

To:

Compliance Committee
of the UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

through the Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
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Cc:

Ministry of Ecology and Natural Resources of Ukraine
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From:

Environment-People-Law

With regard to communication from EPL (ACCC/C/2014/118) concerning compliance by Ukraine with the provisions of the Convention in connection to production sharing agreements

Following the letter from the Secretary to the Aarhus Convention Compliance Committee from May 23rd, EPL sends its regards along with the answers to the Committee's questions to the communicant:

1. In the light of the stated withdrawal of Shell and Chevron, what aspects of the communication, if any, do you consider it would still be appropriate for the Committee to proceed to examine? Which aspects, if any, do you consider that it is no longer necessary for the Committee to examine? In your reply to each question, please refer to specific paragraphs of the communication.

The issues of withdrawal of Shell and Chevron from the PSAs will be addressed below. In light of adoption of the Law of Ukraine on Environmental Impact Assessment in 2017, which requires EIA in the course of negotiation of a PSA prior to its signature, please consider the communication as amended below (amended sections IV and V of the original communication):

IV. Nature of alleged non-compliance

1. This communication concerns 1) specific cases of Aarhus Convention violations in relation to two PSA's concluded by Ukraine in 2013 and 2) ~~general failure of Ukraine to implement access to information, public participation and access to justice provisions of the Convention into the domestic legal framework on PSAs, as well as~~ 3) failure to enforce relevant

provisions of the domestic legislation on access to public information and public participation in the course of ecological expertiza, which are in place.

2. ~~Although the laws of Ukraine do not directly contradict the Aarhus provisions, lack of clarity and details, as well as enforcement of domestic provisions on access to information and public participation in relation to PSAs, created a reality, where the public could not enjoy either of these rights.~~

3. ~~Thus, we allege that Ukraine not only violated all communicant's Aarhus rights in the course of negotiation and entry into PSAs in 2013, but also failed to establish and maintain a clear, transparent and consistent framework to implement the respective provisions of the Convention into PSA legal framework.~~

V. Provisions of the Convention relevant for the communication

4. By this Communication, we allege that Ukraine has failed to comply with its obligations under Article 3(1), Article 4 (1), Article 4 (4), Article 4 (6), Article 6 (1), Article 6 (2), Article 6 (3), Article 6 (4), Article 6 (6), Article 6 (7), Article 6 (8), Article 6 (9) and Article 9 (2) of the Aarhus Convention.

5. We argue that

- information requested from the Government (as indicated in the Sub-Section "Facts of the communication" above) falls within the meaning of "environmental information" under subparagraph (b) of the paragraph 3 of the Article 2;
- Yuzivska and Oleska projects do fall under paragraph 20 of the Annex 1 of the Aarhus Convention. These projects may also fall under paragraphs 12 or 14 of the Annex 1 of the Aarhus Convention, but due to lack of information on the projects we cannot state this as a fact;
- PSAs together with the respective permits for mineral extraction constitute Article 6 decisions.

6. We allege that

- by including full confidentiality clauses (covering all and any terms of the PSA and all and any other documents issued by the Government in the course of negotiation and execution of the PSA) into the texts of agreements on large scale natural gas development projects between the Government and private investors; ~~by not properly implementing access to information and public participation provision into domestic legal framework on PSAs, and by not enforcing those that are in place,~~ Ukraine has violated Article 4 (1) of the Aarhus Convention;
- by denying public requests for information on the terms of the PSA, various drafts of the PSAs, signed texts of Yuzivska and Oleska PSAs, and a copy of permit for mineral extraction issued according to Yuzivska and Oleska PSA (submitted fully in line with domestic legislation), the Party concerned has violated Article 4 (1) of the Aarhus Convention;
- by denying public requests for information on PSA because of a claimed confidentiality the Government improperly struck the balance between such confidentiality and the public interest in disclosure of the requested information, and thus violated Article 4 (4) of the Aarhus Convention;
- by not applying - in case of necessity to treat some portions of information of a PSA confidential - the rule of exclusion of this portion and provision of the rest of the document to the public, the Government has violated Article 4(6);

- by performance of ecological expertiza on Yuzivska PSA after its approval and signature by the Government; by not applying public participation provisions in both Yuzivska and Oleska environmental assessment processes; by not informing the public concerned early in an environmental decision-making procedure, and in adequate, timely and effective manner; by not establishing and applying reasonable time-frames for public participation; by not allowing for early public participation when all options are still open; by not providing access to information relevant to the decision-making; by not allowing for the public to submit comments; by not taking into account the outcomes of public participation; by not publishing signed texts of the PSAs and texts of the permits for minerals issued in relation to the PSAs – the Party concerned has respectively violated Article 6 (1), Article 6 (2), Article 6 (3), Article 6 (4), Article 6 (6), Article 6 (7), Article 6 (8), Article 6 (9) of the Aarhus Convention;
- by denying standing by the court of appeal in an administrative court proceeding regarding omission of the Government to perform ecological expertiza and involve the public concerned into the decision-making process – the Party concerned has violated Article 9 (2) of the Aarhus Convention.

2. In addition, please comment on the following aspects of the Party's response:

(a) The submission that, following the withdrawal of Shell and Chevron, the mining of shale gas at the Yuzivska field will not proceed;

According to information provided by the media as well as Shell and Chevron companies themselves, the initial investors withdrew from the PSAs. Nevertheless, the Government still considers these 50-years long deals valid. Moreover, in 2016 and 2018 there were numerous attempts by the State Geology Service of Ukraine to allow new investors to enter into Uzivska PSA simply replacing the initial investor (Shell) without going through the procedure of tendering and developing a new PSA. In light of the above, we have reasonable fears that the Government may go along with this plan and allow a new investor(s) in one or both PSAs developed and concluded with grave violations of Aarhus rights.

Both deals remain secret until today. The most recent information requests (2017-18) of the communicant to various authorities were also denied.

(b) The assertion that following the adoption of the new EIA law in 2017, draft production sharing agreements will now be subject to access to information and public participation meeting the requirements of the Convention.

It is a fact that the Law of Ukraine on Environmental Impact Assessment containing provisions meeting the requirements of the Convention has been in force since December 2017. It is also a fact that EIA Law requires performance of environmental impact assessment in the course of PSA's negotiation prior to its signature. Nevertheless, since this amendment to the Law, no new PSA was negotiated.

Although we welcome the adoption of the EIA Law and the respective amendment to the PSA LAW, we believe that at this point it would be premature to assert that following its adoption, future draft production sharing agreements will now be subject to access to information and public participation provisions meeting the requirements of the Convention. Application of the law is needed to see how and if at all the respective provisions of the EIA Law will be applied with respect to the PSAs. The previous legal framework also required state ecological expertiza

and public participation in its course both of which were fully ignored by the Government in 2013.

In light of the continuous secrecy of the two PSAs in question (and all other PSAs ever signed by Ukraine), their remaining validity despite the withdrawal of the initial investors and multiple attempts in the recent years to include new investors into the old PSAs conducted without proper EIA and with no access to information and participation from the public – we ask the Committee to assess compliance by Ukraine with its obligations under Articles 4, 6 and 9 of the Convention in the specific cases of negotiation of the PSAs in 2013. Given that the new EIA and PSA legal frameworks requiring openness and public participation have not been yet used in practice, finding and recommendation of the Compliance Committee in this case would guide future practical application of the EIA and public participation provisions with regard to PSAs in Ukraine. Furthermore, in case of non-compliance findings, the communicant hopes to put a halt on the two large scale extraction deals concluded in secrecy and conspiracy.

Best regards,
Yelyzaveta Aleksyeyeva