GOVERNMENT OF ROMANIA

Written explanations

Ref. ACCC/C/2012/69

2nd of October 2012

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Romania in relation to the permitting process for the Roşia Montană mining project (Ref. ACCC/C/2012/69)

Contents

Abbreviations

EIA	Environmental Impact Assessment
HG	Hotărâre de Guvern (Governmental Decision)
OM	Ordinul ministrului (Ministerial Order)
OUG	Ordonanță de Urgență a Guvernului (Governmental Emergency Ordinance)

I. Summary of the written explanations

These written explanations are submitted by the Government of Romania in accordance with paragraph 23 of the annex to decision I/7 which provides that: “a Party shall, as soon as possible but not later than five months after any communication is brought to its attention by the Committee, submit to the Committee written explanations or statements clarifying the matter and describing any response that it may have made.” They intend to clarify the matter brought before the Compliance Committee by the two communicants, Greenpeace CEE Romania and Centre for Legal Resources, and to present its views on the claimed non-compliance by Romania with articles of the Aarhus Convention.

We consider that these clarifications will provide support for the Compliance Committee in order to conclude the compliance of Romania with the Aarhus Convention provisions.

In the final part of these written explanations, the Government has provided answers to the two questions asked by the Compliance Committee.

II. Issues of admissibility

In its preliminary determination on admissibility of communication concerning compliance by Romania in relation to the permitting process for the Roşia Montană mining project (Ref. ACCC/C/2012/69) of 30 March 2012, the Compliance Committee decided, subject to review following any comments received from Romania, that the communication is admissible.

The Committee reached this preliminary determination before considering any substantive merits of the communication, by taking into account the admissibility criteria set out in paragraph 20 of the annex to decision I/7, as well as further criteria identified by the Committee. Therefore, in addition to paragraph 20 of the annex to decision I/7 which provides that: “The Committee shall consider any such communication unless it determines that the communication is:
(a) Anonymous;
(b) An abuse of the right to make such communications;
(c) Manifestly unreasonable;
(d) Incompatible with the provisions of this decision or with the Convention.”

the Committee identified also other criteria, such as:
e) lack of relevance to the subject matter of the Convention;
f) when the communication is made with respect to a State which is not a Party to the Convention, or where the significant event with which the communication is concerned occurred before the Convention had entered into force for the Party, and
g) when the communication is made with respect to a Party which has opted out of having communications from the public concerning its compliance considered by the Committee.

The Government of Romania believes that the communication falls under letter. e), namely *lack of relevance to the subject matter of the Convention*. The main reasons, explained in a more detail manner further in the present written clarifications, are the following:

- The environmental information, especially within the EIA procedure for Roşia Montană was and is still available for the public. The documentation of the EIA includes all the relevant decision-making information[1], in accordance with European Union legislation, namely art. 5(1) of the EIA Directive (transposed in HG445/2009). This information includes also what is considered environmental information regarding natural or cultural sites in art. 2.3 let.a) and c) in the Aarhus Convention, namely the "the state of natural sites" and "state of cultural site [...] inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, the factors, activities or measures referred to in subparagraph (b) above".
- Other information exceeding the framework defined by the Aarhus Convention, while it may of course be public information, cannot be considered environmental information.
- This is the case of the archaeological studies requested by the communicant and is also the case of the licenses for exploration/exploitation which are not required by the environmental decision-making process, because their main object is to grant permission for exploration/exploitation of mineral substances, inasmuch as the developer obtains permits from the public authorities, including the agreement from the environmental authorities. The environmental agreement is an administrative act which has legal force by itself and which regulates from the environmental point of view any project with significant possible impact. The environmental agreement is public and the conditions stipulated thereof are monitored.

Therefore, one has to consider, while recognising the right of the public to request environmental information as defined by the law, whether the documents subject to discussion can be fully understood as falling in this category.

For the reasons described above, the Government of Romania considers that the Committee should, in accordance with criteria identified in let. e), take into account the distinction between environmental information and other type of public information and while acknowledging the right of the public to access public information, especially environmental information, only with respect to the latter may the Compliance Committee analyze a possible state of non-compliance by a Party to the Aarhus Convention. Consequently, Romania invites the Committee to declare the present communication as inadmissible.

