

## **Findings and recommendations with regard to communication ACCC/C/2014/118 concerning compliance by Ukraine**

**Adopted by the Compliance Committee on 24 July 2021<sup>1</sup>**

### **I. Introduction**

1. On 18 November 2014, the non-governmental organization Environment-People-Law (the communicant) 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 noncompliance with the Convention with respect to the production-sharing agreements (PSAs) and mineral extraction permits for the Yuzivska and Oleska oil fields.
2. More specifically, the communicant alleged that the Party concerned failed to comply with its obligations with article 3(1), article 4(1), (3), (4) and (6), article 6(1)-(4) and (6)-(9) and article 9(2), of the Convention in connection with these PSAs and the related mineral extraction permits.
3. At its forty-eighth meeting (24-27 March 2015), the Committee determined on a preliminary basis that the communication was admissible. On 26 March 2015, the communicant provided additional information regarding the location of one of the oil fields in question.
4. 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 29 June 2015.
5. On 25 May 2016, the communicant provided additional information.
6. On 20 June 2016, the Party concerned submitted an update.
7. On 29 March 2017 and 23 November 2017, the communicant submitted letters kindly requesting the secretariat to invite the Party concerned to submit its response to the communication.
8. On 9 March 2018, the Executive Secretary of the UNECE sent the Party concerned a letter to express the Committee's serious concern at the ongoing failure of the Party concerned to provide its response to the communication.
9. On 24 April 2018, the Party concerned provided its response to the communication.
10. On 23 May 2018, the secretariat sent questions from the Committee to the communicant. The communicant provided its reply on 5 June 2018, in which it withdrew its systemic allegations, and those concerning the legislation of the Party concerned and article 3(1). On 27 July 2018, the secretariat sent questions to the Party concerned. The Party concerned submitted its reply on 8 November 2018.
11. On 28 January 2019, the communicant submitted additional information.

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

12. The Committee held a hearing to discuss the substance of the communication at its sixty-third meeting (Geneva, 11-15 March 2019), with the participation of representatives of the communicant and the Party concerned.
13. On 17 December 2019 and 11 March 2020, the communicant submitted updates on recent legislative developments.
14. On 10 May 2021, the Committee sent questions to the communicant for its written reply and on 24 May 2021, the communicant provided its replies thereto.
15. The Committee completed its draft findings through its electronic decision-making procedure on 13 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on that date to the Party concerned and the communicant for their comments. Both were invited to provide comments by 23 July 2021.
16. Neither the Party concerned nor the communicant sent comments on the Committee's draft findings.
17. The Committee proceeded to finalize its findings in closed session and adopted its findings through its electronic decision-making procedure on 24 July 2021. It agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

## **II. Summary of facts, evidence and issues<sup>2</sup>**

### **A. Legal framework**

#### **Legislation on production sharing agreements**

##### *Definition and legal characteristics of production sharing agreements*

18. Article 4(1) the Law On Production Sharing Agreements (Law on PSAs) defines a PSA as a contract by which:

one party, Ukraine (hereinafter “the State”), assigns the other party, the investor, [the right] to prospect for, explore and extract mineral resources in the designated subsoil area(s) and to perform the works provided for by the agreement for a specified period of time, whereas the investor undertakes to perform the assigned works at its own cost and risk, with further compensation of the costs and receipt of payment (remuneration) in the form of a portion of the profit production.<sup>3</sup>

19. Pursuant to article 2(2) of the Law:

The relations arising during prospecting, exploration and extraction of mineral resources, sharing of produced production, as well as transportation, treatment, storage, processing, use, sale or other disposal thereof, shall be governed by a production-sharing agreement, which shall be concluded pursuant to this Law.<sup>4</sup>

20. Pursuant to article 4(3) of the Law:

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<sup>2</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.

<sup>3</sup> Communication, para. 53, and annex 28, p. 2.

<sup>4</sup> Communication, annex 28, p. 2.

The State shall ensure the issuance to the investors, in compliance with established procedure, of [...] special permits to use subsoil and licenses to carry out the activity associated with the prospecting (exploration) and operation of mineral deposits, [...] as well as other permits, authorizations, licenses related to the use of subsoil, performance of the works, construction of the structures stipulated by a production sharing agreement.

Said documents shall be issued pursuant to the requirements of Ukrainian legislation for the term of the agreement, unless otherwise stipulated by the laws of Ukraine, and shall lose effect or be amended under the terms and conditions set forth in the agreement.<sup>5</sup>

21. According to article 8(2) of the Law, a PSA:

shall stipulate: a list of types of the investor's activity and a program of mandatory works, indicating performance deadlines, scopes and types of financing, technological equipment and other indices which shall not be lower than those proposed by the investor in the tender application, as well as other essential terms and conditions [...including...] a plan for restoration of the lands damaged in the course of prospecting, exploring and extracting mineral resources; [...] requirements regarding rational and comprehensive use and protection of the subsoil and the environment, safety and protection of the personnel involved in the works stipulated by the agreement; the procedure for conserving or liquidating of mining facilities.<sup>6</sup>

22. Article 8(4) of the Law provides:

A production-sharing agreement shall include as its integral parts the annexes which the Parties refer to in the agreement, in particular an exhaustive list of the rules, norms, standards for performing the works associated with the use of subsoil, protection of the environment, the use and processing of mineral raw materials, calculations, plans, lists, programs, tables, etc., and, if necessary, conclusions of the experts (Expert Evaluation Statements), scientists and specialists involved in drafting the agreement.<sup>7</sup>

23. PSAs made with respect to hydrocarbons must pursuant to article 9 of the Law on PSAs further stipulate essential conditions, such as the procedure and time-frames for evaluating the environmental pollution level in the subsoil exploitation area as well as the scope and time-frames for the implementation of environmental protection measures.<sup>8</sup>

### **Public participation in decision-making on extractive activities**

#### *Provisions in force prior to December 2017*

24. Prior to December 2017, the Law on PSAs was silent on the involvement of the public concerned at the stages of the expertiza, the approval of the draft PSA by the local councils, the adoption of the final draft by the Cabinet of Ministers, or at any other stage.<sup>9</sup>

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<sup>5</sup> Communication, para. 64, and annex 28, p. 2.

<sup>6</sup> Communication, para. 54, and annex 28, pp. 6-7.

<sup>7</sup> Communication, annex 28, p. 7.

<sup>8</sup> Communication, para. 55, and annex 28, p. 8.

<sup>9</sup> Communication, para. 65.

