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ENVIRONMENTAL
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# Communication to the
# Aarhus Convention Compliance Committee

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*Party concerned by the communication:*
***Armenia***

## Facts of the Communication

On 17.10.2014 the Ministry of nature protection of the Republic of Armenia affirmed the BP-76 Affirmative Conclusion of the Environmental Impact Assessment for the exploitation of Amulsar open-pit mine near the Gndevaz community in Armenia. In accordance with the national legislation, the RA Ministry of Nature Protection is the responsible authority to conduct the state environmental expertise ("expertiza" in OVOS system countries) of the mining projects presented by the developer.

At the same time, the area of mentioned mining project is located in the water catchment area of Sevan Lake, which is a specially preserved water ecosystem, and therefore is highly protected by the RA legislation. The Law on Sevan Lake foresees additional responsibilities for those who launch the economic activity within the protection area of the Lake. In accordance with the corresponding legal requirements, the special Expert Commission was established within the structure of the National Academy of Science to make decisions concerning the activities with potential harmful impact on the Lake.

Pursuant to the current Communication, the Sevan Lake Protection Expert Commission affirmed an arguable Positive Conclusion regarding the issue of impact of the Amulsar mining project on the ecosystem of Sevan Lake in its session on 17 October 2014. Having in mind the location of the planned mining activity, one more expertise was required to carry out by the Sevan Lake Protection Expert Commission. Considering the fact that Sevan Lake Expert Commission is also involved in granting positive expert conclusion, it was the second respondent of the lawsuit in line with the RA Ministry of Nature Protection.

On 02.04.2015 more than ten members of affected community (Gndevaz), as well as two environmental non-governmental organizations ("Ecoera" and "Ecological Right" NGOs) filed a claim with the RA Administrative Court against the RA Ministry of Nature Protection and the Sevan Lake Protection Expert Commission litigating their Affirmative Expert Conclusions. The plaintiffs argued the legality of findings of Experts in both Expert Conclusions indicating the breach of national legislation regarding protection regime of unique biodiversity and water ecosystems, as well as other issues regarding the illegality of Amulsar mining project. The crucial issues of legality that were challenged contained the failure of the Convention to consider nature conservation and social standards in permit procedure. **Those concerns repeatedly provided to both the RA ministry of Nature Protection and Sevan Lake Protection Expert Commissions by the members of Civil Society and independent specialists/experts in written forms, in line with oral presentations of those concerns during the public hearings. However, the two indicated bodies provided the positive Expert Conclusions without addressing the issues raised by the public concerned.**

On 09.04.2015, a Ruling of the RA Administrative Court was adopted, according to which the plaintiffs do not have legal standing to sue the both EIA Positive Expert Conclusion and the Expert Conclusion of Sevan Lake Protection Expert Commission in the Administrative Court. The position of the Court was as follows: **plaintiffs might apply to the Administrative Court only in case if the decisions, acts or omissions of the administrative bodies or their officials caused real legal consequences regarding the protection of rights or freedoms of a person. Pursuant to the Court's Ruling, Expert Conclusion is just an opinion of specialists, which is not an administrative act and does not directly generate legal consequences.**

According to the Judgment, "… not all of those acts themselves directly cause legal effect for the persons. During their activity the administrative bodies can create number of documents or implement physical actions which are not considered as the results of administrative proceeding and do not independently intervene into the rights or liberties of persons. Although, those acts may later serve as basis for consequent legal effects on person's rights and liberties but they are not considered to be legally affecting unless those acts are not put on the basis of an Administrative or Real act (e.g. a document created by the administrative body as an evidence for any administration proceeding or an action of administrative body directed to notify about some administrative proceeding). Therefore, similar documents or actions are not the subjects to be independently litigated. The issue of lawfulness of those documents or actions can be the subject of administrative oversight exclusively within the scope of verification of the **final administrative act.**"

