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Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Fifty-first meeting

Geneva, 15–18 December 2015

Item 9 of the provisional agenda

**Communications from members of the public**

### **Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania\***

**Adopted by the Compliance Committee on 26 June 2015**

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\* This document is a late submission owing to the Committee's meeting schedule: the deadline for submission of the present document (6 October 2015) fell before the end of the Committee's fiftieth meeting (Geneva, 6–9 October 2015).



## I. Introduction

1. On 16 March 2012, Greenpeace CEE<sup>1</sup> Romania, the Center for Legal Resources (Centrul de Resurse Juridice) and the European network of environmental law organizations, Justice and Environment (collectively, the communicants) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Romania to comply with its obligations under article 4, paragraphs 1 and 2, article 6, paragraph 6, and article 9, paragraph 4, of the Convention.<sup>2</sup>

2. Specifically, the communication alleges that the documentation for the environmental impact assessment (EIA) carried out for the Rosia Montana mining project was not complete, because certain documents relating to archaeological monuments were not included and the public concerned was not able to examine them, and for this reason the Party concerned was not in compliance with article 6, paragraph 6, of the Convention. Moreover, when the communicants requested access to that information and also to the exploration/exploitation licences and other mining-related information, they were denied access and, therefore, according to the communication, the Party concerned failed to comply with article 4, paragraphs 1 and 2, of the Convention. In addition, the communication alleges that judicial procedures take a long time to reach a conclusion and that the Party concerned is thus not in compliance with article 9, paragraph 4, of the Convention.

3. The communication concerns the same project that was the subject of communication ACCC/C/2005/15 (see ECE/MP.PP/2008/5/Add.7) in which the Committee had considered allegations of non-compliance by the Party concerned with respect to disclosure of EIA documentation. In that case, the Committee did not find the Party to be in non-compliance because, prior to the adoption of its findings, the situation was remedied at the national level and the law exempting EIA studies from disclosure was amended.

4. At its thirty-sixth meeting (Geneva, 27–30 March 2012), the Committee determined on a preliminary basis that the communication was admissible.

5. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 8 May 2012. On the same date, a letter was sent to the communicants. Both were asked to address a number of questions from the Committee.

6. The Party concerned responded to the allegations and to the Committee's questions on 5 October 2012; the communicants responded on 8 October 2012.

7. In its response of 5 October, the Party concerned requested the Committee to consider the communication inadmissible as lacking "relevance to the subject matter of the Convention".<sup>3</sup> The Party concerned contends that the communication lacks "relevance to the subject matter of the Convention" as: (a) the EIA procedure was still ongoing and therefore there was no decision about the project yet; (b) all information, and in particular

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<sup>1</sup> Central and Eastern Europe.

<sup>2</sup> The communication and other related documentation from the communicants, the Party concerned and the Committee, are available on a dedicated web page for the communication (<http://www.unece.org/env/pp/compliance/compliancecommittee/69tableromania.html>) on the Committee's website.

<sup>3</sup> This criterion was listed as a possible criterion for inadmissibility in the Committee's determination of admissibility dated 30 March 2012.

environmental information, was available to the public; and (c) the exploration/exploitation licences were not required for the environmental decision-making process.

8. At its thirty-ninth meeting (Geneva, 11–14 December 2012), the Committee agreed to invite the communicants to respond to the Party's objection with respect to the admissibility of the communication and preliminarily scheduled to discuss the content of the communication at its fortieth meeting (Geneva, 25–28 March 2013). The communicants provided comments on 5 February 2013. The Committee using its electronic decision-making procedure confirmed its preliminary decision about the discussion of the communication.

9. The Committee discussed the communication at its fortieth meeting with the participation of representatives of the communicants and the Party concerned. At the same meeting, it confirmed the admissibility of the communication. During the discussion, the Committee put a number of questions to the Party concerned, and invited it to respond in writing after the meeting, with the communicants thereafter to have the opportunity to provide their comments on the response of the Party concerned.

10. The Party concerned and the communicants submitted their responses on 22 May 2013 and 5 July 2013, respectively.

11. The Committee prepared draft findings at its fortieth to forty-seventh meetings inclusive, completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicants on 23 February 2015. Both were invited to provide comments by 23 March 2015.

12. The Party concerned requested an extension to provide its comments, which it did on 15 April 2015. It provided an update on 13 May 2015 and further information on 15 June 2015. The communicants also provided comments on 15 June 2015.

13. In the light of the request from the Party concerned for an extension to provide its comments on the draft findings, the Committee had agreed at its forty-eighth meeting (Geneva, 24–27 March 2015) to adopt its findings using its electronic decision-making procedure once the extended deadline for the Party concerned to provide its comments on the draft findings had expired. The Compliance Committee accordingly adopted its findings using its electronic decision-making procedure on 26 June 2015, taking account of the comments received from both the Party concerned and the communicants, and agreed that the findings should be published as a formal pre-session document to its fifty-first meeting. It requested the secretariat to send the findings to the Party concerned and the communicants.