25. The procedure for the issuance of special permits for the use of mineral resources, which are approved by decree of the Cabinet of Ministers contained no provisions on public participation either.<sup>10</sup>

26. According to article 13 of the Law on Ecological Expertiza (Law on Expertiza), performance of an expertiza was obligatory for environmentally hazardous activities.<sup>11</sup> Extraction of minerals including natural gas, regardless of the amount of extraction or the technology, is included in the List of Environmentally Hazardous Activities approved by Decree No. 808 of the Cabinet of Ministers on 28 August 2013.<sup>12</sup>

27. The Law on Expertiza contained several provisions requiring public participation in the decision-making on an expertiza. Pursuant to article 10, promoters of projects listed as environmentally hazardous were obliged to declare through mass media their intent to carry out such activity in a special statement on the ecological consequences of the activity and the public authorities carrying out the expertiza were obliged to inform the public of its conclusions through mass media.<sup>13</sup> Pursuant to article 11 of the Law, entities responsible for performing the expertiza were to conduct public hearings or open meetings with the aim of taking into account public opinion. Moreover, during the expertiza, the public could submit comments, suggestions and recommendations. Public opinion was to be taken into account during the preparation of the conclusions of the expertiza and the taking of a decision in relation to the further implementation of a project.<sup>14</sup>

*Provisions in force as of December 2017*

28. Article 17(4), paragraph 20, of the Law “On environmental impact assessment” (2017 EIA Law), amended article 11(2) of the Law on PSAs by requiring draft PSAs to be subject to an EIA.<sup>15</sup>

29. Article 4(7) of the 2017 EIA Law provides that “the competent local authority and the competent central authority shall ensure free of charge public access to all information (with due account of the requirements of paragraph 8 of this article) relevant to the decision-making as it becomes available.”<sup>16</sup>

30. Article 4(8) of the 2017 EIA Law provides that “in exceptional cases where the documentation on the proposed activity or the environmental impact assessment report contain confidential information on the developer, such information upon the reasoned request of the developer shall be detached and the remaining information shall be provided to the public for examination. However, the information on the environmental impact, including quantitative and qualitative indicators of emissions and discharges, physical and biological factors of impact, use of natural resources and waste management shall be open and access thereto shall not be restricted.”<sup>17</sup>

31. Public participation is provided under article 7 of the EIA Law from the scoping stage to the public discussion on the EIA report.<sup>18</sup>

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<sup>10</sup> Communication, para. 66.

<sup>11</sup> Communication, para. 68, and annex 29, p. 3.

<sup>12</sup> Communication, para. 68.

<sup>13</sup> Communication, para. 72, and annex 29, p. 3.

<sup>14</sup> Communication, para. 72, and annex 29, p. 3.

<sup>15</sup> Party’s response, p. 2.

<sup>16</sup> Party’s reply to the Committee’s questions, 28 November 2018, p. 4

<sup>17</sup> Party’s reply to the Committee’s questions, 28 November 2018, p. 4

<sup>18</sup> Party’s response, p. 2.

*Provisions in force as of December 2019*

32. On 19 December 2019, the Law on Amendments to Certain Legislative Acts of Ukraine on Regulation of Amber Extraction No. 2240 entered into force.<sup>19</sup> Article 5(3) of the law amended article 11(2) of the PSA Law removing the requirement to subject draft PSAs to an EIA.

33. Following the 2019 amendment, article 11(2) of the Law on PSAs now requires PSAs to undergo an EIA in the course of the PSA's implementation.<sup>20</sup>

**Timeframes to appeal a judgment**

34. Article 160 of the Code of Administrative Proceedings provides that when closing a proceeding before it, the court shall immediately issue a ruling. In exceptional cases, depending on the complexity of the case, the drafting of the judgment in full may be postponed for a period not exceeding five days from the date of the final hearing, but the court must declare at that same session the introductory and operative part of the ruling.<sup>21</sup>

35. Article 212(2) of the Code of Administrative Procedure provides that a cassation appeal against court judgements shall be filed within twenty days after the judgment comes into effect. In the case of drafting a judgment in full in accordance with article 160 of the Code, the time is counted from the date of drafting the resolution in full.<sup>22</sup>

**B. Facts**

**PSAs and mineral extraction permits for the Yuzivska and Oleska oil fields**

*Yuzivksa oil field*

36. The Yuzivska oil field, which is 7,886 square kilometres, is situated in the Dnieper-Donetsk oil and gas basin in the territory of Donetsk and Kharkiv regions of Ukraine.<sup>23</sup>

37. In November 2011 the Government announced by decree a tender for the Yuzivska oil field.<sup>24</sup> The Government made it obligatory for any bidder to include a state associated company (Nadra Yuzivska Ltd.) as a co-investor.<sup>25</sup> In May 2012 the Dutch-British company Shell was announced to be the winner and negotiations commenced thereafter.<sup>26</sup>

38. On 16 and 17 January 2013, the draft Yuzivska PSA was approved by the Donetsk and Kharkiv regional councils, respectively. Neither of the regional councils published the draft, nor invited or collected comments from the public.<sup>27</sup>

39. On 23 January 2013, the Government approved the final draft of the PSA by decree and appointed its representative to sign the agreement.<sup>28</sup> On 24 January 2013, the 50 year-

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<sup>19</sup> Communicant's update, 11 March 2020, p. 1.

<sup>20</sup> Communicant's update, 11 March 2020, p. 1 and communicant's reply to the Committee's questions, 24 May 2021, p. 3.

<sup>21</sup> Communicant's reply to the Committee's questions, 24 May 2021, pp. 5-6.

<sup>22</sup> Communicant's reply to the Committee's questions, 24 May 2021, p. 8.

<sup>23</sup> Communication, para. 7, and annex to the additional information from the communicant, 28 January 2019, p. 1.

<sup>24</sup> Communication, para. 8.

<sup>25</sup> Additional information from the communicant, 28 January 2019, p. 1.

<sup>26</sup> Communication, para.8.

<sup>27</sup> Communication, para. 9.

<sup>28</sup> Communication, para. 10.

long PSA for the exploration and production of hydrocarbons at the Yuzivska field was signed by the Government, Shell and Nadra Yuzivska Ltd.<sup>29</sup>

40. On 6 March 2013, mineral extraction permit no. 4345 was issued for a period of 50 years (until 2063) to Shell and Nadra Yuzivska Ltd. to implement the PSA, and was included as an addendum to the PSA.<sup>30</sup> The two-page permit contains basic information such as the permit number, date of issuance, the coordinates of the field, hydrocarbons to be extracted, the period of the permit's validity, and information on the two permit holders.<sup>31</sup> The terms and conditions for the planned extraction activities are not included in the permit which states that these are set out in the PSA.<sup>32</sup>

41. On 27 December 2013, the Ministry of Ecology and Natural Resources (MoE) issued a positive state ecological expertiza conclusion on the Yuzivska PSA.<sup>33</sup>

42. In September 2015, Shell withdrew from its contract and ceased to implement activities under the PSA.<sup>34</sup> Nadra Yuzivska became the sole investor in the Yuzivska PSA.<sup>35</sup> A new tender was carried out to attract a new investor, which was won by Yuzgaz B.V. Thereafter, the Government approved the assignment of participating interests to Yuzgaz B.V.<sup>36</sup>

#### *Oleska oil field*

43. The Oleska oil field, which is 6,324 square kilometres, is situated within the Lviv-Lublin basin on the territory of Lviv and Ivano-Frankivsk regions of the Party concerned.<sup>37</sup>

44. On 27 August 2013, the MoE issued a positive state ecological expertiza conclusion on a draft PSA for the Oleska oil field.<sup>38</sup>

45. On 5 November 2013, the Government, Chevron Ukraine BV, and Nadra Oleska Ltd. (Ukraine) signed a 50 year-long PSA for the exploration and production of hydrocarbons at the Oleska field.<sup>39</sup>

46. Chevron subsequently withdrew from the PSA.<sup>40</sup> However, the Oleska PSA remains valid, and may only be terminated prematurely in accordance with the Law on PSAs.<sup>41</sup>

#### **Access to information**

##### *Access to the text of the Yuzivska and Oleska PSAs*

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<sup>29</sup> Communication, para. 7, and additional information from the communicant, 28 January 2019, p. 1.

