage terminal and port infrastructure

42. On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania approved the construction site for a coastal terminal for storage of oil and by-products and associated port infrastructure through Decision No. 9. On 8 May 2003, the Council of Ministers adopted a decision approving a concession procedure to the benefit of the Italian-Romanian company La Petrolifera. On 13 May 2004, the concession was approved by Parliament. On 11 February 2005, the Council of Ministers adopted a decision registering the land in the name of Petrolifera. Any such facility having a capacity of 200,000 tons or more would fall within the scope of annex I of the Convention. The communicant provided information orally at the fourteenth session, which was not contested by the Party concerned, to the effect that the envisaged capacity was of the order of 500,000 tons.

43. No evidence of public participation in or prior to this sequence of decisions has been presented to the Committee.

Oil and gas pipelines

44. On 5 December 2003, the Council of Territorial Adjustment of the Republic of Albania approved the route of the proposed AMBO pipeline. On 26 April 2004, the Council of Territorial Adjustment (Vlora District) approved the route of the pipeline. No evidence of public participation prior to either of these decisions has been presented.[4]

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[4] The Committee is aware of another proposal for a gas pipeline passing through Vlora, namely the Trans-Adriatic Pipeline proposal from the Swiss company Elektrizitatz Gesellschaft Laufenburg AG for a pipeline which would bring gas from the Caspian, Russia and the Middle East through Greece and Albania to fuel Italian power stations, but has not received any information concerning the decision-making processes involved.

National legislative framework

45. The EIA legislation of Albania has provisions on public debate over projects and the associated EIA reports, with participation of various agencies and stakeholders including "interested people [and] environmental not-for-profit organizations". The debate should be organized and directed by the responsible local authority, which should within five days of receipt of a consultation request from the Minister of Environment: a) notify the public and environmental not-for-profit organizations and put at their disposal the environmental impact assessment report for a period of one month and b)within one month, organize an open debate with all those interested, notifying participants ten days in advance (art. 20).

46. A separate article, article 26, is dedicated to public participation. Whereas article 20 appears to apply to the stage when the EIA report has been prepared, article 26 provides that the interested public and environmental not-for-profit organizations may participate in all phases of the environmental impact assessment decision-making process. The Minister of Environment is required to determine with a separate normative act the duties of environmental organs in order to guarantee the participation of the public and of environmental not-for-profit organizations in this process.

47. The legislation does not have a provision on appeal to a court or another independent judicial body. Instead, in case of irregularities in the EIA process, the public may request the Minister of the Environment to carry out a partial or full review of the process of environmental impact assessment and the Minister is required to reply within twenty days from receipt of request. This is distinct from the appeal possibilities referred to by the Party concerned in its letter of 1 December 2006 (see para. 23 above), according to which the Code of Administrative Procedures gives the right to initiate or participate in administrative processes and procedures for administrative review as well as for appeals whereby any person may make a motion to nullify, cancel or change of administrative decisions.

48. According to the EIA legislation, strategic environmental assessment is required *inter alia* for strategies and action plans on energy, industry, transport, territory adjustment, national and regional plans, industrial areas, coastal areas, tourism areas, protected areas (art.5). Procedures, deadlines and parties' obligations in all phases of strategic environmental assessment process shall be the same as for projects requiring the more in-depth process of environmental impact assessment.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

49. Albania deposited its instrument of ratification of the Convention on 27 June 2001. The Convention entered into force for Albania on 25 September 2001.

50. The Convention, as a treaty ratified by Albania, is part of the Albanian legal system and is directly applicable, including by the courts. The Party concerned has stated that some aspects of the Convention have been transposed into national law, but has not been specific about this.

A. Admissibility and use of domestic remedies

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

52. The communicant attempted to justify this at one point by asserting that Albanian legislation did not provide domestic judicial or similar remedies of the kind envisaged under article 9; at another stage, by reference to its lack of confidence in the ability of the Albanian courts to safeguard its interests in an effective way, referring to the judicial system as 'slow and sluggish, in many aspects corrupted' and asserting that 'there was not a single case up to this day that would have been decided in favour of an environmental complaint or charge'. Furthermore, it considered its efforts to raise signatures and thereby precipitate a referendum to be a form of domestic remedy, albeit not in a conventional sense.[5]

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

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

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[5] The reasons why the Election Committee, and subsequently the Supreme Court, rejected this initiative despite the requisite number of signatures having supposedly been obtained remain unclear to the Committee.