## **II. Summary of facts, evidence and issues<sup>4</sup>**

### **A. Legal framework**

14. The legal framework on access to information in Romania consists of: Law 544/2001 on free access to information of public interest; Government Decision 878/2005 on public access to environmental information; Law 182/2002 on protection of

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<sup>4</sup> 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.

classified information; and Decision 585/2002 concerning national standards for classified information. Public participation is regulated by Government Decision 445/2009.<sup>5</sup>

15. Law 544/2001 provides for exemptions to public access to information requirements (art. 12, paras. 1 and 2):

(1) The following information shall be exempt from the free access citizens provided in article 1, and article 11, 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.<sup>6</sup>

16. Government Decision 585/2002 provides that “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. 4); and 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, and (c) the information was classified by a person who was not legally authorized to do so (art. 20).<sup>5</sup>

17. 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. 31); and 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” (art. 31).<sup>5</sup>

18. Pursuant to Government Decision 445/2009 on EIA, the documentation required to initiate an EIA procedure includes a notification outlining the project, the urbanism certificate and the attached plans. If the competent authority considers that an EIA is necessary, the developer is requested to submit a technical presentation and an EIA report by a certified expert (art. 8). The EIA report must include a “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 interrelation between the above factors” (art. 11, para. 1).<sup>5</sup>

19. The EIA report is subject to public debate and comments may be submitted orally or in writing to the competent authority or the developer. The law provides for early and effective public participation (art. 16, para. 1). The public notice is posted on the websites of the competent authority, the environmental authority and the developer and in national and local newspapers. Comments should be taken into account during the procedure. Once

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<sup>5</sup> More information on these laws and regulations is set out in the Committee’s findings on communication ACCC/C/2010/51 (Romania) (ECE/MP.PP/C.1/2014/12), paras. 20–25.

<sup>6</sup> See written response of the Party concerned to the communication, received 5 October 2012.

taken, the text of the decision, including the reasoning, must be posted on the competent authority's website.<sup>7</sup> Public participation is also required for the revision or update of decisions (art. 21, para. 1).

## B. Facts

20. Rosia Montana is a commune composed of 16 villages in the Rosia River Valley in Alba County, western Transylvania. The area has been known for its mineral resources since Roman times. A State-run gold mine in the area closed in 2006 before Romania acceded to the European Union. The area is still considered to host the largest undeveloped gold deposit in Europe. A Canadian resource company has since sought a permit to develop a new gold and silver mine. The archaeological heritage of the area is rich, with many monuments dating back to Roman times.

21. Further to the application by the developer, the screening exercise indicated that an EIA procedure was required. The EIA procedure for the project started in late 2004. On 15 May 2006, the developer submitted the EIA report to the environmental authority. Public consultations were organized, including 14 public debates in different locations in the Party concerned and two debates in Hungary.

22. In 2005 the communicants requested access to the Rosia Montana mining licences but were refused, and were unsuccessful in their appeal to the courts.<sup>8</sup>

23. The EIA procedure was expected to be concluded by 2007. However, the process was suspended in 2007, owing to the project's urbanism certificate having been suspended by the court, and it was resumed after a new urbanism certificate was issued in April 2010.

24. Since legislation had in the meantime been amended to meet European Union standards, a revised EIA report was prepared, which was again subjected to a public participation procedure. The report included, among other matters, consideration of the Roman remains. In 2010, the EIA study was completed and the report was submitted to the public for comments. Public consultations on the documentation submitted by the developer took place in March, April and May 2011. The developer sent its answers to the public's comments in August 2011. The EIA process for the Rosia Montana mine was still ongoing at the time of submission of the present communication and no final EIA decision had been taken when the present findings were adopted.

25. In 2010, a List of National Monuments was approved by Order No. 2361/2010 of the Romanian Government. Class "A" of the list comprised six national monuments on the territory of Rosia Montana, including the Roman gold mining galleries of Carnic Mountain. In 2011, the Ministry of Culture and National Heritage (Ministry of Culture) issued an archaeological discharge certificate for the mining galleries of Carnic Mountain. The archaeological discharge certificate was motivated by the conclusions of a study concerning the archaeological vestiges from Rosia Montana. As a consequence of the issuance of the archaeological discharge certificate, part of the galleries of Carnic Mountain lost their archaeological protection status. The procedure for the issuance of the certificate was conducted without public participation.

26. In 2010, the communicants requested access to the archaeological study and the documentation submitted by the developer to the National Archaeological Commission

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<sup>7</sup> Ibid., p. 7.

<sup>8</sup> Bucharest Court of Appeal, Section VIII for Contentious Administrative and Tax Matters, 7 November 2005, Civil decision No. 1587, File No. 1589/2005 (see annex IV to the communication).

from the Ministry of Culture. The Ministry of Culture refused access to the information. No reasons for the refusal were provided. The communicants appealed the refusal of access to the archaeological study and supporting documentation to the Bucharest Court. In its submissions to the Court, the Ministry of Culture claimed that “the archaeological research reports represent scientific creations subject to copyright”.<sup>9</sup> The Bucharest Court only accepted part of the communicants’ claims.<sup>8</sup> In October 2012 the Bucharest Court of Appeal held in favour of the Ministry of Culture and rejected the communicants’ appeal in its entirety.<sup>10</sup>

27. In July 2011, the communicants requested copies of the archaeological discharge certificate and the archaeological study from the Alba County Department of the Ministry of Culture. The authority responded by providing the communicants with a copy of the archaeological discharge certificate. With respect to the documentation substantiating the issuance of the archaeological discharge certificate (including the archaeological study), the Alba County Department stated that “such documentation contains a very large amount of information and we do not have the technical and human resources that are necessary in order to prepare an integrated copy thereof”.<sup>11</sup> The communicants were informed that they could examine the documentation at the office of the Department and that they could even make copies of it, at their own expense.<sup>11</sup>

28. In April 2010, the communicants requested the following information from the National Agency for Mineral Resources: (a) what licences for the exploration/exploitation of non-ferrous ore were the subject of ongoing activity in Romania; (b) what was the quantity of non-ferrous ore licensed for exploration/exploitation for each mining licence; (c) what was the current status of exploitation at Baia Mare (where an ecological accident occurred in 2000), what environmental remediation measures had been taken for the contaminated area and what was the stage of implementation of those measures; and (d) copies of the original exploration/exploitation licences. The Agency did not answer the communicants’ request and the communicants appealed the refusal of access to information to the Bucharest Court. By decision No. 914/2011 dated 7 March 2011 the Bucharest Court held that the National Agency for Mineral Resources was obliged to release the aforementioned information.<sup>12</sup> The Agency appealed and the case was sent to the Bucharest Court of Appeal.