<sup>30</sup> Communication, para. 35, and annex to the additional information from the communicant, 28 January 2019, pp. 1-2.

<sup>31</sup> Additional information from the communicant, 28 January 2019, p. 3, and annex.

<sup>32</sup> Additional information from the communicant, 28 January 2019, p. 3, and annex, p. 2.

<sup>33</sup> Communication, para. 31, and annex 25.

<sup>34</sup> Additional information from the communicant, 28 January 2019, p. 1, and Party's response to the communication, p. 1.

<sup>35</sup> Additional information from the communicant, 28 January 2019, p. 1.

<sup>36</sup> Additional information from the communicant, 28 January 2019, p. 2.

<sup>37</sup> Additional information from the communicant regarding location of the oil field, 26 March 2015, and communicant's reply to the Committee's questions, 5 June 2018, p. 3.

<sup>38</sup> Communication, para. 31 and annex 24.

<sup>39</sup> Communication, para. 23.

<sup>40</sup> Party's response to the communication, pp. 1, 3.

<sup>41</sup> Party's reply to the Committee's questions, 8 November 2018, p. 1, and communicant's reply to the Committee's questions, 5 June 2018, p. 3.

47. In February 2013, the communicant filed a request to the MoE requesting access to a draft of the Oleska PSA<sup>42</sup> and in November 2013 to the signed Oleska PSA.<sup>43</sup>

48. In March 2013, the communicant filed a request to the MoE and the State Geology and Minerals Service (GMS) requesting access to the draft Yuzivska PSA.<sup>44</sup>

49. In April 2013, the communicant filed a request to the GMS and the Cabinet of Ministers requesting access to the draft Yuzivska PSA submitted for approval to the Kharkiv and Donetsk regional councils.<sup>45</sup> In April 2013, the communicant made a request to the Cabinet of Ministers requesting access to the final draft PSA as approved by decree of the Cabinet of Ministers and the signed PSA itself.<sup>46</sup>

50. On each occasion, access was refused on the grounds that the requested information was “confidential”.<sup>47</sup>

51. In March 2016, the communicant made requests to the Cabinet of Ministers and the MoE for access to the 2013 resolutions of the Cabinet of Ministers approving the final draft PSAs for both the Yuzivska and Oleska fields. In its requests, the communicant cited a 28 January 2016 ruling by the Supreme Administrative Court in a case brought by two other NGOs which had found that the draft Yuzivska PSA had illegally been withheld.<sup>48</sup> Access to the PSAs was still denied.<sup>49</sup>

52. In 2017 and 2018 the communicants made further information requests concerning the Yuzivska and Oleska PSAs, all of which were denied.<sup>50</sup>

53. The preliminary and final drafts, as well as the signed text of the Yuzikova and Oleska PSAs, have not been released to the public to date.<sup>51</sup> The details of both PSAs remain undisclosed.<sup>52</sup>

#### *Access to the Yuzivska and Oleska mineral extraction permits*

54. In March 2013, the GMS amended its list of “official use only” information to include “information on the terms of Yuzivska PSA” in its list of information with limited access.<sup>53</sup>

55. In August 2013, the communicant made a request to the GMS asking for a copy of a mineral extraction permit for the Yuzivska field.<sup>54</sup> In October 2014, the communicant made a request for a copy of the mineral extraction permit for the Oleska field.<sup>55</sup> On both occasions, access was refused on the grounds that the permits were “for official use only”.<sup>56</sup>

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<sup>42</sup> Communication, para. 25, and annex 17.

<sup>43</sup> Communication, para. 26, and annex 19.

<sup>44</sup> Communication, para. 14, and annex; communication, para 15, and annex 3.

<sup>45</sup> Communication, para. 16, and annex 5; communication, para 17, and annex 7.

<sup>46</sup> Communication, para 18, and annex 9.

<sup>47</sup> Communication, para. 25, and annex 18; communication, para. 26, and annex 20; communication, para. 14, and annex 2; communication, para 15, and annex 4; communication, para 16, and annex 6; communication, para 17, and annex 8; communication, para 18, and annex 10.

<sup>48</sup> Additional information from the communicant, 25 May 2016, p. 2.

<sup>49</sup> Additional information from the communicant, 25 May 2016, p. 2.

<sup>50</sup> Communicant’s reply to the Committee’s questions, 5 June 2018, p. 3.

<sup>51</sup> Communicant’s reply to the Committee’s questions, 24 May 2021, p. 1.

<sup>52</sup> Communicant’s reply to the Committee’s questions, 5 June 2018, p. 3.

<sup>53</sup> Communication, para 21, and annex 14.

<sup>54</sup> Communication, para. 22, and annex 15.

<sup>55</sup> Communication, para. 28, and annex 22.

<sup>56</sup> Communication, para. 22, and annex 16; communication, para. 28, and annex 23.

56. On 11 February 2015, the Lviv Appellate Administrative Court ordered the GMS to disclose the Yuzivska mineral extraction permit to the communicant. After twice being fined by the State Executive Office for failing to comply with the Court's order, the GMS provided the permit to the communicant on 29 June 2016.<sup>57</sup>

57. On 5 January 2017, the communicant received a copy of the Oleska mineral extraction permit.<sup>58</sup>

### **Public participation in the decision-making on the Yuzivska and Oleska PSAs and permits**

58. There was no public participation in the preparation of either the draft Yuzivska or Oleska PSAs.<sup>59</sup>

59. There was no public participation in the state ecological expertizas for either the Yuzivska or Oleska PSAs.<sup>60</sup>

60. There was no public participation in the course of issuing the mineral extraction permits for the Yuzivska and Oleska fields.<sup>61</sup>

### **Access to justice**

61. In August 2013, the communicant filed an administrative lawsuit with the Kyiv-city District Administrative Court alleging a breach of its right to participate in the decision-making process on the Yuzivska PSA as a result of the failure to carry out a state ecological expertiza on the PSA prior to its adoption.<sup>62</sup> The lawsuit asked the court to declare illegal the failure to carry out such an expertiza and entering into the PSA without a prior obligatory expertiza. It also requested the court to order the Cabinet of Ministers to refrain from entering into the Oleska PSA, which was at the time still under negotiation, prior to carrying out an expertiza.<sup>63</sup>