Should the Committee finds the communication admissible, the Government of Romania respectfully requires the Committee to conclude that Romania has not breached any of the provisions of the Aarhus Convention, as explained below.

[1] The information is still under analysis within a Technical Review Committee which will propose the issuance/refusal of the environmental agreement. The environmental decision can be challenged by the public at the court of law.

III. Explanations

1. General aspects regarding the regulatory framework in Romania with respect to development and public participation

In Romania, for every project proposed for implementation, the developer has to request and receive development consent from the local public authorities. For every project which may have significant effects on the environment (either positive or negative) the development consent procedure includes an environmental impact assessment procedure, conducted by the environmental authorities. The regulatory framework is made of HG 445/2009 on the environmental impact assessment of certain public and private projects and the OM no. 135/84/76/1284 of 2009 on approving the EIA procedure and issuing the environmental agreement. The Romanian legislation ensured a public participation process since the EIA Directive 85/337/EEC, as amended by 97/11/EC had been transposed into Romanian law by HG 918/2002 on the establishment of the EIA framework for certain public and private projects.

HG 445/2009 enforces all requirements related to public participation in decisions on specific activities as demanded by the Directive 2003/35/EC which incorporates Pillar II of the Aarhus Convention into EU legislation. Thus, according to art.15, para. 2 (a) of HG 445/2009, the competent authority shall inform the public, by a public announcement and by posting on its own website, early in the environmental impact assessment procedure and at the latest as soon as the information can reasonably be provided, on the following aspects:

- any request for environmental agreement;
- the project is subject of the environmental impact assessment, indicating, where relevant, whether the project is subject to a transboundary EIA;
- contact details of the competent authorities responsible for issuing/rejecting the environmental agreement, those from which relevant information can be obtained, those to which comments or questions can be submitted, and the deadline for transmitting comments or questions;
- the nature of possible decisions or, where there is one, the draft decision;
- an indication of the availability of the information gathered during the scoping stage and the review stage of the EIA Report, including the availability of the EIA Report;
- an indication of the times and places where and means by which the relevant information shall be made available;
- details of the arrangements for public participation (public hearing – time and venue, deadlines for comments in writing).

In accordance with art.8 (1) the documentation required by the EIA legislation in order to initiate the EIA procedure is: a notification outlining the project, the urbanism certificate and its attached plans. If the competent environmental authority decides that there is a need for EIA, then the developer must submit a technical presentation memoire. Within the procedure, the developer must submit the EIA report elaborated by a certified expert.

In accordance with art.11 (1) of HG 445 of 2009 the EIA report has to include the information provided in Appendix 4 (transposing Appendix 4 of the EIA Directive), including point 3. *Description of environmental aspects likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climate factors, material assets, including architectural and* ***archaeological heritage****, landscape and inter-relationship between the above factors.*

However, the EIA legislation does not require the developer to submit any other studies, except the EIA report, nor licenses for exploration/exploitation. These licenses cannot impose any limitation to the EIA assessment whose conclusions are mandatory, when stipulated in the environmental agreement, for the developer, regardless of what a license may grant in terms of economical benefits.

The project and the EIA Report are subject to a public debate. The public can participate in the public debate (public hearing) and can send comments. Before the public debate, the project and the EIA Report are made available for a period of 30 working days. During this time, the public may send comments and opinions to the competent environmental authority and to the developer. The environmental competent authority is obliged to take into account all public comments received during the procedure, whether submitted in writing before the public hearing or expressed during the hearing.

In connection with paragraph 2 of article 6 of the Convention, article 16, para. 1 of HG 445/2009 provides that the public concerned shall have the possibility to participate effectively and early in the environmental impact assessment procedure, to prepare and transmit comments and opinions to the competent environmental authority, when all options are open and before a decision to issue/reject the environmental agreement has been taken. The public is informed of the decision taken by announcements posted on the webpage of the competent authority and of the owner of the project. The announcement contains the text of the decision, including the main reasons and considerations that ground the decision. The owner of the project makes the announcement of the decision taken in national/local newspapers (OM 135/84/76/1284 of 2009), while the environmental authority makes announcements on the taken decision, including its content and reasons, on its webpage.