29. On 13 February 2014 the Bucharest Court of Appeal issued its decision, partially upholding the Agency’s appeal.<sup>13</sup> It overruled the Bucharest Court’s order to communicate the information regarding the quantity of non-ferrous ore licensed on the ground, holding that that information had already been provided to the communicants, and thus that the original ruling was without purpose. It further held that the order to provide copies of the licences was unfounded, on the ground that the requested information related to the Party’s economic interests, and was thus included in the category of classified information according to the law.

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<sup>9</sup> Bucharest Court, Ninth Department for Administrative and Fiscal Contentious Matters, 9 December 2011, Civil Judgement No. 4222, File No. 59715/3/2010 (see annex I to the communication).

<sup>10</sup> Bucharest Court of Appeal, Section VIII, Fiscal and Administrative Legal Department, 4 October 2012, Civil Judgement No. 3421, File No. 59715/3/2010 (see communication web page, decision received 7 June 2013).

<sup>11</sup> Answers to the Committee’s questions by the Party concerned, received 22 May 2013, p. 8.

<sup>12</sup> Bucharest Court, Section IX for Contentious Administrative and Tax Matters, 7 March 2011, Civil Judgement No. 914, File No. 23774/3/CA/2010 (see annex VI to the communication).

<sup>13</sup> Bucharest Court of Appeal, Section VIII, Administrative and Fiscal Court, 13 February 2014, Civil Judgement No. 972, File No. 23774/3/2010 (see communication web page, judgement received from the Party concerned, 15 June 2015).

30. Notwithstanding the Court of Appeal's ruling, the communicants contended that, as at the date of the adoption of the present findings, it had not received the requested information mentioned in paragraph 28 above.<sup>14</sup>

## C. Substantive issues

### Article 2, paragraph 3 and article 4 — access to environmental information

#### *Access to the archaeological study*

31. The communicants allege that, by refusing access to the archaeological study and the accompanying documentation submitted by the developer for the purposes of the archaeological discharge certificate procedure, the Party concerned failed to comply with article 4 of the Convention. The communicants submit that the state of cultural sites, inasmuch as they are or may be affected by the state of the elements of the environment, is explicitly included in the definition of “environmental information” in article 2, paragraph 3, of the Convention.

32. The Party concerned contends that the refusal to provide a copy of the archaeological study was legally correct, since the requested information is not encompassed by the term “environmental information” — however broadly that term is understood. Moreover, the authority in possession of the requested information, namely the Alba County Department of Culture and National Heritage under the Ministry of Culture, was not able to make a copy of such a large volume of documentation (more than 1,060 pages) due to a lack of technical and financial resources. The communicants were, however, informed that they could inspect and make copies of the requested information at the premises of the Alba County Department.

#### *Mining licences and other mining-related information*

33. The communicants also allege that the mining-related information requested in 2010 (see para. 28 above) is environmental information under article 2, paragraph 3 (b) and (c), of the Convention, and through its ongoing refusal to provide access to the requested information, the Party concerned is in breach of article 4, paragraphs 1 and 2.

34. Furthermore, the communicants note that the exploration/exploitation licences were withheld as classified secrets of service. The communicants stress that these licences are administrative acts awarding rights to private entities to extract mineral resources and are environmental information within article 2, paragraph 3, of the Convention. According to the communicant, the fact that mining activities may have an adverse impact on the environment means that this information should be publicly available. Therefore the Party concerned should have released the information. By its refusal to do so, the Party concerned acted in breach of article 4 of the Convention.

35. With respect to the requested mining licences, the Party concerned claims that they are not covered by the definition of “environmental information”. Rather, the mining licences are classified as “secret of service”. Licences in the mining field are contracts with operators and provide obligations and rights for the parties; as such they are classified under national law (Law 544/2001, in conjunction with Government Decisions 182/2002, 585/2002 and 878/2005) and fall under article 4, paragraph 4 (d), of the Convention.

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<sup>14</sup> E-mail from communicant, 15 June 2015.

36. The Party concerned made no comment on the alleged failure to provide the requested information about the status of Baia Mare and the remedial measures taken.

**Article 6 — public participation in relation to the archaeological discharge certificate procedure**

37. The communicants allege non-compliance with article 6 of the Convention on the ground that the archaeological discharge certificate was issued without a public participation procedure.

38. The Party concerned refutes the communicants' allegation. It argues that the archaeological discharge certificate is an administrative act and claims that no public participation is required by law to issue one. Moreover, there is no obligation for the public authorities to disclose the reasons for the discharge, which are usually of a scientific nature.

**Article 6, paragraph 6 — EIA documentation incomplete**

39. The communicants allege that the EIA documentation for the Rosia Montana mine submitted for public comment was not complete because the following documents were missing:

(a) *The archaeological study concerning the Roman remains.* The communicants allege that the study should have been included in the EIA documentation. Further, the communicants submit that a site verification protocol issued in 2011 incorrectly represented some archaeological monuments while some other monuments studied by the archaeologist were entirely omitted from the EIA documentation;

(b) *The exploration/exploitation licences,* which according to the communicants have been unlawfully withheld as classified secrets of service. The communicants stress that these licences are environmental information (see para. 33 above) and should have been included in the EIA documentation;

(c) *Information about the next phases of the project in the surrounding areas,* such as the Bucium Project.