Thus, the court found that both the EIA Expert Conclusion (state environmental expertiza) and Expert Conclusion of the Sevan Lake Protection Expert Commission shall not be considered as administrative acts, which directly intervene into the persons' rights. **The Court found that mentioned Expert Conclusions can be served only as the evidences in the administrative proceeding to litigate the licences and other permits granted by the RA Ministry of Energy and Natural Resources for utilization of mineral resources. Based on this position, the Court found that the legality of both Expert Conclusions can-not be subjects for the litigation in the Administrative Court.**

On 27.04.2015 the plaintiffs brought an appeal against the Ruling of RA Administrative Court to the RA Administrative Court of Appeal (court of higher instance in administrative judiciary). In its Judgment of 12.06.2015 the Administrative Court of Appeal rejected the Appeal and affirmed the legal the position of the Administrative court.

On 23.06.2015 the appeal was brought to the Court of Cassation (court of higher instance). On 22.07.2015 the Court of Cassation rejected to admit the appeal into proceeding.

Thus, the decision of the AR Administrative Court entered into force, and the domestic remedies are exhausted. No other international are launched by the "Ecological Right" NGO concerning the facts of violations of current Communication.

**Nature of non-compliance**

In line with many other Post-Soviet countries, the Republic of Armenia is still uses OVOS during the environmental decision-making instead of standard EIA. Thus, the state environmental expertise (expertiza) is required as part of granting the permit for environmentally sound industrial projects like mining. The current Communication raises two fundamental problems related to recent anxious developments of judicial practice, which undermines the efficiency of implementation of the whole Convention.

1. The first concern relates the issue of Public Authority responsible for making decisions in environmental matters. Unlike the previous judicial precedents, by the current Ruling the RA Administrative Court adopted a legal position that EIA Affirmative Conclusions affirmed by the Ministry of Nature Protection is not an administrative act of Public Authority but just an opinion of specialists. In previous cases communicated in the Compliance Committee, the Administrative Court dismissed the claims with the justification that NGOs do not have legal standing to apply to the court (see the Communication ACCC/C/2011/62 Armenia http://www.unece.org/env/pp/compliance/compliancecommittee/62tablearm.html). **In current case, the court did not formally dismiss the claim brought against the decisions of official bodies. However, it adopted the legal position, which in fact makes impossible the litigation in substance.**

**The main resume of the Judgment is that both Expert Conclusions are not administrative acts (decision, act or omission), and they can be used in the further litigation as evidences in relation to other Administrative acts (license, permits for exploitation, etc). This position does not comply with the regulations envisaged by the Aarhus Convention, as the procedure of EIA is the legal basis for public participation in decision-making on environmental matters. The final stage of the EIA procedure is the State Environmental Expertise and further Affirmation of the EIA Expert Conclusion by the Minister of Nature Protection, in line with Armenian legislation and practice. The improper implementation of public participation itself is an infringement of human rights stipulated by the Aarhus Convention.**

In particular, the EIA Expert Conclusion is adopted by the "Center for Environmental Impact Expertise", which is a state body within the structure of the RA Ministry of Nature Protection. **It is necessary to emphasize that the indicated Center is not an independent expert organization but the state body in the structure of the Public Authority responsible for making the decisions on environmental matters. The status of the mentioned Center is also clearly defined by the Law on**

Environmental Impact Assessment and Expertise, as the body with administrative liabilities. Meanwhile, so far there was a legal practice that the mentioned Expert Conclusions were affirmed by the Minister of Nature protection and afterwards were being considered as permits to implement an environmentally harmful industrial activity.

The administrative liabilities of the "Center for Environmental Impact Expertise" are also foreseen by the RA Mining Code. In accordance with the article 50 paragraph 2 of the RA Mining Code, it is forbidden to conduct the mining activity without the mining project, which properly exposed required state expertise. Moreover, the indicated environmental expertise can-not serve as evidence in relation to other documents of the litigation, as there is no cause and effect relationship between the EIA Expert Conclusion conducted by the Ministry of Nature Protection and the licenses for utilization of mineral resources granted by the Ministry of Energy and Natural Resources. Therefore, the legislation does not demand to conduct any environmental assessment when granting the indicated mineral use licenses. So the demand of Mining Code to properly conduct the expertise concerns the State Environmental Expertise. Consequently, the EIA Expert Conclusion is an Administrative act as it is being conducted and affirmed by the administrative body (the RA Ministry of Nature Protection), and directly interfere into rights of persons, as mining activity can-not be implemented without the mentioned document.