Article 21 para. 1 of HG 445/2009 ensures the implementation of the requirement of article 9 of the Convention. On the other hand, this article ensures the transposition of art.9 of Directive 2003/35/EC. OM 135/84/76/1284 provides that when the public authority revises a decision taken, the public participation is included. Article 47 provides as follows: "(1) Reviewing the screening decision, environmental permit or Natura 2000 approval is done by the issuing environmental authority by taking the following steps: […] b) Drawing-up the public announcement, in accordance with annex 21; c) Publishing the announcement on the website and on the authority's news board; d) Sending the public announcement to the project owner in order to be published in the national or local mass-media, its website and the identification board on the investment site."

2. Link between HG878/2005 and Law544/2001.

Article 31 of the Constitution of Romania provides that every natural and legal person has the right to public information. This provision is substantiated in Law no. 544/2001 on free access to public information, which sets forth the procedure for allowing the public (in the terminology used by this Law – the petitioner) access to public information. This Law applies to all information which is public, regardless its nature. As concerns environmental information - following the ratification of the Aarhus Convention by Law no. 86/2000 and in the process of harmonizing the national legislation with the EU *acquis communautaire* - Romania adopted special legislation, i.e. Hotărârea de Guvern (Governmental Decision) no. 878 from 2005 on the public access to environmental information (HG 878/2005). HG 878/2005 "ensures the public right of access to environmental information held by or for public authorities and sets out the basis and the ways to exercise this right". [2]

Public information is defined in art. 2.b. of Law no. 544/2001 as any information regarding the activities of a public authority or its outcomes, regardless of the format or the form and the modes of expression of the information. We consider that this definition is broad enough as not to restrict in any way the right of the public to be duly informed.

However, HG 878/2005 gives a more specific definition, when it comes to environmental information, in line with the Aarhus Convention and Directive 2003/4. Therefore, in accordance with article 2 of HG 878/2005 environmental information means: "any information in written, visual, aural, electronic or any other material form on:

a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
c) measures (including administrative measures), such as policies, legislation, plans, programs, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect elements referred to in (a);
d) reports on the implementation of environmental legislation;
e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);
f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

[2] Art. 1 para. 1.

With respect to the link between HG 878/2005 regulating access to environmental information and Law 544/2001 regulating access to public information, we would like to clarify the following:

- Environmental information, as it is defined in art. 2 of HG 878/2005, is part of the broader concept of public information. Through HG 878/2005 the Romanian authorities implement the Aarhus Convention pillar related to access to environmental information and the provisions of Directive 2003/4/EC of the European Parliament and Council on public access to environmental information.
- Whereas HG 878/2005 is regulating access to a specific type of information, namely environmental information, as opposed to the general norm in Law 544/2001, it represents *lex specialis,* and, therefore, it applies in situations concerned with public access to environmental information;.
- Therefore, from a legal standpoint, when receiving a request for public information, the public authority needs to analyze the object of the request and to decide whether this regards environmental information, as defined by art. 2 of HG 878/2005 and, therefore, to address the request in accordance with this special normative act, or whether it does not concern environmental information, but information of another nature, as defined by art. 2 b) of Law no. 544/2001 and, therefore, to address the request in accordance with the requirements of Law no. 544/2001
- Usually, the petitioners request environmental information, but do not invoke HG 878/2005, but Law no. 544/2011 because the deadlines for reply are shorter: in accordance with art. 7 of Law no. 544/2001, "the public authority has the obligation to reply in written in 10 days or, where it is the case, in maximum 30 days from the registration date of the request, taking into account the difficulty, complexity or volume for research data and the emergency character of the request. (2) The refusal to communicate the information is conveyed in 5 days from the received request date."
- However, from a legal standpoint, if the information requested is environmental information, the authorities have to proceed in accordance with HG 878/2005, in line with the Aarhus Convention pillar on access to environmental information and Directive 2003/4, regardless of the legal grounds on which the petitioner founded its request.
- Moreover the environmental information should be addressed under the specific legislation – especially when it transposes international and European legislation – because it includes specific provisions which have to be taken into account, such as, for instance, the dissemination *ex officio* of environmental information (art.5.3 of the Aarhus Convention).