62. On 14 March 2014, the Kyiv-city District Administrative Court declared the actions of the government to be lawful and dismissed all the communicant's claims.<sup>64</sup>

63. In its judgment of 10 July 2014, the Kiev Appellate Administrative Court held that the communicant did not have standing to challenge the legality of the Yuzivska PSA because it had not demonstrated how its interests were affected by the PSA.<sup>65</sup>

## **C. Domestic remedies and admissibility**

### **Litigation concerning access to the text of the Yuviska PSA**

64. In May 2013, the communicant filed an administrative lawsuit seeking a declaratory judgment on the illegality of the refusal to provide access to the text of the Yuviska PSA and

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<sup>57</sup> Additional information from the communicant, 28 January 2019, p. 3; communicant's reply to the Committee's questions, 24 May 2021, pp. 1-2.

<sup>58</sup> Additional information from the communicant, 28 January 2019, p. 3; communicant's reply to the Committee's questions, 24 May 2021, pp. 1-2.

<sup>59</sup> Communication, para 33.

<sup>60</sup> Communication, para 33.

<sup>61</sup> Communication, para. 35.

<sup>62</sup> Communication, para. 37.

<sup>63</sup> Communication, para. 37.

<sup>64</sup> Communication, para. 38, and annex 35.

<sup>65</sup> Communication, para. 39, and annex 36.



asking the court to require the Cabinet of Ministers to provide the communicant with a copy of the agreement.<sup>66</sup>

65. In June 2013, the court ruled that the legislation then in force on the negotiation and approval of PSAs does not include an obligation of public authorities to make drafts of PSAs publicly available. The court rejected the communicant's claims, which were based on the Access to Public Information Law. The court ruled that, since the parties to the agreement did not give consent to disclosure, the Government acted in accordance with the Law and dismissed the communicant's claims. The communicant submits that the court disregarded the fact that the defendant in the case, namely the Government, was one of the parties to the PSA. It also never considered whether the requested information, given its environmental nature, could be classified or if the public interest in disclosure outweighed confidentiality concerns, even though the communicant raised these questions.<sup>67</sup>

66. In October 2013, the court of appeal upheld the lower court on the same ground. The communicant's second appeal was also dismissed.<sup>68</sup>

#### **Litigation concerning access to a copy of the Yuzivska mineral extraction permit**

67. In September 2013, the communicant filed another administrative lawsuit seeking a court order against the GMS obliging it to provide access to a copy of the mineral extraction permit for the Yuzivska PSA. The court held that, since the permit contained some terms of the Yuzivska PSA which it was was confidential, the defendant's denial of a copy of the permit was legal. To support its conclusion the court cited the GMS's list of "official use only" information, which includes information on the terms of the Yuzivska PSA. The communicant claims the court never established whether any of the PSA terms were in fact included in the text of the permit or discussed whether the confidentiality of the PSA was itself legal.<sup>69</sup>

68. On 20 November 2013, the communicant appealed the above ruling.<sup>70</sup> On 11 February 2015, the court of appeal delivered its judgment which declared illegal the refusal of the GMS to provide information related to the permit and ordered the GMS to provide the communicant with a copy of it.<sup>71</sup>

69. Despite being fined twice by the State Executive Service, the GMS failed to comply with the court order until 29 June 2016, when the communicant was provided with a copy of the permit.<sup>72</sup>

#### **Litigation concerning public participation in the decision-making on the Yuzivska PSA**

70. In August 2013, the communicant filed an administrative lawsuit claiming the breach of its right to participate in the decision-making process on the Yuzivska PSA due to the failure to carry out an ecological expertiza for the PSA. The communicant asked the court to declare this failure of the Cabinet of Ministers and thus entrance into the PSA without a prior expertiza to be illegal. The communicant also asked the court to oblige the Cabinet of Ministers to refrain from entering into the Oleska PSA, which was under negotiation at the

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<sup>66</sup> Communication, para. 79.

<sup>67</sup> Communication, para. 80, and annex 30.

<sup>68</sup> Communication, para. 81, and annexes 31 and 32.

<sup>69</sup> Communication, para. 82, and annex 33.

<sup>70</sup> Communication, para. 83, and annex 34.

<sup>71</sup> Communicant's reply to the Committee's questions, 24 May 2021, and annex 1, p. 3.

<sup>72</sup> Additional information from the communicant, 25 May 2016, p. 2; additional information from the communicant, 28 January 2019, p. 3; communicant's reply to the Committee's questions, 24 May 2021, p. 1.

time.<sup>73</sup> Contrary to the requirements of the procedural code to consider the case within 2 months, the court issued its judgment only in March 2014. By then, the expertiza for the Oleska PSA had already been performed and the PSA had been signed. The court thus did not address this aspect of the claim.<sup>74</sup> It dismissed the communicant's other claims also.<sup>75</sup>

71. The communicant appealed and in its judgment of 10 July 2014, the Kyiv Administrative Court of Appeal ruled that the communicant did not have standing to challenge the legality of the Yuzivska PSA because it had not demonstrated how its interests were affected by the PSA. Thus, it concluded that the communicant lacked standing and that the lower court had wrongly proceeded to assess the case on the merits.<sup>76</sup>

72. The communicant appealed again and in October 2014, the Supreme Administrative Court dismissed the communicant's second appeal on procedural grounds. According to the Supreme Court, since the communicant's representative was present at the Administrative Appeal Court's hearing when a short text of the court decision was pronounced, the deadline to file the second appeal was 20 days after that date.

73. The Party concerned does not contest the communicant's failure to exhaust domestic remedies.

## **D. Substantive issues**

### **Refusal of requested environmental information – article 4(1) in conjunction with article 2(3)**

74. The communicant claims that the PSAs and mineral extraction permits are "environmental information" under article 2(3)(b) of the Convention.<sup>77</sup>

75. The communicant alleges that the Party concerned breaches the Convention by including conditions in the PSAs requiring full confidentiality of all the terms of the PSAs and any other documents issued by the Government in the course of the negotiation and execution of the PSAs.<sup>78</sup>

76. The communicant further claims that by denying requests for information on the PSAs, including their terms and conditions, drafts, the signed texts, and copies of the extraction permits, the Party concerned is in breach of article 4(1) of the Convention.<sup>79</sup>

77. The communicant concedes that it did eventually receive access to a copy of the Yuzivska and Oleska mineral extraction permits.<sup>80</sup>

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<sup>73</sup> Communication, para. 84.

<sup>74</sup> Communication, para. 85.

<sup>75</sup> Communication, para. 86, and annex 35.