Moreover, the only procedure related to public participation in environmental decision-making defined by the Armenian legislation is the procedure of EIA and further state environmental expertise. However, in line with the indicated Court's Ruling, the EIA Affirmative Conclusion is considered to be just the opinion of environmental experts but not a decision on environmental matters provided by the Public Authority. Consequently, public concerned can-not bring a claim to argue the legality of the EIA Affirmative Conclusion.

2. As to the Expert Conclusion of the Sevan Lake Protection Expert Commission, there is a necessity to clearly define the status of the mentioned body and the legal significance of its Decisions (Expert Conclusions). According to the Law on Sevan Lake, the Sevan Lake Protection Expert Commission is liable body to implement the expertise concerning the issues of any industrial activity with the potential to harm the ecosystem of the Lake. Article 25 of the mentioned Law stipulates that business entities are committed to present the corresponding declaration to the Sevan Lake Protection Expert Commission before starting of the economic activity. Within a month the Commission adopts the Decision on Permission or Denial of the economic activity, based on the results of Expertise implemented in line with the legislation.

Thus, the Sevan Lake Protection Expert Commission is not directly defined to be the body of Public Authority on environmental matters as the "Center for Environmental Impact Expertise" of the RA

Ministry of Nature Protection. However, the Expert Conclusion of the Sevan Lake Protection Expert Commission is also obligatory in line with the Law on Sevan Lake if the activity is planned to be conducted in the area of enforcement of the Law on Sevan Lake. **In current case the Amulsar mine is located in the Sevan Lake water catchment area, and it is not clear the administrative liability and legal and significance of this body in making Decisions on Permission or Denial of the industrial activity.**

**Provisions of the Convention alleged to be in non-compliance**

The claim relates to a failure by the Armenian authorities to implement a range of provisions of the Convention. All infringements relate to the general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. In particular, the following provisions are in non-compliance:

- Article 9 par. 2 in conjunction with article 6 par. 8;
- Article 9 par. 2 in conjunction with article 6 par. 2 (c);
- Article 9 par. 2 in conjunction with article 2 par. 2 (a);
- Article 9 par. 3 in conjunction with article 2 par. 2 (b);
- Article 9 par. 3 in conjunction with article 2 par. 3 (1);

1. Article 9 par. 2 in conjunction with article 6 par. 8 of the Convention were violated by finding that plaintiffs have no legal standing to sue the BP-76 Affirmative Conclusion of the Environmental Impact Assessment for the exploitation of Amulsar open-pit mine provided by the RA Ministry of Nature Protection.

As it is stated in number of Guidelines regarding the implementation of the Convention, the need for authorities to seriously consider the outcome of public participation and to address it in decision-making, policymaking and law-making is a key aspect of the Convention. Provisions relating to taking due account of the outcome of public participation can be found in all three articles relating to public participation. Thus, the public authorities shall ensure that in the decision due account is taken of the outcome of the public participation, and so public comments in relation to environmental matters must be taken into account.

In fact, the public concerned found that its comments and concerns were not duly taken into account by the public authorities responsible for the environmental decision-making and so filed a lawsuit against the outcomes of the EIA Affirmative Conclusion of the RA Ministry of Nature Protection. **Via dismissing the claim the RA Administrative Court rejected the opportunity to protect the position of the public concerned regarding the admissibility and thoroughness of its comments presented to the public authorities in relation to the Amulsar mining project.**

2. Article 9 par. 2 in conjunction with article 6 par. 2 (c) was violated by the RA Administrative Court's finding that EIA Affirmative Conclusion of the RA Ministry of Nature Protection is not the **"final administrative act," and thus the legality of the EIA Expert Conclusion cannot be subjects for the litigation in the Administrative Court.**

Importantly, the public concerned shall be informed of the public authority responsible for making the decision. In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the OVOS and the state environmental expertiza should be considered jointly as a decision-making process involving a form of an EIA procedure and that the conclusions of the state environmental expertiza should be considered as a decision whether to permit an activity.