As a general comment, we consider that there should be a distinction based on the clarifications provided by the communicant, when addressing the Aarhus Compliance Committee, regarding what type of information was requested from the public authorities, in order to understand whether one deals with environmental information or other type of public information not listed in art.2 of HG 878/2005 or art.2.3 of the Aarhus Convention. In principle, a refusal of access to public information on the basis of Law no.544/2001 may not be necessarily related to environmental information.

3. Environmental impact assessment procedure for the Roşia Montană project.

Since the object of the communication is related to the environmental impact procedure for the gold-mining project proposed in Roşia Montană, Alba County, Romania, we would like to present some clarifications regarding the administrative procedure.

The environmental impact assessment procedure started in 14 December 2004 by an application from the developer requiring the issuance of the environmental agreement.

In accordance with the legislation in force, at that time, namely art. 10 (1) of OM no. 860/2002, the application contained the following: technical paper, attached to the urbanism certificate and the project's technical presentation memoire. The competent environmental authority decided that the project is subject to an environmental impact assessment procedure and an environmental impact assessment report has to be drawn-up by a certified expert/group of experts. On 15.05.2006 the EIA report was submitted to the competent environmental authority and has been subject to a public information and consultation process which included 14 public debates in Romania (Roşia Montana, Abrud, Câmpeni, Alba Iulia, Zlatna, Brad, Cluj-Napoca, Turda, Bistra, Baia de Arieş, Lupşa, Bucureşti, Deva, Arad) and two public debate in Hungary (Szeged, Budapesta). All the proposal and comments dully grounded were communicated, in writing, to the developer in order to be replied to in a document which was appended to the EIA report.

In between September 2007-2010 the competent environmental authority was not able to continue the procedure because the urbanism certificate was suspended by a court of law. The EIA procedure was resumed following the submission by the developer of a new urbanism certificate in April 2010. Taking into account that, within this period, the environmental legislation was updated, mostly due to the need for harmonization with the European Union's *legislation,* the developer was asked to update the EIA report, accordingly. Furthermore, a new site visit took place on the 20th of October 2011, the site checking report[3] having been published on the website dedicated to the project, hosted by the Ministry of Environment and Forests.

The EIA report, as updated, was once more submitted to the public for comments, as the communicant has also stated. Currently, the EIA report is being analyzed within the Technical Review Committee which has not issue any decision, so far.

The entire relevant documentation is posted on:
http://www.mmediu.ro/protectia_mediului/rosia_montana/rosia_montana.htm

With respect to the first paragraph in Part *III - Facts of the communication*, we would like to remind that the file ACCC/C/2005/15 was not closed due to the suspension of the national EIA procedure, but in fact it was closed because the Committee found

[3] http://www.mmediu.ro/protectia_mediului/rosia_montana/2011-12-06/2011-12-06_rosia_montana_procesverbalcat20oct2011.pdf

that Romania was in compliance with its obligation under the Convention[4]. Therefore, the resumption of the national EIA procedure does not trigger the re-opening of the file ACCC/C/2005/15, as it might be understood from the position of the applicant.

With respect to the present communication we would like to mention that the archaeology studies – as standalone documents – are not required by the EIA legislation to be part of the EIA procedure. However, the impact on cultural heritage related to all the phases of the project, as well as the measure to protect the objectives with historical value within the project area are addressed in Chapter 4.9 of the EIA Report drafted and in the 3 Management Plans, as a requirement of the EIA procedure.

With respect to the critique regarding the site checking report we would like to point out that this document reflects on the outcome of the visit in the field, its purpose not being to assess the impact on the area or to provide an exhaustive list of sites. That is, however, the role of the EIA report. Therefore, even though the site mentioned by the communicant, namely Tăul Secuiului – Pârâul Porcului, is not listed in the site checking protocol, this archaeology site is taken into account in the EIA Report (chapter 4.9 and the Management Plan for Cultural Heritage – Archaeology).