40. The communicants allege that, because the above-mentioned documents were missing from the EIA documentation, the Party concerned failed to comply with article 6, paragraph 6, of the Convention.

41. The Party concerned refutes the allegation of non-compliance with article 6, paragraph 6. It submits that "the EIA legislation does not require the developer to submit any other studies, except the EIA report, nor licences for exploitation/exploration. These licences cannot impose any limitation to the EIA assessment whose conclusions are mandatory when stipulated in the environmental agreement".<sup>15</sup>

**Article 9, paragraph 4 — timeliness of access to justice regarding access to information**

42. The communicants allege that court procedures concerning access to information in the Party concerned are not timely, and that the Party concerned thus fails to comply with article 9, paragraph 4, of the Convention. In this regard, the communicants cite the following timeline: (a) their court application for access to the archaeological study was submitted on 5 October 2010; (b) the case was registered with the Bucharest Court on 9 December 2010; (c) the Court issued its decision on 9 December 2011 and ordered the

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<sup>15</sup> Party's response to the communication, p. 7.



Ministry of Culture to make available the archaeological documentation requested by the communicants;<sup>9</sup> (d) the Ministry of Culture appealed, and by a decision of 4 October 2012 (written decision received by the communicants in May 2013), the Court of Appeal upheld the Ministry of Culture's appeal denying access to the requested documentation on the ground that the documentation was not held by the Ministry of Culture, but rather by the National Archaeology Commission, which is not a public institution subordinate to the Ministry of Culture but instead an autonomous specialized scientific organism without legal personality in a consultative role to the Ministry of Culture;<sup>10</sup> and (e) if the outcome of the court procedure had been successful for the applicant, the requested information would have been released two years after the initial application and therefore would be useless.

43. The communicants also provide other examples to demonstrate that court proceedings concerning access to environmental information may take several years before a decision is issued.<sup>16</sup>

44. The Party concerned refutes the communicants' allegations of non-compliance with article 9, paragraph 4, and claims they are not substantiated. It points out that, according to a recent study,<sup>17</sup> the majority of cases registered are resolved within six months. It also stresses that, once final, a court decision is enforced, and there is full transparency of all decisions through journals and electronic databases. The Party concerned cites established jurisprudence of the European Court of Human Rights to the effect that the reasonableness of the length of the proceedings is to be seen in the context of the circumstances of a case.<sup>18</sup> The Party submits that two years for one degree of jurisdiction is not excessive in length. Finally, the Party concerned submits that the following legal tools were available to the communicants to speed up the court proceedings, but the communicants did not use them:

- (a) A demand to change the date of the audiences before the national tribunals;
- (b) A demand to accelerate the proceedings by directly invoking the European Convention provisions;
- (c) A demand for application of a fine for judges that intentionally delay the proceedings;
- (d) An action for compensation for intentional delay of the proceedings.<sup>19</sup>

#### **D. Domestic remedies**

45. When their 2010 request for access to the archaeological study was refused, the communicants challenged the refusal in the Bucharest Court, which found in favour of the communicants at first instance. By its decision of 4 October 2012, the Bucharest Court of Appeal subsequently reversed that decision in favour of the Ministry of Culture (see para. 26 above).

46. The communicants also challenged the refusal of the National Agency for Mineral Resources to disclose the exploration/exploitation licences in the courts. In March 2011, the communicants succeeded at first instance but the Agency appealed. The Bucharest Court of Appeal issued its ruling on 13 February 2014, partially overturning the order of the court of first instance (see para. 29 above).

<sup>16</sup> Additional information from the communicants, received 4 February 2013.

<sup>17</sup> Romania, Superior Court of Magistracy, "Report on the State of Justice, 2011", available (in Romanian ) from [http://www.csm1909.ro/csm/linkuri/10\\_04\\_2012\\_\\_48486\\_ro.pdf](http://www.csm1909.ro/csm/linkuri/10_04_2012__48486_ro.pdf).

<sup>18</sup> Buchholz v. Germany, judgement of 6 May 1981.

<sup>19</sup> Party concerned's response to communication, page 16.

### III. Consideration and evaluation by the Committee

47. Romania ratified the Aarhus Convention on 11 July 2000. The Convention entered into force for Romania on 30 October 2001.

#### **Environmental information — article 2, paragraph 3**

##### *Archaeological study and archaeological discharge certificate*

48. The Party concerned states that it does not consider that the archaeological discharge certificate and the documentation substantiating it, including the archaeological study, represent “environmental information” for the purpose of article 2, paragraph 3, of the Convention. It also asserts that the mining licences and other mining-related information requested by the communicants in 2010 are not environmental information within the definition of article 2, paragraph 3.

49. The Committee recalls that the definition of “environmental information” in article 2, paragraph 3 (c), includes, inter alia, any information in any material form on “cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph [3] (b)” of article 2. The archaeological study contains information on the state of “cultural sites and built structures” (i.e., the Roman ruins), which “may be affected by activities or measures, including administrative measures” (i.e., the “activity” of mining, or the “administrative measure” of the archaeological discharge certificate) “affecting or likely to affect the elements of the environment” (i.e., soil, land, landscape and natural sites). In the light of the preceding analysis, the Committee considers the definition of environmental information is clearly wide enough to include the archaeological study. Therefore, access to information could not be refused on the ground that the study was not environmental information.

50. The Committee considers for the same reasons that the archaeological discharge certificate is also within the scope of environmental information under article 2, paragraph 3 (c), of the Convention.