3. Article 9 par. 2 in conjunction with article 2 par. 2 (a) was violated, as the RA Administrative Court Ruled that the EIA Affirmative Expert Conclusion of the RA Ministry of Nature Protection is not the **"final administrative act."** The "Public authority" means Government at national, regional and other level. **The final stage of the EIA procedure is the State Environmental Expertise and further Affirmation of the EIA Expert Conclusion by the Minister of Nature Protection, in line with Armenian legislation and practice. In accordance to Armenian legislation is no any other state body responsible for environmental policy and decision-making or ensuring the public participation but the RA Ministry of Nature Protection. Therefore, the Court's Ruling factually means that the RA Ministry of Nature Protection is not the state liable Public Authority, and its Affirmative Expert Conclusion is not legally binding act but just opinion of specialists.**

4. Article 9 par. 3 in conjunction with article 2 par. 2 (b) was violated by finding that plaintiffs have no legal standing to sue the the Positive Conclusion of the Sevan Lake Protection Expert Commission regarding the issue of impact of the Amulsar mining project on the Sevan Lake.

According to the Law on Sevan Lake, the **Decision** of the Sevan Lake Protection Expert Commission is obligatory to execute if the corresponding activity is planned to be conducted in the area of enforcement of the Law on Sevan Lake. **In line with the article 3 of the Law on Sevan Lake, the Amulsar mine is located in the Sevan Lake water catchment area, and the Expert Commission is committed to adopt the Decision on Permission or Denial of the mentioned mining project, based on the article 25 of mentioned Law.**

Though, the Sevan Lake Protection Expert Commission is not the public authority, however, it derives from the analysis of the legislation that this Commission has legally defined certain liabilities **to make Decisions on Permission or Denial of industrial projects** touching the issues of Sevan Lake ecosystem, based on environmental assessment. In fact, the Decision of this Commission is the same as the Affirmative Expert Conclusion, as the Law on Sevan Lake does not constitute any other legal definition regarding the procedure of adoption of Decisions.

Meanwhile, the legislation does not directly regulate the public participation procedure regarding decision-making issues of Sevan Lake Expert Commission. The position of this Commission does not even affect on final EIA conclusion affirmed by the responsible public authority, as the RA Ministry of Nature Protection is not committed to take into account the conclusions and decisions adopted by the Sevan Lake Expert Commission, and the BP-76 Affirmative Conclusion of the Environmental Impact Assessment refer to the position of the Sevan Lake Expert Commission. Thus, the Expert Conclusion Sevan Lake Expert Commission is does not have any relation with the Expert Conclusion of the RA Ministry of Nature Protection.

Moreover, the Sevan Lake area includes more than 40 surrounding communities, which can directly be affected by any impact on the lake's ecosystem. Furthermore, the lake has vital importance for the whole country and the Caucasus region as well, with its 35 billion cubic meters of spring water and unique ecosystem. None of surrounding communities participated in decision-making process. In fact, the Decision of Sevan Lake Protection Expert Commission shall be based on the assessment and consideration of the impact on mentioned communities and general impacts.

Having in mind that in Armenia public participation in environmental decision-making is being implemented on the environmentally sound issues through EIA procedure, the Expert Conclusion of the Sevan Lake Protection Expert Commission shall ensure the full public participation, in accordance to the national legislation, as its **Decisions** entail the right to generate the industrial activities with potential impact on Sevan Lake.

Thus, article 9 par. 3 in conjunction with article 2 par. 2 (b) of the Convention was violated when the court dismissed the claim of the plaintiffs to litigate the substance of the Affirmative Conclusion of Sevan Lake Expert Commission. In fact, Sevan Lake Protection Commission is a Legal Person performing specific public administrative functions in relation to the environment, under the national law.