B. Legal basis

55. As is clear from section I, the case concerns a number of different issues and proposed activities: the energy and industrial park, the TEP, the oil storage facility, the oil and gas pipelines, among others. Each of these issues and proposed activities has its own decision-making processes, and to a certain extent they relate to different provisions of the Convention.

56. During the discussion on the case which took place at the Committee's fourteenth meeting (13-15 December 2006), the communicant indicated that the various decisions of the Albanian authorities referred to in the communication were parts of an overall construction and development plan, about the existence of which the public had not been informed. No evidence or further information to substantiate this allegation has been made available to the Committee. Consequently, the Committee has not addressed this issue in its findings and conclusions. The Committee, however, notes that where such overall plans exist, they might be subject to provisions of the Convention and that, in any event, meaningful public participation, generally speaking, implies that the public should be informed that the decisions subject to public participation form parts of an underlying overall plan where this is the case.

57. The Committee decides to primarily concentrate on the issue of public participation with regard to the making of three decisions by the Council of Territorial Adjustment of the Republic of Albania, all made on 19 February 2003, namely Decision No. 8 (approving the site of the proposed industrial and energy park), Decision No. 9 (approving the construction site for the proposed coastal terminal for storage of oil and by-products and associated port infrastructure) and Decision No. 20 (approving the construction site of the proposed TEP). This approach is in line with the Committee's understanding, set out in its first report to the Meeting of the Parties (ECE/MP.PP/2005/13, para. 13), that Decision I/7 does not require the Committee to address all facts and/or allegations raised in a communication. This procedural decision by the Committee to focus on these issues does not prevent it from addressing other aspects of the case.

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

59. Decision Nos. 9 and 20 concern activities of types that are explicitly listed in annex I of the Convention. Paragraph 1 of annex I refers to 'Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more'. Paragraph 18 refers to 'Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more'. Other paragraphs of the annex may also be relevant to Decision No. 9. As regards Decision No. 8, industrial and energy parks are not listed in annex I as such, even though many of the activities that might typically take place within such parks are listed. If an

EIA involving public participation for such a park were required under national legislation, it would be covered by paragraph 20 of annex I.

60. Decisions Nos. 9 and 20 are decisions that simply designate the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, they are more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant.

61. Decision No. 8 on the industrial and energy park, on the other hand, has more the character of a zoning activity, i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not).[6] This would link it more closely with article 7.

62. The proposed industrial and energy park includes several separate construction projects, each of which would require various kinds of permits. From the information received from the Party concerned and the communicant is not clear is the extent to which the industrial park itself, as distinct from its components, would require further permitting processes, which would in turn allow opportunities for public participation. This too might be a factor distinguishing Decision No. 8 from Decision Nos. 9 and 20, because it is clear that the latter decisions will be followed by further permitting decisions for the respective projects.

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

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

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[6] In reaching this conclusion, the Committee notes the definition of "plans" in the EC Guide for Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment: "Plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas." Definition of "program" is "the plan covering a set of projects in a given area… comprising a number of separate construction projects…." http://www.unece.org/env/sea_ec_guide/sect3.htm#Ref/7

C. Substantive issues

Industrial and energy park

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

66. No evidence of any notification of the public concerned, or indeed of any opportunities for public participation being provided during the process leading up to this decision, has been presented to the Committee by the Party concerned, despite repeated requests. The documents provided by the Party concerned do not demonstrate that the competent authorities have identified the public that may participate, as requested under article 7 of the Convention, and that they have undertaken necessary measures to involve the members of the public into the decision-making. To the contrary, the evidence provided suggests that the opponents were not properly notified about the possibilities to participate. The Committee is therefore convinced that the decision was made without effective notification of the public concerned, which ruled out any possibility for the public to prepare and participate effectively during the decision-making process. Given the nature of the decision as outlined in the previous paragraph, even if public participation opportunities were to be provided subsequently with respect to decisions on specific activities within the industrial and energy park, the requirement that the public be given the opportunity to participate at an early stage when all options are open was not met in this case. Because of the lack of adequate opportunities for public participation, there was no real possibility for the outcome of public participation to be taken into account in the decision. Thus the Party concerned failed to implement the requirements set out in paragraphs 3, 4 and 8 of article 6, and consequently was in breach of article 7.

