DRAFT FINDINGS AND RECOMMENDATIONS OF THE COMPLIANCE COMMITTEE WITH REGARD TO COMMUNICATION ACCC/C/2009/43 CONCERNING COMPLIANCE BY ARMENIA[1]

adopted on 17 December 2010

I. INTRODUCTION

1. On 23 September 2009, the Armenian non-governmental organization (NGO) Transparency International Anti-corruption Centre, in collaboration with the associations Ecodar and Helsinki Citizens' Assembly of Vanadzor (hereinafter collectively the communicant), submitted a communication to the Committee alleging failure by Armenia to comply with its obligations under article 6, paragraphs 2, 4, 8, 9 and 10, and article 9, paragraph 2, of the Convention.

2. The communication concerns the issuance and renewal of licenses to a developer for the exploitation of copper and molybdenum deposits in the Lori region of Armenia. It alleges that the Party concerned by (a) not informing the public concerned early in the licensing decision-making, (b) not providing for early and effective public participation, (c) not taking into account the outcome of public participation in the decision-making, and (d) not informing at all the public about the decision to renew the licenses or informing it only after their issuance, failed to comply with article 6, paragraphs 2, 4, 8, 9, and 10, of the Convention. Also, the communication alleges that by not recognizing the interest of the communicants to challenge the legality of the licenses at the Armenian courts, and dismissing their application, the Party concerned failed to comply with article 9, paragraph 2, of the Convention.

3. At its twenty-fifth meeting (22-25 September 2009), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 29 October 2009 along with a number of questions put forward by the Committee soliciting additional information from the Party on matters relating, inter alia, to the applicable legal framework and the decision-making procedures for the project. Also on 29 October 2009, the secretariat forwarded to the communicant a number of questions put forward by the Committee.

5. On 9 December 2009, the communicant addressed the questions raised by the Committee. On 16 December 2009, the Party concerned sent its considerations on the communication.

6. At its twenty-sixth meeting (15-18 December 2009), the Committee agreed to discuss the content of the communication at its twenty-seventh meeting (16-19 March 2010).

7. On 23 February 2010, the Party concerned addressed the questions raised by the Committee and commented on the allegations of the communication.

[1] This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

8. The Committee discussed the communication at its twenty-seventh meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned submitted additional information to the Committee on 19 and 20 May 2010; and the communicant on 16 May 2010. On 7 June 2010 the communicant sent additional information to the communication and the Party concerned responded on 2 August 2010. The Committee took note of these letters at its twenty-eighth and twenty-ninth meetings (15-18 June and 21-24 September 2010, respectively), and decided to consider the points raised only to the extent that they related to the scope of the communication, as discussed with the parties at the Committee's twenty-seventh meeting.

9. The Committee prepared draft findings at its twenty-ninth meeting, and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 11 October 2010. Both were invited to provide comments by 8 November 2010.

10. The communicant and the Party concerned provided comments on the 8 and 9 November respectively.

11. At its thirtieth meeting (14-17 December 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. SUMMARY OF FACTS, EVIDENCE AND ISSUES[2]

A. Legal Framework

12. The 2002 Law on Concessions of the Entrails for Prospecting and Extraction with the Purpose of Exploitation of Minerals (translation provided by the parties; hereinafter the 2002 Law on Concessions), provides that only holders of mining rights may undertake prospecting/mining activities (art. 10). Rights for industrial exploitation of deposits of mineral resources are awarded through a multi-phase process: a license (on prospecting/mining), a license agreement between the relevant authority and the licensee, determining the terms of the mining rights, and the project document, after the carrying out of an environmental impact assessment (EIA) procedure and the issuance of a positive expertiza. The 2002 Law on Concessions also distinguishes between a mining license and a special mining license. According to article 3 of the Law on Concessions a special license is a written permit to carry out mining activities on a certain site and it can be issued from a period exceeding 12 years and up to 25 years. Compared to a simple mining license, a special license is of a longer duration, while it provides the possibility for the licensee to sign a concession agreement with the Government.

13. A license becomes valid from the date of signing of the license agreement (art. 10, para. 6 of the 2002 Law on Concessions), which defines the conditions of mining and the rights and obligations of the parties. In case of a special mining license, the license agreement should be signed within nine months from the date of license issuance (art. 10, para. 6.3 of the 2002 Law on Concessions).

[2] 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.

14. Armenian legislation does not explicitly determine the stage at which the EIA procedure should take place during the permitting procedure for mining activities. The 2002 Law on Concessions (art. 60) provides that the mining authority, when it grants mining rights, it should take into account the expertiza on environmental assessment; this provision implies that the EIA procedure, as detailed in the EIA Law (see below), should be carried out before signing of the license agreement.