##### *Mining licences and other mining-related information*

51. With respect to the mining licences and the other mining-related information requested by the communicants, the Committee notes that article 2, paragraph 3 (a), of the Convention stipulates that the state of elements of the environment includes soil, landscape and natural sites. Exploration/exploitation of non-ferrous ore is an activity affecting or likely to affect the state of these elements of the environment, within the definition of article 2, paragraph 3 (b). Similarly, a mining licence is an administrative measure affecting or likely to affect the state of elements of the environment. While not at this point of the findings precluding that one of the exceptions in article 4, paragraph 4, may exempt certain aspects of the mining licences and the mining-related information from disclosure, the Committee finds that the licences and other mining-related information requested, including the “quantities of non-ferrous ore” that were entitled to be extracted under those licences, are clearly “environmental information” within the scope of article 2, paragraph 3, of the Convention. Thus, it was not open for the Party concerned to refuse access to this information on the ground that it was not “environmental information”.

52. The Committee wishes to emphasize that once a piece of information that has been requested is found to be “environmental information” within the scope of article 2, paragraph 3, of the Convention there is a presumption that it should be released. A process is triggered by the request whereby there are a series of duties to be performed by the

authorities (see art. 4, paras. 1–7). The Committee will examine some of these duties in more detail below.

#### **Article 4**

##### *Access to the archaeological study*

53. The Party concerned states that, in order to comply with article 4 of the Convention, it was enough to ensure that the public was able to view the archaeological study at the premises of the Alba County Department of the Ministry of Culture free of charge. Moreover, the communicants were informed that they could make copies of the requested documentation, at their own expense. The Party submits that such conduct cannot be regarded as an unjustified refusal to provide access to information.

54. According to the documentation before the Committee, the reason put forward by the Alba County Department of the Ministry of Culture for not providing a copy of the requested information was that it did not have the capacity to deal with the request. It also indicated that it had received other similar requests. In its answers to the Committee's questions received 22 May 2013, the Party concerned stated:

In accordance with Art.4 (1) (b) of the Convention, public authorities may refuse to grant access to environmental information in case “is more reasonable for the respective authority to provide the respective information in another form, in which case the reasons shall be given for making it available in that form”.<sup>20</sup> In the case at hand, the public authorities informed the communicant about the objective reasons for which it could not provide a full copy of the documentation (i.e. large amount of information — over 1060 pages) but allowed the communicant to copy such documentation on the communicant's expense, without imposing any tariff in this respect.

55. The Committee considers that, according to article 4, paragraph 1, of the Convention it is not sufficient to respond to a request for information from the public under article 4 by simply providing access to examine the information free of charge. Article 4, paragraph 1, expressly requires the applicant to be provided with copies of the actual documentation. With respect to the Party concerned's reference to article 4, paragraph 1 (b), the Committee clarifies that article 4, paragraph 1 (b), does not entitle a Party to refuse to provide copies of the requested information, but rather refers to the form the copies of the requested documentation is provided in: for example, paper form, electronic form, or on a CD Rom. Providing free access to examine the requested documentation does not amount to providing a copy of the requested information. Thus, in the present case, the Party cannot rely on article 4, paragraph 1 (b), because the information was not provided to the communicants in any other form nor was it already publicly available in another form.

56. The Committee notes that the public authority would have been entitled under article 4, paragraph 8, of the Convention to make a reasonable charge for providing copies of the requested information so long as a schedule of charges was provided in advance. The authority in question did not do so. It is not clear from the information before the Committee whether an electronic version of the requested information existed. If it did, it would have been reasonable to have made the requested information available to the communicants in that form. However, even if an electronic version did not initially exist, given the authority's statement that it had received other requests for the same information,

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<sup>20</sup> Note that the answer is reproduced as received, and that the citation of the Convention does not reproduce the provision exactly.

an efficient approach may have been for the authority to have the requested pages scanned, and then it would have been able to meet both the requests of the communicants and other similar requests without much additional effort. However, this did not happen, nor was any other means used to provide the communicants with a copy of the requested information.

57. In its communication, the communicants also state that they were denied access to the archaeological study on the ground that the study was the intellectual property of the archaeologist who carried out the study. The Ministry of Culture successfully invoked this legal exception to the rule of access to information before the Bucharest Court of Appeal.<sup>10</sup>

58. The Committee considers it important to clarify that, with regard to intellectual property rights and disclosure, the archaeological study in this case should be treated similarly to EIA studies. In this regard, the Committee recalls its findings on communication ACCC/C/2005/15 (Romania) (ECE/MP.PP/2008/5/Add.7):

28. EIA studies are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law.

29. The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure. This is in particular so in situations where such studies form part of “information relevant to the decision-making” which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure.

30. ... Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule.

59. The Committee considers likewise that the Party concerned in this case could not refuse access to the archaeological study on the ground of article 4, paragraph 4 (e), of the Convention (intellectual property rights). Therefore the Committee finds that the Party concerned failed to comply with article 4, paragraphs 1 and 2, of the Convention in two respects — by its failure to provide the communicants with a physical or electronic copy (see paras. 53–56 above) and for denying access on the grounds of intellectual property rights (see paras. 57–58 above).

#### *Mining licences and mining-related information*

60. In the light of its analysis of the scope and meaning of “environmental information” as defined in article 2, paragraph 3 (b) (see para. 51 above), the Committee considers that the communicants were entitled to copies of the requested mining licences. With respect to the mining-related information requested in 2010, save for the information exempted under article 4, paragraph 4, of the Convention (and bearing in mind that any grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by

disclosure and whether the information requested relates to emissions into the environment), the Committee considers that the Party concerned should have provided the communicants with access to the requested information. This includes copies of the actual documentation, with any information exempted from disclosure redacted.

61. The Party concerned claims that the mining licences and mining-related information fall under the exception in article 4, paragraph 4 (d), namely, that its release would adversely affect confidential commercial and industrial information.<sup>21</sup> Elsewhere,<sup>22</sup> the Committee has expounded its views on how the Party concerned should implement article 4, paragraph 4 (d).