<sup>76</sup> Communication, para. 87, and annex 36; communicant's reply to the Committee's questions, 24 May 2021, annex 2, pp. 2-3.

<sup>77</sup> Communication, para 77.

<sup>78</sup> Communication, para 78.

<sup>79</sup> Communication, para. 78.

<sup>80</sup> Additional information from the communicant, 28 January 2019, p. 3; communicant's reply to the Committee's questions, 24 May 2021, p. 1.

78. While not commenting on whether the information is “environmental information” the Party concerned confirms that the PSAs for the Oleska and Yuzivska oil fields have not been disclosed.<sup>81</sup>

#### **Exceptions to disclosure – article 4(3) and (4)**

79. The communicant claims that the Party concerned breached article 4(4) of the Convention by denying requests for information on the PSAs on the grounds of “confidentiality”. It submits that the Party concerned moreover failed to strike a proper balance between such confidentiality and the public interest in disclosure.<sup>82</sup>

80. The Party concerned submits that neither the Yuzivska nor Oleska PSA are available to the public because the “for official use only” stamp has not been removed from them. Article 6 of the Access to Information Law defines several types of restricted information, in particular confidential, secret, and official information. The Party concerned claims that these documents are classified as confidential and states that as of November 2018 there is ongoing litigation at the national level on this matter.<sup>83</sup>

81. Finally, the Party concerned submits that, in accordance with the procedure under the 2017 EIA Law, a decision on the implementation of the planned activities shall be made public by placing it on the official website of the competent body, in the Unified Register of EIA, and publication in the media.<sup>84</sup> Moreover, in accordance with article 4 of the Law, all documentation required for the EIA is available to the public on the Unified Register of the EIA, where the information is open and free. It submits that article 4(7) requires free public access to all information (with due account of the requirements of article 4(8)) relevant to the decision-making process as it becomes available. Article 4(8) provides for withholding some confidential information upon the reasoned request of the developer.<sup>85</sup>

#### **Separation of information exempted from disclosure – article 4(6)**

82. The communicant claims that the Party concerned violates article 4(6) of the Convention by not ensuring that, in case it is necessary to treat some portions of the information in a PSA as confidential, only these portions are excluded, and the rest of the document is provided to the public.<sup>86</sup>

83. The Party concerned submits that, according to article 4(8) of the 2017 EIA Law, when confidential information is withheld, it shall be detached, and the remaining information shall be provided to the public. Information on the environmental impact, including quantitative and qualitative indicators of emissions and discharges, physical and biological factors of impact, use of natural resources and waste management shall be open and access thereto shall not be restricted.<sup>87</sup>

#### **Public participation in decision-making on the Yusivska and Oleska PSAs – article 6**

##### *Article 6 - applicability*

84. The communicant claims that the Yuzivska and Oleska projects fall under paragraph 20 of Annex I, of the Convention because the extraction of minerals including natural gas, regardless of the amount of extraction or technology, is required to undergo a

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<sup>81</sup> Party’s reply to the Committee’s questions, 8 November 2018, pp. 2-3.

<sup>82</sup> Communication, para. 78.

<sup>83</sup> Party’s reply to the Committee’s questions, 8 November 2018, pp. 2-3.

<sup>84</sup> Party’s reply to the Committee’s questions, 8 November 2018, p. 3.

<sup>85</sup> Party’s reply to the Committee’s questions, 8 November 2018, p. 4.

<sup>86</sup> Communication, para. 78.

<sup>87</sup> Party’s reply to the Committee’s questions, 8 November 2018, p. 4.

mandatory expertiza including public participation in accordance with domestic legislation.<sup>88</sup> The communicant submits further that the projects may also fall under paragraphs 12 and 14 of Annex I, of the Convention, but that it could not establish this due to a lack of information on the projects. The communicant submits that the PSAs, together with the respective permits for mineral extraction, constitute article 6 decisions.<sup>89</sup>

85. The communicant also claims that while the 2017 EIA Law required an EIA in the course of a PSA's negotiation prior to its signature, the December 2019 amendments to article 11(2) of the PSA Law mean that an EIA is no longer required to be carried out in the course of preparing a PSA.<sup>90</sup>

86. The Party concerned does not dispute that the PSAs and the mineral extraction permits are within the scope of article 6 of the Convention. To the contrary, it submits that PSAs are subject to an EIA under article 11 of the Law on PSAs.<sup>91</sup>

*Alleged breaches of article 6*

87. The communicant alleges that the Party concerned has breached article 6(1), (2), (3), (4), (6), (7), (8), and (9), of the Convention by:

- (a) Performing the expertiza on the Yuzivska PSA after the approval and signature of the PSA;
- (b) Not applying the public participation provisions in either the Yuzivska or Oleska environmental assessment processes;
- (c) Not informing the public concerned early in an environmental decision-making procedure, and in an adequate, timely and effective manner;
- (d) Not establishing and applying reasonable time-frames for public participation;
- (e) Not allowing for early public participation when all options are still open;
- (f) Not providing access to information relevant to the decision-making;
- (g) Not allowing for the public to submit comments;
- (h) Not taking into account the outcomes of public participation;
- (i) Not publishing the signed texts of the PSAs and the texts of the permits for minerals issued in relation to the PSAs.

88. The Party concerned claims that public participation is provided for under article 7 of the 2017 EIA Law, putting into place a mechanism for ensuring public participation from the scoping stage to direct participation in the public discussion of the EIA report of the planned activity.<sup>92</sup>

89. The Party concerned submits that article 4 of the 2017 EIA Law provides that all documentation required for the EIA is available to the public, with all relevant information being placed on the official website.<sup>93</sup> The law also enshrines the obligation for the entity to publish the relevant documentation in the print media and on the boards of the local government or other public boards on the territory where it is planned to carry out their

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<sup>88</sup> Communication, paras. 69 and 77.

<sup>89</sup> Communication, para. 77.

<sup>90</sup> Communicant's update of 11 March 2020, p. 1.

<sup>91</sup> Party's reply to the Committee's questions, 8 November 2018, p. 3.

<sup>92</sup> Party's response, p. 2.

<sup>93</sup> Party's response, p. 1.

activity or to publicize in another way that guarantees the access to information for the inhabitants of the corresponding administrative territory, in which the site is planned to be located or to the relevant territorial community that may be affected by the planned activity, and other stakeholders.<sup>94</sup>

90. The Party concerned submits that accessibility and transparency of information are provided through the Unified Register of the EIA, which is in the public domain.<sup>95</sup>

91. The Party concerned does not comment on the 2019 amendment to the PSA Law removing the requirement to conduct an EIA on a draft PSA and inserting a requirement that the PSA undergo an EIA during its implementation.

