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COMMISSION OF THE EUROPEAN COMMUNITIES

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Submissions of the European Commission,  
**on behalf of the European Community, to the Aarhus Convention Compliance  
Committee concerning communication ACCC/C/2007/21**

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**1. Introduction and general comments**

1. By letter of 19 December 2007, the Secretary to the Aarhus Convention<sup>1</sup> ('the Convention') informed the European Commission that communication ACCC/C/2007/21 had been lodged with the Aarhus Convention Compliance Committee ('ACCC') by the Albanian NGO "Civic Association for the Protection of the Bay of Vlora" ('CAPB' or 'the communicant') against the European Community. The documentation originally submitted as attachments to the above-mentioned letter was supplemented by additional information sent by e-mail of 14 January 2008.
2. The communicant argues in essence that the European Community has breached the access to environmental information and public participation provisions of the Convention in the context of the financing by the European Investment Bank ('the Bank' or 'EIB') of a project of thermal electric power plant to be built in Vlora ('TEPP').
3. In its original communication, the communicant argues that the *"European Community has violated Article 6 of the of the Convention, because the procedure leading to the approval of the EIB loan from the selection of the site of the TEPP through the end of the permitting procedures were conducted without public participation requirements set by the Aarhus Convention. Indeed, at no time prior, during and after the negotiating and signing of the Financing Contract did the BEI - independently and on its own volition - conduct any public participation of any kind with the local community concerned in the City of Vlora"* (emphasis in original text).
4. In its memorandum sent to the ACCC in response to a letter from the latter of 1 October 2007, the communicant further contends that Articles 4(1) and 5(3) of the Convention would have been breached on the account that the Bank has not given access to a full copy in English of the Loan Agreement concluded on 29 September 2004 with the Albanian Energy Corporation (KESH) and the Framework Agreement concluded between Albania and the Bank on 5 February 1998.
5. The ACCC, having determined, on a preliminary basis, that the communication was admissible, sought, with the above-mentioned letter of 19 December 2007, the views of the European Community on the alleged non-compliance; in addition, the ACCC requested the Community to answer two questions. Copy of the questions sent to the communicant was also sent to the Community, which was invited to submit its observations on those questions as it saw fit. The Community was expected to reply as soon as possible and within five months at the latest<sup>2</sup>.

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<sup>1</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (done at Aarhus on 25 June 1998).

<sup>2</sup> The Commission considers that the time-limit to submit its comment is to be computed not from 19 December 2007 but from 14 January 2008, date on which it received the remainder of the information enabling it to have a full knowledge of the relevant facts.

6. The Commission represents the Community, as Contracting Party to the Convention, in the various bodies set up by, or under, the Convention, including the ACCC. Yet, since the alleged non-compliance was said to result from the conduct of the Bank, the Commission has consulted the Bank in the course of preparing the following submissions, although it should be made clear that the Commission is sole responsible for the views set out hereafter.

## **2. Background information**

7. As far as the factual context of the case is concerned, the Commission is happy to present to the ACCC the following remarks, based on the information given to it by the Bank:
8. It appears that the communicant, or its representatives, already contacted the EIB's services on different occasions regarding the TEPP project in Vlora. A brief chronology of events, which both precede and succeed communication 2007/21, follows.
9. In 2005 the communicant submitted a communication against the Republic of Albania with the ACCC (ACCC/C/2005/12). During its meeting of 13-15 June 2007, the ACCC approved the final Finding and Recommendations whereby the ACCC recognized the partial liability of the Albanian government for non-compliance with the Aarhus Convention. It is worth noting that the communication 2005/12 is on a much larger scale than only the TEPP co-financed by the EIB.
10. On 11 March 2005 the communicant submitted, on behalf of several environmental associations and representatives of civil society in Albania, an Open Letter on the TEPP to the EIB, the EBRD and the World Bank. The EIB replied on 4 May 2005 by providing information on its involvement and, inter alia, on the project's site selection report and Environmental Impact Assessment (EIA), including the Environmental Management Plan (EMP). The link to the project's EIA and other documents available on the World Bank's website was provided.
11. On 5 April 2006 the EIB received a request for disclosure of the "Loan Agreement" between the EIB and Albania of 29 September 2004 and the "EIB's environmental impact assessment" from a communicant identifying himself as Mr. Agron Alibali, attorney and adjunct professor at Bryant University, Smithfield, Rhode Island, USA. The request included the disclosure of the project's Finance Contract and EIA, as well as the question whether or not the EIB conducted its own inquiry on "potential historical/archaeological value of the site".
12. In accordance with the Bank's Public Disclosure Policy applicable at that time, the request to release of the Finance Contract was denied on 28 April 2006. The EIB was not aware at that time that an Albanian translation of the Finance Contract was in the public domain. The Bank explained that, as a matter of principle, it does not conduct its own EIA, which is always the responsibility of the project promoter. Additional information about the project's site selection study and EIA was also provided, including a reference to the availability of the EIA from the World Bank's website. Regarding the issue of potential historical/archaeological values of the site, the Bank indicated that this was not identified during the appraisal and that, at the request of