62. The Committee notes that the Party concerned justified its refusal of access to the mining-related information for the first time after the Bucharest Court issued its decision and an appeal against the decision was filed.<sup>23</sup> In the Committee's view, this way of proceeding does not facilitate the implementation of the Convention. Failing to provide reasons for the refusal to provide the requested information in their response to the request significantly limits transparency and accountability in the way the Party concerned implements the Convention and is thus not in keeping with the spirit of the Convention. The Committee observes that, had the National Agency for Mineral Resources provided the reasons for its refusal of access to the requested information, the discussion with respect to the correct implementation of article 4, paragraph 4 (d), could have happened in the context of the proceedings before the Bucharest Court.

63. In the present case, the Committee is not in a position to examine whether any parts of the licences could be exempted from disclosure under article 4, paragraph 4 (d) (see para. 35 above). However, even if article 4, paragraph 4 (d), (or any other ground of refusal set out in article 4, paragraphs 3 and 4) could be applied in this case and aspects of the Rosia Montana or other mining licences could validly be exempted from disclosure, those parts might be redacted and the rest of the requested information disclosed. The Party concerned has provided no evidence to justify the failure to disclose the remainder of the licences, including copies of the actual licences themselves and annexes. Moreover, the analysis of what was to be exempted and what disclosed should have been on a document-by-document basis. The Committee notes that such an analysis is also missing in the decision of the Bucharest Court of Appeal dated 13 February 2014.<sup>13</sup> The Committee stresses that the classification of an entire type of environmental information as exempt from disclosure runs contrary to the letter and spirit of the Convention.

64. Thus, the Committee finds that, owing to its failure to provide the requested mining-related information or to redact those parts validly within the scope of the exceptions in article 4, paragraph 4, and to disclose the remainder, the Party concerned is in non-compliance with article 4, paragraphs 1 and 2, of the Convention.

65. The Committee takes note of the cooperative tone of the letter from the Ministry of Environment and Climate Change to the communicants dated 17 May 2013. However, the Committee also notes that the letter of 17 May 2013 refers the communicants back to the National Agency for Mineral Resources to ask for the majority of the information it had requested. The Committee further notes that the communicants were involved in court proceedings with the Agency for exactly this information from October 2010 until February

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<sup>21</sup> Party concerned's response to the communication, received 5 October 2012, p. 13.

<sup>22</sup> See findings on communication ACCC/C/2010/51 (Romania) (ECE/MP.PP/C.1/2014/12), paras. 90–95.

<sup>23</sup> Appeal No. 985 brought by the National Agency for Mineral Resources before the Bucharest Court of Appeal, 30 March 2011, File No. 2377/3/CA/2010 (see annex III to the communication).

2014 (see paras. 28 and 29 above). At the time of the adoption of these findings, there is no indication that the Agency's position has changed.

**Article 4, paragraph 6 — separation and disclosure of the part of information that is not exempted**

66. The Committee asked the Party concerned whether its legislation transposed the requirement in article 4, paragraph 6, of the Convention: that, if information exempted from disclosure under the Convention can be separated out without prejudice to the confidentiality of the information exempted, public authorities should make available the remainder of the requested information. In response the Party concerned informed the Committee that its legislation (Governmental Decision No. 878/2005, art. 15, para. 1) provides that "The environmental information held by or for the public authorities, which has been requested, is partially supplied when its separation from the information falling under the provisions of Article 11 para. (1) d) and e) or of Article 12 para. (1), is possible".

67. In a previous communication, the Committee has received indications that article 4, paragraph 6, may not be regularly observed in practice by the public authorities of the Party concerned.<sup>24</sup> Such indications are again present in the present communication where in none of the instances of requests for access to environmental information the authorities took the necessary steps to ensure that the non-confidential portion of the information was made available.

68. The Committee finds that the Party concerned has a legal basis for the correct implementation of article 4, paragraph 6, namely article 15, paragraph 1, of Governmental Decision No. 878/2005. Nevertheless the Committee considers there is enough evidence before it to conclude that, in practice, article 4, paragraph 6, of the Convention is not regularly observed by the authorities of the Party concerned. Thus the Committee finds that, by failing to ensure that the non-confidential portion of the information is made available, the Party concerned fails to comply with article 4, paragraph 6, of the Convention.

69. In addition, the Committee notes that the authorities' obligation under article 4, paragraph 6, of the Convention is not mentioned in the flyers published by the Ministry of Environment in 2007 and 2009, nor the guidance published in paper and electronic form by the National Environmental Protection Agency, each explaining the public's rights to have access to environmental information, and how they may do so. In the Committee's view the public should be informed about the whole range of rights provided by the Convention.

**Article 4, paragraph 7 — statement of reasons for a refusal of a request for information**

70. Neither the communicants nor the Party concerned have raised the issue of whether Romanian authorities provide reasons for refusals of requests for environmental information. It is undisputed that at least one of the refusals for access to information — the 2010 request for access to mining-related information (see para. 28 above) — was a tacit one and no reasons were provided. Neither were reasons provided for the express refusal of the request for access to the Archaeological Study in 2010 (see para. 26 above).

71. Article 4, paragraph 7, of the Convention contains explicit requirements, *inter alia*, that refusals must be in writing if the information request was in writing or the applicant so requests and also that the reasons for a refusal must be stated.

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<sup>24</sup> See ECE/MP.PP/C.1/2014/12, para. 98.

72. The Committee notes that providing a statement of reasons under article 4, paragraph 7, not only helps the administration and the public to understand the Convention, but also provides higher administrative authorities and the court with a better basis to assess whether the officials have correctly implemented the law. Under the Romanian legal system where declassification of information takes additional time, a statement of reasons for a refusal of a request for information can also reduce the duration of a procedure.