15. The 1995 Law on Expertiza on Environmental Assessment (hereinafter EIA Law) provides for a list of activities that are subject to EIA procedure and the Government sets thresholds for these activities (art. 4). The Law applies to mining activities and provides for public participation opportunities during the decision-making on three occasions: (i) upon the developer's notification of the planned activity; (ii) upon preparation of the EIA documentation by the developer; and (iii) upon issuance of the expertiza opinion by the competent authorities (articles 6, 8 and 10 respectively).[3]

16. Upon receipt of the EIA documentation (under (ii) above), the Ministry of Nature Protection has to forward the documentation to the local authorities, other relevant government bodies and the affected population. The local authorities inform the affected population through the mass media about where and when the documentation can be accessed. The public may submit their comments to the local authorities or directly to the Ministry during the 30-day public comment period. Within 30 calendar days from the receipt of the documentation, the Ministry, the local authorities and the developer have to make arrangements for possibilities for study and for public hearings about the EIA documentation (article 8 of the EIA Law).

17. Upon receipt of the expertiza opinion (under (iii) in para. 15 above), the Ministry has to ensure the organization of public hearings within 30 days. The public notice, including information about the location and the timing, is addressed to the developer, the local authorities, the affected population, relevant government bodies and the persons involved in the expertiza, and must be issued by the Ministry at least 7 days before the hearings (art. 10 of the EIA Law).

18. Apart from public participation in decisions on planned activities, the EIA Law provides for public participation concerning "concepts", defined by the law as proposals, programs, complex designs and master plans. The concept submitter organizes the public hearings and has to take their outcome into consideration. The submitter and the competent authorities ensure that the concept and the related EIA documentation are publicly available at least 30 days before the public hearings (art. 15).

19. According to the provisions of the Administrative Procedural Code (Article 3.1) and of the Law on NGOs (art. 15.1), NGOs have locus standi to challenge administrative acts at the court, if they consider inter alia that such acts have violated or may directly violate their rights, as these are guaranteed by the Constitution, international treaties and other laws.

20. Also, according to article 52 of the Civil Code "a legal person may have civil rights corresponding to its purposes of activity provided in its founding document and bear the duties connected with this activity".

[3] According to Armenian law, the environmental impact assessment process is undertaken by the developer and the related documentation is reviewed by experts who comment on it; the public authorities issue the expertiza on the basis of the experts' review and a project may be implemented only if the expertiza conclusions are positive.

21. Further to the amendments of the Armenian Constitution in 2005 and of the Judicial Code in 2007, the Court of Cassation has the role to ensure the uniform application of the laws in the country.

B. Facts

22. The Lori region of Armenia is a rich in biodiversity area of the country. In the 1970's, deposits of copper and molybdenum (hereinafter referred to only as deposits) were found near to the rural settlements of Teghout and Shnogh.

23. On 8 April 2001, the Armenian government issued a license to the Manex & Vallex CJSC, the predecessor of the developer Armenian Copper Programme (ACP), to exploit the deposits for 25 years. In 2004, due to changes in Armenian legislation introduced by the 2002 Law on Concessions, the form of the special mining license with ACP had to be renewed, but its terms and duration remained the same.

24. By decision of the prime minister, an inter-agency commission was established with the mandate to consider and coordinate activities that would support the Teghout development program. On 30 September 2005, the commission approved the Concept for the exploitation of the deposits. In general, Armenian legislation (i.e. the 1992 Subsoil Code and the 2002 Law on Concessions), does not require the issuance of a Concept in this respect.

25. In 2006, the developer proceeded with the carrying out of the EIA procedure. The decision-making process, coordinated by the Ministry of Nature Protection, involved two stages in the EIA procedure where public hearings took place. For the EIA documentation, the public notice for the hearing was issued on the newspaper "Republic of Armenia" on17 March 2006: the public hearing took place on 23 March 2006 and the positive expertiza conclusions were issued on 3 April 2006. For the review of the project working document: the public notice for the hearing was issued on the newspapers "Republic of Armenia" and "The Right" on 28-29 September 2006, the public hearing took place on 12 October 2006 and the positive expertiza conclusion was issued on 7 November 2006.

26. On 1 November 2007, the Government adopted a decision allocating 735 hectares of land to the developer for a term of 50 years and with the objective to construct a mine, including the right to log in a forest area of 357 ha. According to the communicant, the decision was taken without competition. The license agreement between the Government and the developer was concluded on 8 October 2007.