Thermal electric power plant

67. Contrary to the decision-making process leading up to the designation of the site of the industrial and energy park, the decision-making process relating to the proposed TEP involved some elements of public participation, e.g. public notifications, public meetings, availability of EIA documentation and so on. However, as regards Decision No. 20, dated 19 February 2003, which establishes the site of the TEP, the only element of public participation in this phase of the process appears to have been the public meeting that took place in Vlora on 31 October 2002. The issues of who was notified of the meeting and invited to participate in it, the content of the notification, and who actually participated, are therefore important. As mentioned above (para.

37(a)), the Party concerned asserted that among those who participated in the meeting were "intellectuals and NGOs of Vlora" This assertion has been strongly disputed by the communicant. Unfortunately, despite repeated requests by the Committee, the Party concerned has failed to provide specific information on these points. The obscure circumstances around the meeting in October 2002, and the failure of the Party concerned to provide anything to substantiate the claim that the October meeting was duly announced and open for public participation, clearly point to the conclusion that the Party concerned failed to comply with the requirements for public participation set out in paragraphs 3, 4 and 8 of article 6 of the Convention.

68. The two meetings that took place on 2 April 2003 and 3 September 2003, respectively, obviously occurred after the adoption of Decision No. 20, and therefore cannot be considered as events contributing to the involvement of the public in that decision. Thus, they do not mitigate the failure of the Party concerned to comply with the Convention in the process leading to Decision No. 20 of 19 February 2003.

69. Even so, the Committee wishes to make a short comment on these meetings as well, since they also give rise to concern. No information has been provided by the Party concerned to demonstrate that the meetings in April and September 2003 were publicly announced, so as to make it possible also for members of the public opposing the project to actively take part in the decision-making. Nor has the Party concerned been able to give any reasonable explanation as to why the rather strong local opposition to the project, indicated by the 14,000 people calling for a referendum, was not heard or represented properly at any of these meetings. It is thus clear to the Committee that the invitation process also at this stage was selective and insufficient. The only public notification, in the form of newspaper advertisements, that was presented to the Committee related to meetings that took place later in 2004. Thus the Committee notes that, despite some subsequent efforts to improve the means for public participation, there were several shortcomings also in the decision-making process after February 2003.

Oil storage terminal and port infrastructure

70. Decision No. 9 approving the construction site for a proposed coastal terminal for storage of oil and by-products and associated port infrastructure appears to have been adopted without any prior public participation. Assuming that the proposed oil storage terminal would have a capacity of more than 200,000 tons (see para. 42), it is an activity falling within the scope of annex I of the Convention. Considered under either article, the lack of public participation possibilities leading up to the decision represents a failure to implement the requirements set out in paragraphs 3, 4 and 8 of article 6.

Oil and gas pipelines

71. The Committee notes that pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km are listed in paragraph 14 of annex I of the Convention and therefore subject to the full set of public participation requirements under article 6. The AMBO pipeline and other pipeline proposals have not been a particular focus of the Committee's attention, and the Committee has not received sufficient information from the

Party concerned or the communicant to be in a position to conclude whether or not there was a failure of compliance with the Convention.

Requests for Information, Article 4

72. With regard to the allegations of the communicant that several requests for information were refused or ignored (para. 29 above), the Committee is concerned that at least some information requests to the government may not be registered or dealt with properly. However, in the absence of more concrete evidence, including proof that the requests were received by the public authorities in question, the Committee is not in a position to find that there was a failure to comply with article 4 of the Convention.

Clarity of the framework, Article 3, paragraph 1

73. The Committee is concerned about the lack of a clear, transparent and consistent framework to implement the provisions of this Convention in Albanian legislation. In particular, there is no clear procedure of early notification of the public (by public announcement or individual invitations, before a decision is made), identification of the public concerned, quality of participation, or taking the outcome of public meetings into account. Besides the fact that the Committee had difficulties to obtain information from both parties who did not answer all its questions in a timely and comprehensive manner and that it still has some questions unanswered, the Committee considers that the Party concerned should take the necessary legislative, regulatory and other measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions of the Convention.