73. In at least two other cases which were brought before the Committee, Romanian authorities left the requests for access to environmental information unanswered without stating the reasons for refusal.<sup>25</sup>

74. For the above-mentioned reasons, the Committee finds that, by failing to provide reasons for the refusal of the request for the mining related information in 2010 (see para. 28), the Party concerned failed to comply with article 4, paragraph 7, of the Convention.

#### **Article 6, paragraph 6 — incompleteness of the EIA documentation**

75. The communicants claim that the Party concerned has failed to comply with article 6, paragraph 6, of the Convention in respect of the requested archaeological study and other information (see para. 39 above).

76. According to the Party concerned,<sup>26</sup> the communicants were entitled to have access for examination, free of charge, to the archaeological study. The Party concerned did not comment on the fact that the communicants had access to the archaeological study only long after the period of public consultations on the EIA report.

77. The Committee was not provided with evidence as to the moment when the archaeological study was finished. Thus it is not clear whether the archaeological study could have been included in the EIA documentation for the purposes of the public consultations.

78. In addition, the Committee notes that a final EIA decision for the Rosia Montana mine has not been taken yet. It would thus still be possible for the Romanian environmental authority, or, if necessary, the Romanian courts, to consider the communicants' allegation of failure to comply with article 6, paragraph 6, and if there was such a failure, to address it. For this reason the Committee is not in a position to come to any conclusion regarding the alleged unlawfulness of the EIA procedure with respect to the above-mentioned facts. The Committee thus does not find the Party concerned to be in non-compliance with article 6, paragraph 6, of the Convention.

#### **Article 6, paragraphs 3 and 7 — issuance of the archaeological discharge certificate**

79. The communicants submit that the decision to grant the archaeological discharge certificate should be seen as part of the wider decision-making procedure to permit the mine. A decision-making procedure involving multiple decisions of a "permitting" nature is sometimes called a "tiered decision-making" procedure. The Committee recalls its findings in communication ACCC/C/2006/17 (European Community), in which it found that article 6 does not necessarily require "that the full range of public participation requirements set out in paragraphs 2 to 10 of the article be applied for each and every decision on whether to permit an activity of a type covered by paragraph 1 ... Some such

<sup>25</sup> ECE/MP.PP/C.1/2014/12, paras. 30 and 38.

<sup>26</sup> See answers by the Party concerned to the Committee's questions, received 22 May 2013.

decisions might be of minor or peripheral importance ... therefore not meriting a full-scale public participation procedure.”<sup>27</sup>

80. According to the Party concerned, “the archaeological discharge certificate is issued following completion of archaeological research procedure (6 years for Carnic). The discharge certificate defines (i) areas that are important from archaeological perspective and have to be protected in situ and (ii) areas in which other activities can be carried out.”<sup>28</sup>

81. The Party concerned indicates that a large amount of the EIA documentation (namely eight of its volumes) deals with the archaeological patrimony of the proposed Rosia Montana site. The Committee considers that this clearly leads to a conclusion that the archaeological site and its legal status are not of minor or peripheral importance. In the Committee’s view the issuance of the archaeological discharge certificate was a fundamental step in the decision-making process which resulted in a significant change of the subject matter of the EIA. In the present case there is a clear relation between the two procedures — the EIA and the procedure for issuing the archaeological discharge certificate. Thus, in this case the two decisions were part of a “tiered decision-making procedure”.

82. Moreover, the Committee considers that the assertion of the Party concerned that there was no rationale to involve the public in the issuance of the discharge certificate as “the general public could not override the judgement of experts on such matters as to whether a particular item’s archaeological value was properly assessed or not”<sup>28</sup> fails to take into account the fact that the public includes persons with different expertise, knowledge, opinions or experience. It is thus contrary to the objectives of the Convention.

83. The importance of the procedure for issuing the archaeological discharge certificate was such that the Party concerned should have provided sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making (art. 6, para. 3) and an opportunity for the public to submit comments, information, analysis or opinions (art. 6, para. 7). For the above-mentioned reasons the Committee finds that, by not providing for any public participation in the procedure for issuing the archaeological discharge certificate, the Party concerned failed to comply with article 6, paragraphs 3 and 7, of the Convention.

#### **Article 9, paragraph 4 — timeliness of court procedures for access to information**

84. Article 9, paragraph 1, of the Convention requires Parties to ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused in part or in full, inadequately answered, etc., has access to a review procedure before a court of law or another independent and impartial body established by law. Article 9, paragraph 4, requires that the procedures referred to in article 9, paragraphs 1, 2 and 3, be, *inter alia*, timely.

85. The communicants have put before the Committee eight court proceedings regarding requests for access to information to which they have been party.<sup>29</sup> At the time the list of cases was provided to the Committee, after over two years of proceedings one of the cases had been concluded. The other cases were all ongoing, several for more than two years and one for well over three years. Included in this list were the communicants’ court proceedings with the National Agency for Mineral Resources regarding access to various

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<sup>27</sup> ECE/MP.PP/2008/5/Add.10, para. 41.

<sup>28</sup> See answers by the Party concerned to the Committee’s questions, received 22 May 2013.

<sup>29</sup> Additional information in relation to the Party’s response from the communicants, received on 4 February 2013, pp. 7–10.



mining-related information.<sup>12</sup> In that case, the communicants had filed the original proceedings in October 2010, and the decision of the Court of Appeal was ultimately issued on 13 February 2014 — i.e., almost three-and-a-half years after the communicants' original proceedings were filed.