#### **Access to justice to challenge the PSAs - article 9(2)**

92. The communicant alleges that the Party concerned violated article 9(2) of the Convention due to the ruling by the Kiev Appellate Administrative Court, in its judgment of 10 July 2014, that the communicant did not have standing to challenge the legality of the Yuzivska PSA because it had not demonstrated how its interests were affected by the PSA.<sup>96</sup>

93. With respect to the Supreme Administrative Court's dismissal of the communicant's second appeal on procedural grounds, the communicant claims that the court held that, since the communicant's representative was present at the Administrative Appeal Court's hearing when a short text of its decision was pronounced, the deadline to file the second appeal was 20 days after that date. The communicant submits that the Supreme Administrative Court disregarded the fact that the communicant had promptly filed numerous requests for a copy of the full text of the court decision,<sup>97</sup> which the Court had announced it would prepare within five days pursuant to article 160 of the Code of Administrative Procedure. The communicant submits that, on 1 September 2014, its representative had to travel to the Kyiv-city Administrative Appeal Court (approximately 500 kilometres each way) to obtain the full court decision, which was dated 15 July 2014.<sup>98</sup> The communicant claims that its request to extend the deadline for the second appeal based on the late receipt of the text of the decision was denied.<sup>99</sup>

94. The Party concerned does not comment on the communicant's article 9 allegation.

### **III. Consideration and evaluation by the Committee**

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

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<sup>94</sup> Party's response, p. 1.

<sup>95</sup> Party's response, p. 2.

<sup>96</sup> Communication, para. 78.

<sup>97</sup> Communicant's reply to the Committee's questions, 24 May 2021, p. 9, and annex 4 and annex 5 to the communicant's reply to the Committee's questions, 24 May 2021.

<sup>98</sup> Communicant's reply to the Committee's questions, 24 May 2021, p. 9.

<sup>99</sup> Communication, para. 88, and annex 36; communicant's reply to the Committee's questions, 24 May 2021; annex 6 and annex 8 to the communicant's reply to the Committee's questions, 24 May 2021.

## **Admissibility**

96. The communicant's use of domestic remedies to challenge the alleged noncompliance in this case are described in paragraphs 64-72 above. The Party concerned does not contest the admissibility of the communication. The Committee determines the communication to be admissible.

## **Access to the PSAs for the Yuzivska and Oleska oil fields – article 4(1)**

### Environmental information – article 2(3)

97. The Committee first examines whether the requested information, namely the text of the Yuzivska and Oleska production-sharing agreements (PSAs), amounted to environmental information within the meaning of article 2(3) of the Convention.

98. According to article 2(2) of the Law on PSAs:<sup>100</sup>

“The relations arising during prospecting, exploration and extraction of mineral resources, sharing of produced production, as well as transportation, treatment, storage, processing, use, sale or other disposal thereof, shall be governed by a production-sharing agreement, which shall be concluded pursuant to this Law.

99. Article 4(1) of the Law on PSAs sets out the definition of a production-sharing agreement:<sup>101</sup>

“According to a production-sharing agreement, one party, Ukraine (hereinafter—“the State”), assigns the other party, the investor, [the right] to prospect for, explore and extract mineral resources in the designated subsoil area(s) and to perform the works related to the agreement for a specified period of time, whereas the investor undertakes to perform the assigned works at its own cost and risk, with further compensation of the costs and receipt of payment (remuneration) in the form of a portion of the profit production.”

100. Based on the above provisions, the Committee considers that a PSA is an “administrative measure” regulated by the law of the Party concerned within the meaning of article 2(3)(b) of the Convention. Furthermore, a PSA concerning the extraction of mineral resources is clearly a measure “affecting or likely to affect the state of elements of the environment” such as “soil, land, landscape and natural sites” for the purposes of article 2(3). The state of other elements of the environment may be affected as a result of the extraction process as well.

101. In the light of the foregoing, the Committee considers that a PSA for the extraction of mineral resources comprises “environmental information” within the scope of article 2(3)(b) of the Convention.

102. A request for access to a PSA is therefore a request for access to environmental information within the scope of article 4(1) of the Convention. In this regard, the Committee underlines that article 4(1) explicitly requires “copies of the actual documentation” containing the environmental information to be disclosed.

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<sup>100</sup> Communication, annex 28.

<sup>101</sup> Communication, annex 28.

103. Accordingly, subject to the exemptions from disclosure in article 4(3) and (4) of the Convention, a PSA must be provided upon request in full.

Reasons for refusal

104. In March 2013, the communicant submitted requests to the Ministry of Ecology and the State Geology and Minerals Service for access to the draft Yuzivska PSA. Following the PSA's submission in April 2013 to the Kharkiv and Donetsk regional councils for approval, the communicant made a further request to the State and Geology Minerals Service for access to the PSA as then submitted for approval. The communicant then made a further request to the Cabinet of Ministers in April 2013 for access to the final draft PSA as approved by decree of the Cabinet of Ministers and for the signed PSA itself. On each occasion, the communicant's request was refused on the ground that the PSA was "confidential".

105. In February 2013, the communicant submitted a request to the Ministry of Ecology for access to the draft Oleska PSA and then in November 2013 for access to the signed Oleska PSA. On both occasions, the communicant's requests were again refused on the ground that the PSA was "confidential".

106. In its subsequent judgment rejecting the communicant's appeal against the refusals to disclose the Yuzivska PSA, the Kyiv City District Administrative Court stated that it had been agreed between the parties to the PSA that its terms were confidential and that neither party had agreed to its disclosure.<sup>102</sup> That judgment was upheld on appeal by the Kyiv Appellate Administrative Court and then by the Supreme Administrative Court of Ukraine.

107. The Committee underlines that the grounds for non-disclosure set out in article 4(3) and (4) of the Convention are exhaustive. None of the grounds in article 4(3) and (4) empowers a Party to the Convention to agree with third parties that any information other than that listed in article 4(3) and (4) will be kept confidential.

108. Accordingly, the inclusion of a clause in an agreement between a Party to the Convention and a third party which imposes a blanket prohibition on the disclosure of the terms of that agreement, and other information related thereto, has no effect on the Party's obligations to provide access to environmental information upon request under article 4 of the Convention.

109. If a member of the public makes a request for a document which comprises environmental information under article 2(3) of the Convention, the full text of that document must be disclosed except for any information which is withheld from disclosure under article 4(3) or (4) of the Convention. In those cases, in accordance with article 4(6), the information exempted from disclosure may be redacted. However, the rest of the document must be disclosed.

110. In the present case, the Party concerned has not justified its refusal to disclose the PSAs on the basis of any of the grounds set out in article 4(3) or (4) of the Convention, and neither the full text nor a redacted version of the Yuzivska and Oleska PSAs were provided to the communicant.

111. In the light of the foregoing, the Committee finds that, by failing to provide access upon request to either the full text of the production-sharing agreements for the

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<sup>102</sup> Communication, p. 11.

Yuzivska and Oleska oil fields, or redacted versions thereof, the Party concerned failed to comply with article 4(1) of the Convention.