the project' lenders, the Ministry of Culture had investigated and informed the EIB on the 17 March 2006 that no historical values had been identified for that area.

13. On 25 October 2006 the <sup>2</sup>communicant lodged a complaint with the EIB's internal complaints mechanism on several issues, including allegations of fraud, negligence and infringement of Community and Albanian environmental law. The complaint did not include, nor referred to, a previous request for disclosure of documents. On 27 November 2006 the Bank thoroughly replied to the complainant addressing his allegations.
14. On 9 September 2007, the Bank received an application for disclosure of the Framework Agreement between the EIB and the Republic of Albania of 1998 from Mr. Agron Alibali. The Bank's competent services replied to the request on successive messages dated 8 October 2007 and 8 November 2007, and ultimately disclosed the requested document on 15 January 2008 after having received the corresponding authorisation from the Albanian authorities.
15. On 4 February 2008, the communicant referred to the EIB reply of 15 January 2008 to Mr. Agron Alibali's request for disclosure of the Framework Agreement of 1998, indicating that such request was submitted on behalf of the Civic Alliance for the protection of the Bay of Vlora and further submitted a request for the disclosure of original texts in English of the Finance Contract between the EIB and the Albanian corporation KESH on the TEPP project of 29 September 2004, and of the EIB-Albania Guarantee Agreement of 6 December 2004, as well as copies of the EIB Statute in force in 1998 and 2004. These requests were dealt with by the Bank's competent services which provided the requested documents on 17 March 2008 on the basis of the fact that they were already in the public domain in Albanian language and with the exception to the annexes of the Finance Contract which had not been published in the Albanian Official Gazette. Following the authorisation of the Albanian authorities, the annexes were disclosed to the communicant on 10 June 2008.

### **3. Replies to the questions raised by the ACCC**

16. The ACCC has posed the two following questions to the Community:
  - (1) Is the information requested (in particular the Framework Agreement) by the communicant "environmental information"? Would there be a need to get the agreement of the borrower before the information could be publicly disclosed?
  - (2) In case "environmental information" is not provided by the EIB to a person requesting the information what procedures could be used to have a review of this decision undertaken? Which would be the competent authority to undertake the review? Are there any legal remedies in place which may be used by the person requesting the information?
17. With regard to the first question, the Community takes the view that neither the Finance Contract (Loan agreement) of 2004 nor the Framework agreement of 1998 can be considered as "environmental information". The Framework agreement sets out the general provisions governing the EIB activities in Albania and does not contain as such any information relating to the environment. As to the Finance

Contract, it deals with the loan from the Bank to finance the project and does not relate to the environment, with the possible exceptions of Article 6.08 thereof and Schedule A.1 (technical description of the project). That said, it should be noted that the applicant was interested, and had requested, access to the full Finance Contract.

18. On the basis of the above, these submissions will no longer address the Framework Agreement as this document does not fall under the scope of application of the Aarhus Convention.
19. As regards the need for the borrower's consent for the public disclosure of the Finance Contract, the Community notes that it would only be relevant to examine this issue to the extent that the Finance Contract would contain environmental information since the document as such, and in any case all information other than environmental information, is not covered by the Convention.
20. The Commission understands that, under the relevant regulatory framework, any request for access to environmental information would lead the Bank, as any other Community institution or body concerned, to consider whether 1) the information requested is environmental information and 2) no exception applies which would justify that disclosure be refused.
21. Concerning the latter point, it may be useful to refer to the protection afforded by Article 4(4)(d) of the Convention to the "*confidentiality of commercial or industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest*".
22. This exception has been retained in Community legislation, as it appears from a combined reading of Articles 3 and 6 of the Aarhus Regulation and 4(2) first indent of Regulation No 1049/2001.
23. In that context, the Commission understands that, where the requested environmental information would be part of a document, such as a Finance Contract, which typically falls under the above-mentioned exception under the parallel but distinct regime governing access to documents, the environmental information would be subject to a separate assessment as to the applicability of that exception (as well any other relevant exception under the applicable regulatory framework), and, should no harm to the interests concerned be identified, the environmental information would be released.
24. As, in the case at issue, the communicant requested the full Finance Contract, the Bank considered the request as one for having access to the full document (it being understood that the release of the full document would have ipso facto given access to any environmental information possibly contained in the document).
25. It is also to be noted that, as soon as the Bank became aware that the Finance Contract was in the public domain, it disclosed an English version thereof with the exception of the annexes to it, which had not been published in the Albanian Official Gazette. As already stated, following the authorisation of the Albanian authorities, the annexes were disclosed to the communicant on 10 June 2008.

