TO Mrs Fiona Marshall

Secretary to the Århus Convention Compliance Committee

United Nations Economic Commission for Europe

Environment and Human Settlement Division

Room 332, Palais des Nations

CH-1211 Geneva 10

Switzerland

Dear Mrs Marshall,

With regard to your letter from 04.09.2015 concerning the Draft findings and recommendations of the Committee on Communication ref. ACCC/C/2012/76 we would like to provide you with the following comments:

We support the draft findings and recommendations of the Committee. Yet, we need to provide some additional information concerning the analysis of the "Role of the public authorities" in granting orders for preliminary enforcement and clarify the legal practice concerning the balance of interests by the courts.

I. Additional facts on the „Role of the public authorities"

With respect to the "Role of the public authorities", in par. 44 of the draft findings it is noted that the communicant contends that the authorities routinely grant an order for preliminary enforcement making only a formal reference to the conditions in APC article 60 since there is no obligation on the competent authority to perform an objective test in this respect. In par. 45 the Party concerned submits that, when considering whether to issue orders for preliminary enforcement of EIA/SEA decisions, the competent authorities take into account the results of the independent procedures leading to those decisions, including the public participation procedure. It submits that quite often in such cases the public did not raise any objections to the proposed activity, in particular environmental concerns, during the public participation procedure. On basis of this argument, the Committee stated that it is not convinced that the current practice of Bulgarian public authorities with respect to the grant of orders for preliminary enforcement fails to comply with the requirements of article 9 paragraph 4 of the Convention, and therefore the Committee does not conclude that the Party concerned is in non-compliance with the Convention in this specific point.

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In order to allow more objective analysis of the question whether the public authorities fail to comply with the requirements of article 9, par. 4 of the Convention, we need to draw the attention of the Committee to key facts, available in the EIA/SEA decisions issued by the Ministry of Environment and Water and the Regional Inspectorates for Environment and Waters under the Ministry, enclosed to the communication as annexes. Seven of the 9 EIA/SEA decisions (namely Annexes 2, 3, 9, 12, 15, 18, 19) demonstrate that the public concerned raised critical objections to the proposed activities/plans, in particular environmental concerns. For instance, it is commented the enclosed EIA decisions - Annexes 9 (page 6), 12 (p.5), 15 (p.9-10), 18 (p.5-6) and 19 (p.5), that during the public participation procedure were submitted numerous statements of the public concerned concerning the negative environmental risks of the projects.

With respect to the screening EIA decisions in Annexes 2 and 3, however, the only possible legal opportunity to raise an objection is by means of an appeal, since the screening EIA decisions are not preceded by public participation procedures by law.

These facts show that the Bulgarian NGOs use very actively their right granted by the Convention to participate in the environmental decision making processes. Obviously, when the „views, comments and suggestions of the members of the public“ are not taken properly in consideration by the competent authorities or are rejected without adequate motivations, the NGOs are forced to seek for administrative or judicial review procedures (see Communication ACCC/C/2011/58 from Bulgaria).

II. Legal practice concerning the balance of interests by the courts

In the analysis of the “Role of the courts” the key question raised by the Committee in the Draft finding (par. 69-78) is whether the courts properly carry out their task to balance the interests involved in a given case when considering applications for interim measures. As observed by the Committee, in most cases the courts rely solely on the conclusions of the competent authority on the potential environmental effects, i.e. the exact conclusions being challenged in the main proceeding.

In this regard, we would like to clarify that in the cases referred by the Communicant, the NGOs appealed the respective EIA/SEA decision arguing that the appealed acts were either inadmissible by law (Case “a”) or the EIA/SEA reports were incomplete and of low quality (Cases “b”-“e”). This means that with regard to Case “a”, any damage to the environment should be prevented since the inadmissibility means that even insignificant impacts on the environment are not justifiable (e.g. cutting a dozen of trees in a National park).

The main case-law with respect to the appealing of EIA/SEA decisions is generated, however, by members of the public which are not satisfied with the way their motivated objections are rejected during the public participation (information for concrete objections is mentioned in the EIA decision in Annexes 11, 15 and 18) or with the correctness of the EIA/SEA decisions. Most often this is the case when the applicants assess the scientific facts and the conclusions in the EIA/SEA

as incomplete or incorrect. The incomplete and incorrect scientific facts and conclusions in the EIA/SEA generate the following two most common disputes during the main proceedings:

1. Is an unforeseen environmental damage expected or not (e.g. is x-ray radiation possible above the legal limits or pollution of the underground waters during the mining)?
2. Is the expected environmental damage insignificant or significant (e.g. the loss of 1 ha of forest during the construction of a high-way in most cases would be assessed as an insignificant impact, but it can be critical for an endangered species which is really inhabiting this forest but was not found during the EIA due to methodological errors)?

In this regard, we do not accept the thesis that the court should assess if the risk of environmental damage is high or low and if the impact would be significant or insignificant since such an assessment should be subject to the main proceedings. Taking account of the public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, in proceedings concerning complaints against orders for preliminary execution of its EIA decision **the court should assess on the basis of the available facts if there is any potential risk of irreversible effects on the environment at all** (see ruling no. 15028/2010 in Annex 8). In case the court is not able to make its own assessment of the risk of potential environmental damage in the light of the available facts, it can appoint an independent expertise to evaluate whether these facts imply any potential environmental harm, i.e. without assessing the level of probability and significance of the environmental impacts.

At last, we need to address the thesis that applicants do not provide evidence for environmental harms when challenging the legality of orders for preliminary enforcement of EIA/SEA decisions (par. 75). Such cases are not common since the applicants' objections to the EIA/SEA decisions are most often motivated namely with evidence for missing scientific facts in the EIA/SEA report or with evidence for concrete environmental risks which were not assessed in the EIA/SEA report.

Yours faithfully,

Alexander Dountchev,

On behalf of the Balkani Wildlife Society

Date: 02.10.2015