86. The Party concerned refutes the allegation that its court procedures are not timely, and states that in the light of jurisprudence of the European Court of Human Rights, court proceedings with a duration of two years per degree of jurisdiction is not excessive in length. In addition the Party concerned points to a national 2011 Report on the State of Justice<sup>17</sup> by the Superior Council of Magistracy, which concluded that the majority of cases registered in the courts of law of the Party concerned were solved in less than six months per jurisdiction level. Finally, the Party concerned draws attention to the opportunities a litigant has for accelerating a court procedure which, according to the Party concerned, the communicants have not used.

87. In the view of the Committee, the jurisprudence of the European Court of Human Rights deals with cases of greater variety than access to environmental information cases. For that reason the Committee does not find the European Court of Human Rights jurisprudence to be directly applicable when considering allegations under article 9, paragraph 4, in relation to article 9, paragraph 1, of the Convention. However, some of the criteria used by the European Court of Human Rights, such as the complexity of the factual or legal issues raised by the case or the issue at stake for the applicant, are relevant here also. In the light of the first of these criteria, the Committee considers that an access to environmental information case would generally be neither factually nor legally complex. The Committee notes that the National Agency for Mineral Resources did not lodge a defence to the first instance court proceedings regarding access to mining-related information<sup>12</sup> — i.e., the factual and legal complexity of the case apparently did not motivate the defendant to make a submission before the court. As for the second criterion, in both of the communicants' court proceedings subject to the present communication the requested information could have helped the applicants to more effectively participate in the repeat procedure for EIA of the Rosia Montana mining project. Therefore, the issues at stake required timely final decisions.

88. As for the reference by the Party concerned to the 2011 Report on the State of Justice, the Committee finds that six months as an average duration for court procedure per jurisdiction in the Party concerned is considerably shorter than the duration of each of the eight access to environmental information court procedures to which the communicants refer. The Committee notes that in at least one instance the information requested was relevant to an ongoing environmental decision-making procedure subject to the Convention. Since the court procedure did not provide access to the requested information within a time frame that would enable that information to be used in the ongoing environmental decision-making procedure, the Committee finds that the court procedure for access to the requested information was neither timely nor provided an effective remedy as required under article 9, paragraph 4, of the Convention.

89. With respect to any legal tools available to the applicants in domestic court proceedings to speed up the process, the Committee observes that these tools should be not only available to applicants, but also to defendants. Defendants thus bear equal responsibility to use such procedural tools to prevent delays in the court proceedings. Article 9, paragraph 1, of the Convention clearly recognizes the particular need for the speedy resolution of review procedures concerning information requests in comparison to other types of review procedures, and the fact that overloaded court systems may struggle to be able to meet these needs. In the circumstances where a Party provides for the review of information requests by a court of law, article 9, paragraph 1, requires the Party to ensure that such a person also has access to an expeditious procedure established by law that is

free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. The Committee has not received any information from the parties to indicate whether or not such an alternative expeditious procedure exists in the Party concerned, and if it does, why the communicants did not use it.

90. Thus, in the light of the duration of the communicants' eight cited court procedures concerning access to environmental information, and bearing in mind that the Party concerned did not provide any examples of access to environmental information court procedures that were completed in a considerably shorter time, the Committee finds that the Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4, of the Convention.

## **IV. Conclusions and recommendations**

91. 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**

92. The Committee finds that:

(a) The Party concerned failed to comply with article 4, paragraphs 1 and 2, of the Convention in two respects: by its failure to provide the communicants with a physical or electronic copy of the requested archaeological study and for denying access on the grounds of intellectual property rights (para. 59);

(b) Owing to its failure to provide the requested mining-related information or to redact those parts validly within the scope of the exceptions in article 4, paragraph 4, and to disclose the remainder, the Party concerned is in non-compliance with article 4, paragraphs 1 and 2, of the Convention (para. 64);

(c) By failing to ensure that the non-confidential portion of the information is made available, the Party concerned fails to comply with article 4, paragraph 6, of the Convention (para. 68);

(d) By failing to provide reasons for the refusal of the request for the mining-related information in 2010, the Party concerned failed to comply with article 4, paragraph 7 of the Convention (para. 74);

(e) By not providing for any public participation in the procedure for issuing the archaeological discharge certificate, the Party concerned failed to comply with article 6, paragraphs 3 and 7, of the Convention (para. 83);

(f) The Party concerned has failed to ensure that the review procedures for information requests referred to in article 9, paragraph 1, are timely and provide an effective remedy, as required by article 9, paragraph 4 (para. 90).

### **B. Recommendations**

93. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures request in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned:

(a) Take the necessary legislative, regulatory or administrative measures and practical arrangements, as appropriate, to ensure the correct implementation of the Convention with respect to:

- (i) Article 2, paragraph 3: the definition of “environmental information”;
- (ii) Article 4, paragraph 4: the grounds for refusal and the requirement to interpret those grounds in a restrictive way, taking into account the public interest served by disclosure;
- (iii) Article 4, paragraph 6: the requirement to separate confidential from non-confidential information whenever possible and to make available the latter;
- (iv) Article 4, paragraph 7: the requirement to provide reasoned statements for refusing a request for access to information;

(b) Review its legal framework in order to identify cases where decisions to permit activities within the scope of article 6 of the Convention are conducted without effective participation of the public (art. 6, paras. 3 and 7), and to take the necessary legislative and regulatory measures to ensure that such situations are adequately remedied;

(c) Review its legal framework and undertake the necessary legislative, regulatory and administrative measures to ensure that the court procedures for access to environmental information are timely and provide adequate and effective remedies;

(d) Provide adequate practical arrangements or measures to ensure that the activities listed in subparagraphs (a), (b) and (c) above are carried out with broad participation of the public authorities and the public concerned.

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