C. Use of domestic remedies

27. The communicant challenged the legality of several administrative acts relating to this project at the Administrative Court (see also excerpts of the application to the administrative court, translated in English by the communicant), among these acts: the positive expertiza conclusions of 3 April 2006 concerning the EIA study; the positive expertiza conclusion of 7 November 2006 concerning the project working document; the decision of 1 November 2007 to allocate land to the developer for the project; and the license contract of 8 October 2007, for violation of several provisions of Armenian legislation relating to the EIA procedure, land, water, mineral resources, concessions, flora and fauna.[4] In their application, the communicant referred also to non-compliance with the Convention on Environmental

[4] See annex 1 to the communication for the excerpts of the relevant legislation as provided by the communicant.

Impact Assessment in Transboundary Context (Espoo Convention)[5] and the Aarhus Convention, in particular its articles 6, paragraphs 2, 4, 8, 9 and 10.

28. On 9 July 2009, the Administrative Court rejected the application as inadmissible on the grounds that "[a] person cannot apply to the court with any or an abstract demand, but may make a claim only if he/she is a person concerned, i.e. if the administrative body has violated his/her public subjective rights. […]". On 28 July 2009, the communicant appealed against this decision, but the court at the second instance confirmed the first instance decision.

29. On 7 August 2009, Ecodar and Transparency International submitted a joint complaint at the Court of Cassation. On 9 September 2009, the Court of Cassation determined the complaint admissible and on 30 October 2009, the Court decided to consider the complaint only with regard to one of the applicants, Ecodar.

30. On 24 March 2010, the Administrative Court rejected Ecodar's application on the grounds that Ecodar may not question environmental decisions issued by institutions. On 26 April 2010, Ecodar appealed against the decision and on 29 May 2010 it was notified that the case had been determined admissible. No date has been determined for the hearing yet.

D. Substantive Issues

31. The communicant alleges that the public participation provisions of article 6 of the Convention apply in all decisions that have been challenged before the Armenian courts (see para. 27 above), on the basis of article 6, paragraph 1(a) in conjunction with paragraph 16 of the annex to the Convention. However, according to the communicant, the Party concerned failed to comply with the public participation requirements of the Convention when it issued these decisions.

32. The communicant alleges that under Armenian legislation the Concept adopted by the inter-agency commission on 30 September 2005 (see para. 24 above) should have been subject to EIA procedure.

33. Further, the communicant alleges that the public concerned was not informed early enough in the decision-making process and it was not provided with any information about the elements specified under article 6, paragraphs 2 (a), (b), (d) and (e) that would enable it to prepare for the public hearings organized on 23 March 2006 and on 12 October 2006. In this regard, the communicant alleges that the public hearing of 23 March 2006 was organized after a special license for exploitation of the deposit had already been issued to the developer, that at both public hearings the information presented to the public concerned was not comprehensive, and that the public was never notified about and involved in the decision-making relating to the land allocation (decision of 1 November 2007) and the related agreement (8 October 2007) between the government and the developer.

34. The communicant alleges that the public hearings in 2006 were organized at a time when critical decisions (special license for exploitation to the developer in 2004 and review of the project by the interagency commission in 2005) had already been taken by the competent authorities, and thus that the public concerned was not given any opportunity to participate in an effective manner in the decision-making, as required in article 6, paragraph 4, of the Convention.

[5] The deposits are located in the watershed of the river Debed, which originates in Armenia and ends in Georgia.

35. The communicant alleges that the Party concerned failed to consider the outcome of public participation in the decision-making and that the public was informed about the decisions after their adoption. For this reason, the communicant alleges that the Party concerned failed to comply with article 6, paragraphs 8 and 9. The communicant also alleges that the Party concerned by failing to notify the public concerned about the 2004 renewal of the 2001 mining license to the developer, failed to comply with article 6, paragraph 10, of the Convention.

36. The communicant alleges that because the administrative court rejected its application for review of the procedure on grounds that the administrative proceedings in question have not affected its rights and interests, and also because the Court of Cassation has rejected the complaint to the extent submitted by Transparency International, the Party concerned failed to comply with article 9, paragraph 2, of the Convention.

37. Finally, the communicant alleges that in its view little progress has taken place in Armenia after the recommendations of the Committee at ACCC/C/2004/08 as endorsed by the decision III/6b of the Meeting of the Parties.

38. The Party concerned in general argues that the facts and the legality of the allegations of the communication are not substantiated and that the communicant is not well informed about the Armenian legislative framework.