26. In reply to the second question, the Commission would like to refer to paragraphs 105-107 of the Bank's Public Disclosure Policy – Principles, Rules and Procedures of 17 July 2007<sup>3</sup>, which set the provisions pertaining to the appeal mechanism which is available to members of the public who feel that a request for information was not dealt with by EIB staff according to the standards and procedures formally adopted by the Bank:

***"Provisions for appeal***

*105. Members of the public who feel that a request for information was not dealt with by EIB staff according to the standards and procedures formally adopted by the Bank may lodge a formal appeal with the EIB's Secretary General. Appeals must be made in writing, within 20 working days of the date of the correspondence, which is the subject of the complaint. The Bank will acknowledge the receipt of the appeal without delay and the Secretary General's reply will be provided no later than 20 working days following receipt of the appeal.*

*106. In accordance with Article 195 of the EC Treaty, EU citizens or any natural or legal person residing or having its registered office in a EU Member State can also refer their appeal to the European Ombudsman (10). The Ombudsman has been set up to examine appeals about mal-administration in the activities of EU institutions and bodies and reports to the European Parliament.*

*The actions of the Bank shall also be subject to judicial appeal before the Court of Justice of the EC in accordance with the relevant provisions of the EC Treaty, in particular Article 237(11).*

*107. For cases where non-EU citizens residing outside the EU, or a legal person with no established office in the EU, wish to appeal against non-disclosure of EIB information, and whose cases are not being handled by the European Ombudsman, appeal can be made to the Bank's Inspector General (12). In carrying out his task, the Inspector General acts independently from the Management of the Bank. His reports are sent to the independent EIB Audit Committee, at the same time as they are sent to the Management.*

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<sup>10</sup> Before appealing to the Ombudsman, the public must explore all the established procedures of an EU institutions' or body such as the EIB.

<sup>11</sup> Article 237.

*The Court of Justice shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:*

*a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 226;*

*b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 230;*

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<sup>3</sup> Available at: <http://www.eib.org/about/publications/public-disclosure-policy.htm>.

c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 230, and solely on the grounds of non-compliance with the procedure provided for in Article 21 (2), (5), (6) and (7) of the Statute of the Bank.

<sup>12</sup> As set out in the Bank's "Statement on Governance", the Inspector General provides an independent recourse mechanism for investigating complaints that the European Ombudsman considers to be outside his remit. The terms of reference for the appeal mechanism under the Inspector General are being prepared."

### ***Procedures for appeal***

*For EU citizens or any natural or legal person residing or having its registered office in a EU Member State:*

***Confirmatory application → Secretary General → European Ombudsman  
Court of Justice of the EC, in accordance with the relevant provisions of the EC Treaty***

*For non-EU citizens residing outside the EU or a legal person with no established office in the EU:*

***Confirmatory application → Secretary General → European Ombudsman / Inspector General  
Court of Justice of the EC, in accordance with the relevant provisions of the EC Treaty***

27. It appears from the above that any person suspecting an act of maladministration by the EIB can lodge a complaint under the Bank's complaints mechanism by writing to the EIB Secretary General or to a dedicated inbox (complaints@bei.org). In case the complainant is not satisfied with the internal review undertaken by the EIB's Complaints Office, (s)he has the possibility to lodge a complaint against the Bank with the European Ombudsman as set by Article 195 of the Treaty establishing the European Community, which defines the mandate of the European Ombudsman. According to article 195, the European Ombudsman can hear complaints of alleged maladministration committed by EU institutions and bodies when the complaints are lodged by EU citizens/residents or by non-EU legal persons with a registered office in the EU. In this context it is worth emphasizing that in October 2007, on the occasion of the presentation of the Annual Report of the European Ombudsman for 2006 to the European Parliament, the Ombudsman declared its intention to use his power of own initiative when the only cause of inadmissibility of the complaint is the non-EU origin of the complainant.