IV. Answers to the questions asked by the Compliance Committee

1. How long does it take on average to go through a procedure for access to environmental information, including two court instances?

Art.4 of HG 878/2005 stipulates that "the environmental information is made available to the applicant as soon as possible or at the latest within one month after the receipt of request". The same article provides that the authority has to respond to a request for information within a month after the registration of the request, except (for the cases) when the amount or complexity of the requested information requires a two months period. In such cases, the applicant is informed, as soon as possible, and at the latest before the end of the one month timeframe, about the extension of the response timeframe and the reasons on which this extension is grounded.

In case the petitioner considers that her/his request was refused, totally or partially, in an unjustified manner, was ignored or replied to inappropriately, has the right to make a plea to the manager of the public authority and he/she is entitled to receive a solution within 30 days[5]. This administrative procedure is free of charge.

Following the reply of the manager of the public authority, in case the petitioner considers that his/her rights mentioned in HG878/2005 are harmed or he/she did not receive a reply within the legal deadline of 30 days, he/she has the right to submit a plea to the competent court of law on administrative contentious.

[4] point 3 of the Decision III/6 General Issues Of Compliance adopted at the third meeting of the Parties held from 11 to 13 June 2008 in Riga.

[5] Art. 16 of HG878/2005

As to the timeliness standards, the Government is aware that this is very important to review procedures under article 9, and is constantly taking measures to insure proper timeliness in the administration of justice.

The right to justice and to a fair trial represents one of the fundamental rights stipulated in art.21 of the Romanian Constitution. Similar provision are found in Law no.304/2002 on judicial organization (art.6) and Law no.554/2004 on administrative contentious (art.1 par.1 (1)). Within this general framework the process to maximize the efficiency of justice is a constant priority of the Romanian authorities. On these grounds Law no.202/2010 on measures for accelerate trial solutions was adopted. More recently, new judicial codes have been elaborated and adopted, namely: the civil code, criminal code, code for civil procedure and code for criminal procedure.

In accordance with the *Report on the justice state in 2011*[6] elaborated by the Superior Council of Magistrates, the majority of cases registered at the courts of law are solved in less than 6 month per each jurisdiction level. For instance, at the level of the High Court of Justice and Cassation 61% of files have been solved in less than 6 months since they have been registered, although the number decrease in 2011 at 48%. At the level of Courts of Appeal, in the administrative contentious field, as first instances 70% and as appeal instances 92% of the cases were solved in less than 6 months. At the level of the Courts in 2011 76% of cases were solved in 6 months.

Once a Romanian court has taken a final decision, all public authorities of Romania have the duty to enforce it. Those who do not follow this duty are criminally responsible. As to the suspending effect of the appeal, this is an ordinary feature of the Romanian legal system in order to ensure the constitutional guarantees to a fair trial.

The communicants did not bring any reasons for considering the judicial review process as unfair or inequitable, and therefore, the Government of Romania does not consider necessary to comment on the respect of these standards in relation to the judicial procedures.

The Government also wishes to draw attention to the fact that all court proceedings in respect of cases concerning access to public information are free of any duties.

In relation to the accessibility of the judgments delivered by the courts, the Government of Romania needs to stress that an important number of court decisions in Romania are currently made public on the internet at www.jurisprudenta.org. Moreover, the Romanian action plan for reform in the judicial system[7] requires all courts to publish relevant decisions on the *Portalul Instanţelor de Judecată* (Courts of Justice Internet Portal), accessible through the website of the Ministry of Justice at www.just.ro. The Appeals Courts, the High Court of Cassation and Justice and the Superior Council of the Magistracy need to publish journals containing their most relevant decisions.

[6] http://www.csm1909.ro/csm/linkuri/10_04_2012__48486_ro.pdf
[7] HG 1346/2007 *on approving the action plan for fulfilling the conditions within the verification and cooperation mechanism implemented in Romania in the field of the judicial system reform and fight against corruption*

2. **What are the reasons for classifying all exploration/exploitation licenses and the Governmental Decision no.S921/2004 as "secret of service"?**

The decision to classify such information was taken according to the standards and the procedures provided for in Law 182/2002 on protection of classified information, and the provisions of the same law are followed when the information are declassified.