**Access to the mineral extraction permits for the Yuzivska and Oleska oil fields – article 4(1)**

112. A mineral extraction permit is clearly an “administrative measure affecting or likely to affect the elements of the environment” including, but not limited to, such elements as soil, land, landscape, water and biological diversity. It thus comprises environmental information under article 2(3)(b) of the Convention. A request for access to such a permit is thus a request for access to environmental information within the scope of article 4(1) of the Convention.

113. In August 2013, the communicant sent a request to the State Geology and Mineral Services for access to the mineral extraction permit for the Yuzivska field. In October 2014, the communicant sent a similar request for access to the mineral extraction permit for the Oleska field. In both cases, the State Geology and Mineral Services refused the request on the ground that the mineral extraction permits were “for official use only”.

114. The Committee points out that there is no exception in article 4(3) and (4) of the Convention for “official use only”. The only grounds for non-disclosure for environmental information are those set out in article 4(3) and (4) and the Party concerned has not pointed the Committee to any ground listed in article 4(3) and (4) of the Convention on which disclosure was validly refused. The Committee underlines once again that the list of grounds for nondisclosure in article 4(3) and (4) of the Convention is exhaustive.

115. In the light of the foregoing, the Committee considers that the refusal to provide the communicant with access to the Yuzivska and Oleska mineral extraction permits upon its request would have amounted to non-compliance with article 4(1) of the Convention.

116. The Committee notes however that on 11 February 2015 the Lviv Appellate Administrative Court ordered the State Geological and Minerals Service to disclose the Yuzivska mineral extraction permit to the communicant. After twice being fined by the State Executive Office for failing to comply with the Court’s order, the State Geological and Minerals Service finally provided that permit to the communicant on 29 June 2016. Subsequently, on 5 January 2017, the Oleska mineral extraction permit was also provided to the communicant. The Committee thus finds that, since the Yuzivska and Oleska mineral extraction permits have now been disclosed, the Party concerned is not in non-compliance with article 4(1) of the Convention with respect to these permits.

**Public participation on the draft Yuzivska and Oleska PSAs - article 6**

*Annex I, para. 12*

117. Where the extraction of petroleum and natural gas for commercial purposes meets the thresholds set out in paragraph 12 of annex I of the Convention, the activity is subject to article 6(1)(a) of the Convention, and thus to the provisions of article 6. However, the PSAs for the extraction of the Yuzivska and Oleska oil fields remain



undisclosed. The Committee is therefore not in a position to determine whether the extraction activities set out in those PSAs meet the thresholds in paragraph 12.

118. While it cannot make a finding on paragraph 12 of Annex I to the Convention due to the PSAs' ongoing nondisclosure, the Committee makes the following observations.

119. Pursuant to article 8(2) and (4) of the Law on PSAs, all the conditions, including environmental conditions, of the extractive activities are to be set out in the PSA. This is confirmed by the text of the Yuzivska mineral extraction permit which states that all special conditions are set out in the Yuzivska PSA. Accordingly, while the mineral extraction permit legally permits the commencement of the extractive activities, the conditions under which those extractive activities are to be carried out are set out in the PSA.

120. Given this fact, the Committee considers that the PSA and the related mineral extraction permit are decisions in a multi-stage decision-making procedure to permit the extractive activities. If those extractive activities meet the paragraph 12 threshold, the PSA and mineral extraction permit are each subject to the provisions of article 6, and public participation meeting the requirements of article 6 must be carried out on each. Moreover, since all the conditions of the extractive activities, or the vast majority of them, are contained in the PSA, the public participation procedure should be carried out jointly on the draft PSA and draft mineral extraction permits. Otherwise, the requirement in article 6(4) of the Convention that public participation is provided for "when all options are open and effective public participation can take place" cannot be met.

121. Since the continuing failure by the Party concerned to divulge the PSAs prevents the Committee from making a finding on the applicability of paragraph 12 of Annex I of the Convention in this case, the Committee will now examine whether paragraph 20 of annex I applied to the Yuzivska and Oleska PSAs.

*Annex I, para. 20*

122. At the time of the preparation of the Yuzivska and Oleska PSAs, article 11(2) of the Law on PSAs required that draft PSAs be subject to mandatory state ecological expertiza in respect of financial, legal, environmental and other matters in accordance with national legislation.

123. Article 11 of Law on Ecological Expertise as then in force required public participation to be carried out during the preparation of the state ecological expertise. It provided that public hearings or meetings were to be held to take into account public opinion and that the preparation of the conclusions of the state ecological expertise and decision-making on the further realization of the activity subject to the state ecological expertise were to be carried out taking into account the public opinion.

124. This means that "public participation" was required to be provided for such activities "under an environmental impact assessment procedure in accordance with national legislation" within the meaning of paragraph 20 of annex I to the Convention. Accordingly, the Party concerned was required by article 6(1)(a) of the Convention, to apply the provisions of article 6 to draft PSAs.

125. Pursuant to article 6(10) of the Convention, the Party concerned is also required to ensure that, if the operating conditions in existing PSAs are subsequently reconsidered or updated, the provisions of article 6(2)-(9) are applied *mutatis mutandis* and where appropriate.

126. In the present case, state ecological expertiza were carried out for both the Yuzivska and Oleska oil fields. The state ecological expertiza conclusion for the Yuzivska oil field was adopted on 27 December 2013, 11 months after the Yusivska PSA was signed. The state ecological expertiza conclusion for the Oleska oil field was adopted on 27 August 2013, prior to the PSA's signature in November 2013.

127. It is common ground that no public participation procedure was carried out during the preparation of either the Yuzivska or Oleska PSAs or their related state ecological expertizas.

128. Based on the foregoing, the Committee finds that, by failing to carry out a public participation procedure meeting the requirements of article 6 regarding the draft production-sharing agreements for the Yuzivska and Oleska oil fields, the Party concerned failed to comply with article 6(1)(a) of the Convention.

#### **Subsequent developments regarding the Law on PSAs – article 6(4)**

129. Subparagraph 20 of article 17(4) of the 2017 EIA Law amended article 11(2) of the Law on PSAs so as to require draft PSAs to be subject to a mandatory EIA procedure.<sup>103</sup>

130. However, in December 2019, article 11(2) of the Law on PSAs was amended again by the Law on Amendments to Certain Legislative Acts of Ukraine on Regulation of Amber Extraction. This amendment removed the requirement that draft PSAs be subject to EIA and in its place inserted a requirement that PSAs undergo EIA (and thereby public participation) only in the course of the PSA's implementation.<sup>104</sup>

131. This is inconsistent with article 6(4) of the Convention which requires Parties to provide for early public participation on activities subject to article 6 when all options are open and effective public participation can take place.

132. It is clear that a legal framework in which public participation will only be carried out once a PSA has been concluded and is in the course of being implemented cannot meet the requirement to provide for early public participation when all options are open.

133. Based on the foregoing, the Committee finds that, by establishing a legal framework in which public participation under article 6 of the Convention will only be carried out once a production-sharing agreement is already at the implementation stage, the Party concerned fails to comply with article 6(4) of the Convention.