28. On the basis of these considerations, the competent authority to carry out a review of the decision by the EIB not to provide environmental information to a person requesting such information is the Secretary General of the EIB under the internal complaints mechanism, and, in case the complainant is not satisfied with the outcome of the first stage of the complaints mechanism, the European Ombudsman which provides an external and independent review of the EIB's decisions. Ultimately, the actions of the Bank may also be subject to judicial appeal before the Court of Justice of the European Communities in accordance with the relevant articles of the EC Treaty, in particular Articles 237 and/or 230 EC.



29. The Commission is aware of the restrictive wording of Article 237 EC. It considers, however, that indications can be found in the judgment of the Court of 10 July 2003<sup>4</sup> suggesting that decisions by the Bank which directly adversely affect rights of third parties should be challengeable so as to ensure that the rule of law is ensured within the Community<sup>5</sup>. Admittedly, the above judgment does not settle the issue conclusively but the Commission would submit that due regard should be paid to the general principle of effective judicial protection<sup>6</sup>. Besides, there are precedents in the case-law where the Court did not consider that the silence of a Treaty provision meant that access to justice was not possible<sup>7</sup>. It is also settled law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community (in this case, Article 9(1) of the Convention)<sup>8</sup>.
30. The Commission is conscious that the Court has made clear that it is not for the Community judicature to provide for legal remedies where the Treaty clearly indicates otherwise<sup>9</sup>. The Commission would be inclined to consider, however, that Articles 237 and/or 230 EC should be given a functional interpretation in that the Treaty only seeks to exclude judicial challenges against the Bank's decisions, which the latter has taken as an independent financial institution. The Commission is aware of the special position of the Bank under the EC Treaty<sup>10</sup>; it would contend, however, that access to justice in the field of environmental information is not capable of jeopardising or otherwise imperilling the capacity of the Bank to act as an independent financial institution on the financial markets and elsewhere.
31. The Commission stresses that the above considerations are only made with respect to the issue of access to environmental information, which is subject to a specific legal regime under the Convention and Regulation No 1367/2006, and do not concern the financial and banking activities of the EIB as such.

#### **4. Further comments on the alleged non-compliance of the European Community with the Aarhus Convention**

##### **4.1 With respect to access to environmental information**

32. With regard to the right to have access to environmental information, the communicant alleges that the Community would have violated Articles 4(1) and 5(3) of the Aarhus Convention insofar as the EIB would have unfairly refused access to a full copy in English of the Loan Agreement concluded on 29 September 2004 with

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<sup>4</sup> Case C-15/00 *Commission v European Investment Bank* [2003] ECR I-07281.

<sup>5</sup> See para. 75 in particular of Case C-15/00.

<sup>6</sup> See Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339 and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras 38 and 39. That said, applicants other than the Member States or the Commission would have to be directly and individually concerned by the contested decision.

<sup>7</sup> See Case C-70/88 *European Parliament v Council* [1990] ECR I-2041).

<sup>8</sup> See, among others, Cases C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52, C-284/95 *Safety Hi-Tech v S. & T.* [1998] ECR I-4301, para. 22, C-341/95 *Bettati v Safety Hi-Tech* [1998] ECR I-4355, para. 20 and C-76/00 *Petrotub & Republica v Council* [2003] ECR I-79, para. 57.

<sup>9</sup> See para. 44 of the judgment in Case C-00/50 P.

<sup>10</sup> See para. 101 of the judgment in Case C-00/15.

the Albanian Energy Corporation (KESH) and of the Framework Agreement concluded between Albania and the Bank on 5 February 1998.