5. Pursuant to the problems of judiciary revealed in current Communication, the enforcement is surely linked to access to justice, and the access to justice pillar indeed contributes to the enforcement of the other two pillars in certain respects. However, any provisions of the Convention not directly enforceable through article 9, as well as the access-to-justice provisions themselves, require mechanisms for their enforcement. Paragraph 1 clearly states the connection between having a clear, transparent and consistent framework for implementing the Convention and properly enforcing it. Article 3, paragraph 1, requires each Party to establish and maintain a "clear, transparent and consistent framework" to implement the Convention.

The violation of article 9 par. 3 in conjunction with article 2 par. 3 (1) already has a continual character in Armenian legal practice. Since 2001, when Armenia ratified the Convention, three Communications were launched concerning non-compliance of different provisions of the Convention. During all three Communications the Compliance Committee found that there was non-compliance of number of provisions. As we can see, the brutal infringements of the Convention

continue, and no substantive progress is recorded, at least concerning the issues presented in current Communication.

The findings of the Compliance Committee reveal that a Party's failure to implement individual provisions of the Convention frequently also involves a violation of article 3, paragraph 1. In its findings on submission ACCC/S/2004/1 and communication ACCC/C/2004/3 (Ukraine), the Compliance Committee held that the lack of clarity with regard to the public participation requirements in the Party Concerned's EIA and environmental decision-making procedures gave rise to a breach of article 3, paragraph 1.

In case of Armenia, the same violations occur repeatedly, which consequently leads to the violation of article 3 par.1. Particularly:

- As a result of the communication ACCC/C/2004/08 the Committee came to the conclusion that the Government failed to ensure access to information on the Environmental matters (Article 4, point 1and 2), public participation in the decision making (Article 6, point 1(a), 2-5 and 7-9), as well as Article 7), the access to justice (Article 9, point 2-4)[1] .

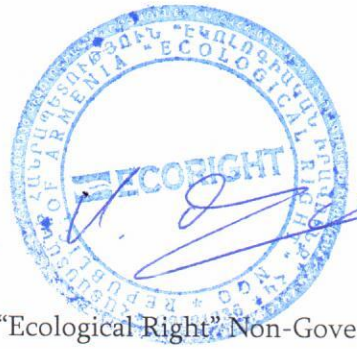
- As a result of the communication ACCC/C/2009/43 the Compliance Committee affirmed a failure to implement provisions of the Convention (Article 3, point 1), and stated once again the violation of the Convention on ensuring public participation in the decision making (Article 6, point 2,4 and 9) [2].

- As a result of the communication ACCC/C/2011/62 the Compliance Committee stated again the violation of the right to access to justice (Article 9, point 2)[3].

As it is clearly presented in the Implementation Guidance of the Convention, Parties must not only ensure that all relevant legislation is on its face clear and consistent with the Convention, but must also guard against the inconsistent application of that legislation by public authorities, or inconsistent decisions by judicial or administrative bodies, by taking measures to ensure that such bodies interpret and apply the relevant legislation in a clear, transparent and consistent manner. Courts and other review bodies must also apply the law in a clear and consistent manner. In its findings on communication ACCC/C/2005/11 (Belgium), the Compliance Committee recalled the obligation in article 3, paragraph 1, and noted that the independence of the judiciary cannot be taken as an excuse by a Party for not taking the necessary measures.

[1] http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_2_e.pdf
[2] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2009-43/Findings/C43ARMFindings.pdf
[3] http://www.unece.org/env/pp/compliance/compliancecommittee/62tablearm.html

Current Communication emphasizes the fundamental problem of permanent and total inobservance of the provisions of the Convention by the Party concerned, which is reflected in the absolute ignorance of the regulations of the Convention by the judicial authority. It means that no tangible efforts were applied by the state bodies and other responsible persons to improve the level of knowledge of judiciary regarding the conventional regulations. It seems that all progress reports presented to the Secretariat of the Convention were just an imitation of activity but not a substantive work.

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