Art.31 of Law 182/2002 provides that secret of service information is established by the manager of the legal entity on the basis of the methodology provided by Governmental Decision. Art.33 stipulates that it is forbidden to classify as secret of service information which by its nature or content aims to ensure the information of citizens on personal or public interest aspects, for abetting or hiding the elusion of law or for obstructing justice.

According to art.4 of the HG585/2002 on approving the national Standards of classified information in Romania, "in accordance with the law, the information is classified secret of State or secret of service, depending on the importance which it holds for the national security and to the consequences which might occur in case of unauthorized disclosure or dissemination". Art. 20 of HG585/2002 stipulates that the information may be unclassified if a) the classification period has ended; b) information disclosure cannot prejudice any longer the national security, national defence, public order or interest of public and private entities which hold the information; c) the information was classified by a person who was not legally authorised to do so.

The licenses in the mining field are contracts with operators and provide obligations and rights for parties. They are classified in order to protect financial and economical data belonging to the holder of the licence. They are exempted from access to public information on the grounds provided in Law no.544/2001, art.12(1) "The following information shall be exempt from the free access citizens provided in article 1, and article 11^1 respectively:
[…]
b) information on the deliberations of the authorities, as well as those that concern the economic and political interests of Romania, if they belong to the category of classified information, according to the law;
[…]
2) The responsibility for enforcing the measures to protect the information pertaining to the categories provided in para. 1 lies with the persons and public authorities who hold such information, as well as with the public institutions empowered by law to ensure the security of information."

Even if the mining licenses could be considered as environmental information they would fall under the ambit of art.4.4(d) of the Aarhus Convention, which allows for the denial of a request to provide environmental information when the disclosure would affect "d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest". We also draw the attention to the provisions of art.12 of HG878/2005 in accordance to which the competent authorities may deny a request for environmental

information if it affects "(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy".

V. Answers to the claims of the communicants in respect of noncompliance

Alleged non-compliance with article 4.1. and 4.2

Article 4 binds the Parties to the Convention to ensure access to environmental information. The complaint concerns the denial of access to certain documents, namely the archaeological discharge certificate for the mining galleries at Carnic Mountain and the mining licences for the Roşia Montană area. However broadly the term ''environmental information" is interpreted, it cannot be understood as covering the documents to which the communicants refer. We recall that the environmental information, as defined by European Union and Romanian legislation, concerning the Roşia Montană project was made available to the public.

Alleged non-compliance with article 6

Article 6 concerns the public participation in decisions on specific activities. It is alleged that these provisions have been breached because the public consultations are conducted without all relevant information being submitted to the public and because "the archaeological discharge certificate was issued without any public consultation procedure, in total opacity"

In regard of this allegations the Government of Romania reiterates that the relevant environmental impact assessment information has been fully made available to the public, so as to ensure an informed an meaningful participation of the public in the decision making process in respect of the concerned project. The Aarhus Convention cannot be read to imply that every data conceivably related to a proposed activity must be disclosed to the public.

In respect of the archaeological discharge certificate the Government of Romania points out the following:

An archaeological discharge certificate was issued by the competent Romanian authority (the Culture and National Heritage Directorate of the Alba County) for the Masivul Cârnic archaeological site (and not for the "Rosia Montana area", as suggested by the communicants). The archaeological discharge certificate is a document which annuls the regime of protection previously established for a site where archaeological heritage is found, so that the concerned site is restored to habitual uses. The decision to issue such a certificate is grounded on scientific criteria and is a prerogative of the competent Romanian authorities. The procedure applicable in accordance to Romanian legislation does not provide for a public consultation in respect of the issuance of such a certificate. The relevant procedure was followed in the case of the Masivul Cârnic site.

The Aarhus Convention does not bind the Parties to disclose to the public the reasons for which decisions made in respect of the protection of archaeological sites are made. As pointed out above, the protection of the sites having archaeological value situated in the project area was addressed in the impact assessment prepared for the Roşia Montană project.