Process of developing findings and recommendations

74. As a general remark on the processing of the communication, the Committee is concerned by the fact that it has taken more than two years to prepare findings and recommendations in this case. This is at least partly attributable to the initial lack of engagement of the Party concerned in the process (as evidenced not least by the fact that it did not accept the invitation to participate the discussion at the eleventh meeting of the Committee), and to the difficulties in obtaining timely, accurate and comprehensive answers from both the Party concerned and the communicant.

IV. CONCLUSIONS

75. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

76. With respect to the proposed industrial and energy park (paras. 65-66), the Committee finds that the decision by the Council of Territorial Adjustment of the Republic of Albania to allocate territory for the Industrial and Energy Park of Vlora (Decision No. 8 of 19 February 2003) falls

within the scope of article 7 and is therefore subject to the requirements of article 6, paragraphs 3, 4 and 8. The Party concerned has failed to implement those requirements in the relevant decision-making process and thus was not in compliance with article 7.

77. With respect to the proposed thermal electric power plant (paras. 67-69), the Committee finds that the decision by the Council of Territorial Adjustment of the Republic of Albania on the siting of the TEP near Vlora (Decision No. 20 of 19 February 2003) is subject to the requirements of article 6, paragraphs 3, 4 and 8. Although some efforts were made to provide for public participation, these largely took place after the crucial decision on siting and were subject to some qualitative deficiencies, leading the Committee to find that the Party concerned failed to comply with the requirements in question.

78. With respect to the proposed coastal terminal for storage of oil and by-products and associated port infrastructure (para. 70), the Committee finds that the decision by the Council of Territorial Adjustment of the Republic of Albania on the siting of this facility near Vlora (Decision No. 9 of 19 February 2003) is subject to the requirements of article 6, paragraphs 3, 4 and 8. The failure of the Party concerned to provide for public participation possibilities leading up to that decision represents a failure to implement those requirements.

79. By failing to establish a clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation the Party concerned was not in compliance with article 3, paragraph 1, of the Convention (para. 73).

B. Recommendations

80. [Noting that the Party concerned has agreed that the Committee take the measure referred to in paragraph 37 (b) of the annex to decision I/7,] the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, [has adopted] the recommendations set out in the following paragraphs.

81. The Committee recommends that the Party concerned take the necessary legislative, regulatory, administrative and other measures to ensure that:

(a) A clear, transparent and consistent framework to implement the provisions of the Convention in Albanian legislation is established;

(b) In order to comply with article 7 of the Aarhus Convention, “practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment” are in place not only during preparation of individual projects, including through development of detailed procedures and practical measures to implement article 25 of the EIA Law of Albania;

(c) The public which may participate is identified;

(d) Notification of the public is made at an early stage for projects and plans, when options are open, not when decisions are already made;

(e) Notification of the entire public which may participate, including non-governmental organizations opposed to the project, is provided, and notifications are announced by appropriate means and in an effective manner so as to ensure that the various categories of the public which may participate are reached, and records kept of such notifications;

(f) The locations where the draft EIA can be inspected by the public before public meetings are publicized at a sufficiently early stage, giving members of the public time and opportunities to present their comments.

(g) Public opinions are heard and taken into account by the public authority making the relevant decisions in order to ensure meaningful public participation;

82. Having regard to paragraph 37 (d), in conjunction with paragraph 36 (b), of the annex to decision I/7, the Committee recommends the Party concerned to take particular care to ensure early and adequate opportunities for public participation in any subsequent phases in the permitting process for the industrial and energy park and the associated projects.

83. The Committee also recommends that the measures proposed in paragraphs 80 to 82 be taken or elaborated, as appropriate, in consultation with relevant NGOs.

84. The Committee invites the Party concerned to draw up an action plan for implementing the above recommendations and to submit this to the Committee by 15 September 2007.

85. The Committee invites the Party concerned to provide information to the Committee by 15 January 2008 on the measures taken and the results achieved in implementation of the above recommendations.

86. The Committee requests the secretariat, and invites relevant international and regional organizations and financial institutions, to provide advice and assistance to the Party concerned as necessary in the implementation of the measures referred to in paragraphs 80 to 88.

87. The Committee resolves to review the matter no later than three months before the third meeting of the Parties and to decide what recommendations, if any, to make to the Meeting of the Parties, taking into account all relevant information received in the meantime.