#### **Article 9(2) – standing of environmental NGOs**

134. In paragraph 124 above, the Committee held that draft PSAs are subject to article 6 of the Convention. Accordingly, PSAs fall within the scope of article 9(2) of the Convention.

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[https://unece.org/DAM/env/pp/compliance/MoP5decisions/V.9m\\_Ukraine/frPartyV9m\\_22.06.2017/frPartyV9m\\_22.06.2017\\_att\\_1\\_EIA\\_law\\_ENG.pdf](https://unece.org/DAM/env/pp/compliance/MoP5decisions/V.9m_Ukraine/frPartyV9m_22.06.2017/frPartyV9m_22.06.2017_att_1_EIA_law_ENG.pdf), p. 34.

<sup>104</sup> Communicant's update, 17 December 2019, annex, and communicant's further update, 11 March 2020, p. 1.

135. Pursuant to article 9(2) of the Convention, the interest of any non-governmental organization meeting the requirements referred to in article 2(5) of the Convention is deemed sufficient for the purposes of standing under subparagraph (a) of article 9(2).<sup>105</sup>

136. In the present case, the communicant is a non-governmental organization registered under the law of the Party concerned, with the protection of the environment as its main statutory goal.<sup>106</sup> The Party concerned does not dispute that the communicant is a nongovernmental organization meeting the requirements of article 2(5) of the Convention.

137. The communicant should therefore have been deemed to have a sufficient interest to have standing under subparagraph (a) of article 9(2) of the Convention.

138. Yet, in its judgment of 10 July 2014, the Kiev Appellate Administrative Court held that the communicant did not have standing to challenge the legality of the Yuzivska PSA because it had not demonstrated how its interests were affected by the PSA.

139. Based on the foregoing, the Committee finds that, by denying a non-governmental organization meeting the requirements of article 2(5) from standing to challenge the legality of a production-sharing agreement subject to article 6, the Party concerned failed to comply with article 9(2) of the Convention.

#### **Article 9(4) – fair time limit to appeal**

140. Under article 212 of the Administrative Procedure Code, a cassation appeal can be filed within twenty days of the date on which the judgment to be appealed was drawn up in full.

141. The judgment of the Kiev Appellate Administrative Court was announced on 10 July 2014 and drawn up in full on 15 July 2014. The communicant claims however that, despite making several requests, it was not provided with the full text of the judgment until September 2014.

142. In October 2014, the Supreme Administrative Court dismissed the communicant's appeal on the ground that it was submitted out of time, since it was brought more than twenty days after the date of the lower court's judgment.

143. The Committee considers calculating the timeframe for the public to challenge a decision from the date of the judgment, and not the date on which the judgment was made available to the claimant, is manifestly unfair. Moreover, it creates an incentive for courts not to make the written version of their decisions promptly available, knowing that there will then be less opportunity for those decisions to be challenged.

144. The Committee accordingly finds that, by maintaining a legal framework in which cassation appeals under article 9(2) of the Convention must be brought within twenty days of the date that the contested judgment was drawn up, rather than from the date that the claimant received the full text of that judgment, the Party concerned

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<sup>105</sup> See the Committee's findings on communication ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 81; as well as its findings on communication ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 71, and its findings on communication ACCC/C/2005/11 (Belgium) ECE/MP.PP/C.1/2006/4/Add.2, para. 27.

<sup>106</sup> Communication, p. 1.

fails to comply with the requirement that review procedures under article 9(2) be fair in accordance with article 9(4) of the Convention.

**Article 9(4) – adequate and effective remedies for review of requests for environmental information**

145. In its judgment of 11 February 2015, the Supreme Administrative Court ordered the State Geological and Minerals Service to disclose the Yuzivska mineral extraction permit to the communicant. However, despite the State Executive Office fining the State Geological and Minerals Service twice for failing to comply with the Supreme Administrative Court's order, the State Geological and Minerals Service only disclosed the Yuzivska mineral extraction permit to the communicant on 29 June 2016, more than 16 months later. The Committee considers that such a lengthy delay in complying with a court order to disclose the requested environmental information cannot be considered to constitute an adequate and effective remedy for the review of environmental information requests.

146. Based on the foregoing, the Committee finds that, by failing to ensure that the requested environmental information was disclosed promptly after the court had ordered it to be disclosed, the Party concerned failed to comply with the requirement in article 9(4) of the Convention to provide an adequate and effective remedy for the review of environmental information requests.

## **IV. Conclusions and recommendations**

147. 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**

148. The Committee finds that:

(a) By failing to provide access upon request to either the full text of the production-sharing agreements for the Yuzivska and Oleska oil fields, or redacted versions thereof, the Party concerned failed to comply with article 4(1) of the Convention;

(b) By failing to carry out a public participation procedure meeting the requirements of article 6 regarding the draft production-sharing agreements for the Yuzivska and Oleska oil fields, the Party concerned failed to comply with article 6(1)(a) of the Convention;

(c) By establishing a legal framework in which public participation under article 6 of the Convention will only be carried out once a production-sharing agreement is already at the implementation stage, the Party concerned fails to comply with article 6(4) of the Convention;

(d) By denying a non-governmental organization meeting the requirements of article 2(5) from standing to challenge the legality of a production-sharing agreement subject to article 6, the Party concerned failed to comply with article 9(2) of the Convention;

(e) By maintaining a legal framework in which cassation appeals under article 9(2) of the Convention must be brought within twenty days of the date that the contested judgment was drawn up, rather than from the date that the claimant received the full text of that judgment, the Party concerned fails to comply with the requirement that review procedures under article 9(2) be fair in accordance with article 9(4) of the Convention;

(f) By failing to ensure that the requested environmental information was disclosed promptly after the court had ordered it to be disclosed, the Party concerned failed to comply with the requirement in article 9(4) of the Convention to provide an adequate and effective remedy for the review of environmental information requests.

## **B. Recommendations**

149. The Committee, pursuant to paragraph 35 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 requested in paragraph 36 (b) of the annex to decision I/7, recommends that the Party concerned undertake the necessary legislative, regulatory, administrative or other measures to ensure that:

(a) Subject to any redactions made in accordance with article 4(3) and (4) of the Convention, the texts of production-sharing agreements are to be provided in full to members of the public upon request in accordance with article 4 of the Convention;

(b) Public participation meeting the requirements of article 6 of the Convention is to be carried out on draft production-sharing agreements prior to their approval, at an early stage when all options are open and effective public participation can take place.

(c) Non-governmental organizations meeting the requirements of article 2(5) are deemed to have standing in review procedures under article 9(2) of the Convention;

(d) The timeframe for filing a cassation appeal within the scope of article 9(2) of the Convention is calculated from the date that the claimant receives the full text of the contested judgment;

(e) Adequate and effective remedies are put in place to ensure that orders by the courts to public authorities to disclose environmental information are promptly complied with.