Alleged non-compliance with article 9

Article 9 provides the obligation of the Parties to the Convention to ensure the access to a review before a court of law in case a person considers that a request for environmental information has not been adequately dealt with.

In respect of compliance with Article 9, it should be borne in mind that the requests for information submitted do not concern environmental information, as explained above, so the provisions of the Aarhus Convention are not applicable. Furthermore, the access of the communicants to judicial review was fully ensured, as the legal action challenging the denial of access to information were found admissible by the courts.

In respect of the allegedly excessive length of internal proceedings regarding access to information, the Government of Romania believes that the claims must be judged against the background of the relevant jurisprudence of the European Court of Human Rights.

Firstly, in the light of the European Convention on Human Rights and Fundamental Freedoms it has to be determined if the outcome of the proceedings by which the applicant seeks to be provide with information is or not decisive for the applicant organization's civil rights and obligations in private law. In the Court's opinion the concept of "civil rights and obligations" has an autonomous meaning and cannot be interpreted solely by reference to the domestic law of the respondent State (see *König v. Germany*, 28 June 1978, § 88, Series A no. 27). Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned (see *König*, cited above, § 89 and *mutatis mutandis*, *Loiseau v. France*, decision of 18 November 2003, no 46809/99, CEDH 2003-XII).

Secondly, it is to be noted that the proceedings are ongoing, and the reasonableness of the length of proceedings cannot be appreciated at this stage, as any prospective of end would be purely speculative. *Prima facie,* the facts of the case do not disclose a breach of the European Convention of Human Rights Fundamental Freedoms, as 2 years for one degree of jurisdiction do not seem excessive in length.

According to the case-law of the he European Court of Human Rights, the reasonableness of the length of proceedings comes within the scope of Article 6 § 1 (art. 6-1) of the European Convention of Human Rights Fundamental Freedoms and must be assessed in each case according to the particular circumstances (*Buchholz v. Germany*, judgment of 6 May 1981).

The criteria set by the Court in order to appreciate on the reasonableness of the length of proceedings are, *inter alia*,

- the complexity of the factual or legal issues raised by the case
- the conduct of the applicants
- the conduct of the competent authorities
- what was at stake for the applicant.

In addition, only delays attributable to the State may justify a finding of a failure to comply with the "reasonable time" requirement (*Buchholz* judgment).

On the other hand, article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (*Kudla v. Poland*, judgment of 26 October 2000).

The scope of the Contracting States’ obligations under Article 13 varies depending on the nature of the applicant’s complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law. The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favorable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees, which it affords, are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, the *Silver and Others v. the United Kingdom* judgment of 25 March 1983, and the *Chahal v. the United Kingdom* judgment of 15 November 1996).

There are in Romanian law several possibilities for an applicant to try to accelerate the proceedings to which he/she participates as follows:

a) demand for changing the date of the audiences before the national tribunals
b) demand for acceleration of the proceedings by directly invoking the European Convention provisions
c) demand for application of a fine for judges that intentionally delay the proceedings
d) action for compensation for intentional delay of the proceedings

VI. Conclusions

For the reasons stated above, the Government of Romania respectfully asks the Compliance Committee to consider the distinction between environmental

information, in the sense of public information but as defined by law, and public information as a broader concept, and to apply the identified criterion in let. e).

Should the Compliance Committee consider it needs to analyze the communication further, the Government of Romania argues the communication has not prove any state of non-compliance by Romania with the Convention provisions as:

- complete and adequate environmental information regarding the concerned project was made available to the public; the environmentally significant aspects of the projects were addressed in the EIA documentation; the communication concerns only denial of access to information which is not of an environmental nature;
- the environmental impact assessment of the procedures regarding the project of the mine at Roşia Montană are not completed and no decision in respect of the project was taken; at this stage, all option remain open
- the communication was lodged with the Committee despite the fact that the communicants have also seized the Romanian courts and domestic review procedures are ongoing;
- the judicial review procedures cannot be considered as unreasonably prolonged, at least not up to the current stage; there is not indication that the communicants tried to avail themselves of the means to accelerate the proceedings.