33. On the basis of the considerations expressed above, the Commission does not agree with the communicant as regards his allegations concerning his request for total disclosure of the document under the Aarhus Convention. The latter imposes the obligation to disclose "environmental information". The Community therefore challenges the alleged failure to comply with the Aarhus Convention insofar as it would have not provided a full version of the Loan Agreement with KESH as the Bank is not bound by the Aarhus Convention to disclose a Finance Contract *per se* but rather to give access to environmental information possibly contained herein (subject to relevant exceptions to disclosure).
34. The same holds true with respect to the Framework Agreement.
35. The communicant further contends that, contrary to other international financial institutions, there would be very limited, if any, environmental information at the EIB site on the TEPP project, which may constitute a violation of Article 5(3) of the Aarhus Convention (point 36 of the communicant's memorandum). The Commission does not share the communicant's views that the Bank would not have disclosed enough information and refers to the extensive environmental information provided by the Bank in its correspondence with the communicant.<sup>11</sup> The Commission also notes that pursuant to both the Aarhus Convention and the Aarhus Regulation, environmental information is to be made available *progressively*, thus allowing for flexibility in the way in which such information is disseminated. Finally, the environmental information the EIB possesses on the TEPP project can be hardly considered to fall under any of the categories of information contained in Article 5(3) of the Convention. Indeed, this environmental information cannot be assimilated either to a report on the state of the environment, or to a text of legislation on or relating to the environment, or to policies, plans and programmes on or relating to the environment, or to an environmental agreement, or to other information to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention.

#### **4.2 With respect to public participation in decision-making**

36. With regard to the right to public participation in decision-making in environmental matters, the communicant alleges that the European Community would have violated Article 6 of the Aarhus Convention, because "*the procedure leading to the approval of the EIB loan from the selection of the site of the TEPP through the end of the permitting procedures were conducted without public participation requirements set by the Aarhus Convention. Indeed, at no time prior, during and after the negotiating and signing of the Financing Contract did the BEI -independently and on its own volition - conduct any public participation of any kind with the local community concerned in the City of Vlora*" (point 13 of the original communication). In its memorandum submitted in response to the letter of 1 October 2007 from the ACCC, the communicant provides further argumentation in support of its allegation that the

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<sup>11</sup> See paragraphs 9 *et seq.* above.

EC, through the conduct of the EIB, would not have complied with Article 6 of the Convention (notably points 15-26 and 37-54).

37. The communicant also argues that some provisions of Article 6 of the Guarantee Agreement between Albania and the EIB would constitute violation of paragraphs 2, 3, 4 and 8 of Article 6 of the Convention because *"by inducing specific, strict and inflexible obligations upon another Party to the Convention, EIB leaves no other option open to the public except that of building the TPP at the pre-determining site ignoring all relevant Article 6 requirements under the Aarhus Convention"* (point 44 of the communicant's memorandum).
38. The Commission would submit in that respect that Article 6 of the Convention does not apply to the Bank's operations in that financing of a project does not constitute a permitting decision.<sup>12</sup> Indeed, contrary to what the communicant seems to contend in his submission, given the EIB's role as a fund provider and not as a party to the environmental decision-making process, it cannot have an independent and separate obligation to carry out public participation, the responsibility for which rests with the project promoters at national level. As the preparation and the permitting processes take place at national level, public participation should also be provided for at this level and not when the related subsequent financing decisions are taken.<sup>13</sup>
39. As regards the communicant's allegation that some provisions of the Guarantee Agreement would constitute violation of Article 6 of the Convention, suffice it to mention, in addition to the above, that as clearly indicated in the Agreement, the Albanian Government's obligation as guarantor to assist in the permitting process is limited to means available under Albanian law, which obviously includes any international agreement, such as the Aarhus Convention, whose implementation is to be ensured within the Albanian legal order.

## 5. Conclusion

40. In light of the aforementioned, the Commission would contend that the Community is not to be considered as having acted in breach of Articles 4, 5 and 6 of the Aarhus Convention in the specific case having given rise to communication ACCC/C/2007/21.

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<sup>12</sup> Interestingly, the author of the legal analysis referred to by the communicant in its memorandum (footnotes 7 and 10) also concludes that *"EIB does not issue decisions subject to Article 6 of the Convention, as it does not have any regulatory powers. Its decisions about financing particular projects, although they often do relate to projects belonging to activities listed in Annex I to Aarhus Convention, can not be treated as "decisions on whether to permit proposed activities" because in the current legal framework within the EU, such decisions are taken solely by the national authorities"*, (paragraph 25). For the avoidance of doubt, the reference in this context to the said legal analysis is not to be taken as the Commission's general approval of its contents.

<sup>13</sup> Nevertheless, in accordance with the Bank's general policy, the EIB systematically verifies that the projects it finances comply with relevant environmental rules and standards, including requirements for public participation.