39. The Party concerned argues that the 2001 license was issued before the entry into force of the Convention in Armenia and that its renewal was only a formality that did not affect the actual content of the license. The Party concerned also explains that under Armenian legislation a mining license does not award the right to undertake mining operations, but only initiates a multi-phase process for the establishment of such a right (see para. 12 above); the law clearly provides that the mining rights arise from the conclusion of the mining agreement Public participation rights are guaranteed in mining activities in the context of the EIA procedure and they were not violated in the case of the license.

40. The Party concerned claims that the Concept of 30 September 2005 was not subject to EIA procedure, including public participation, because the inter-agency commission discussed the Concept but did not adopt it; the minutes of the inter-agency commission session of 30 September 2005 uses the terms “program” and “concept” in a conditional sense. Later, on 20 June 2008 the Government (including ministries of nature protection, economy and energy) met with a number of stakeholders, including Transparency International. According to the Party concerned at this meeting participants approved a number of elements of the Concept and the Program, as evidenced in the minutes of that discussion. The communicant disagrees and claims that at this meeting it had the possibility to discuss the concerns raised by NGOs and experts about the impact of the mining project and not elements of the concept or program

41. With regard to the alleged non-compliance with article 6, paragraph 2, the Party concerned argues that Armenian legislation regulating the form of public notice is in full compliance with the Convention. Public notice is given through the Internet, the press and the television. In its view, the public hearings of 23 March 2006 and 12 October 2006, took place in a timely and effective manner and according to the minutes the communicant neither participated nor submitted any comments. In the view of the Party concerned, earlier public participation, namely from the time that the decision-making for the license took place, was not necessary, since the license only initiates the formation of a mining right, but does not establish the right.

42. With regard to the alleged non-compliance with article 6, paragraph 8, the Party concerned argues that a number of comments were submitted by the public concerned at the public hearings and that further to one comment suggesting the establishment of a public monitoring mechanism during the carrying out of the EIA procedure, the developer collaborated with an NGO on the "Environmental Management Plan".

43. With regard to the alleged non-compliance with article 6, paragraph 9, the Party concerned argues no final decision had been adopted that should be communicated to the public, as required by the Convention and Armenian law, but only a draft.

44. About the allegations of non-compliance with article 9, paragraph 2, the Party concerned argues that the decision of the Court of Cassation accepting the application by Ecodar and denying locus standi to Transparency International Anti-corruption Center was substantiated and justified: Ecodar has the objective of promoting environmental interests enshrined in its statute, whereas the statute of Transparency International does not reflect such objective. In this respect, the Party concerned points to the distinction between the definitions of the "public concerned" (art. 2, para. 5) and the "public having sufficient interest" (art. 9, para. 2(a)), and to the broad discretion given to the Parties in implementing article 9, paragraph 2(a). Accordingly, Armenian law has defined that the criterion to identify whether an NGO has sufficient interest rests with the statute of the organization.

45. The Party concerned also mentions the trend in Armenian judicial practice to interpret broadly the criteria for actio popularis. For instance, in the present case, the Court of Cassation construed the legal standing criteria of the legislation in such a way as to accept the application submitted by Ecodar, which under Armenian law is not an NGO, but a "societal amalgamation".

46. While the Party concerned discards the allegations of the communication, it acknowledges that in general there are drawbacks and gaps in Armenian legislation and practice, but steps are being taken to improve implementation.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

47. Armenia deposited its instrument of ratification of the Convention on 1 August 2001. The Convention entered into force for Armenia on 30 October 2001.

48. The subject of the present communication and the allegations of non-compliance with the provisions of article 6 are the subject of the pending procedure before the administrative court (see para. 30 above). The Committee recalls that in some cases it has decided to suspend consideration of a communication pending national review procedures. However, the allegations of non-compliance in the present communication reflect similar legal issues upon which the Committee has already deliberated in communication ACCC/C/2004/08 (ECE/MP.PP/C.1/2006/2/Add.1) and the findings and recommendations with regard to this communication have been endorsed by decision III/6b of the Meeting of the Parties (ECE/MP.PP/2008/2/Add.10). While the Party concerned regularly reports to the Committee on its progress in implementing the recommendations of decision III/6b, the Committee decides to consider the present communication in order to examine the actual impact of decision III/6b in Armenian practice, especially with respect to public participation. The Committee, however, does not

look at the argumentation of the administrative court in its decision of 24 March 2010, currently under appeal.

Clear, transparent and consistent framework – article 3, paragraph 1

49. The Committee notes that the EIA law subjects to EIA procedure decisions for planned activities and "concepts" (see paras. 15-18 above). The distinction between a planned activity and a concept in the EIA law appears to reflect the distinction between decisions for specific activities under article 6 of the Convention and plans and programmes under article 7 of the Convention. The Convention does not clearly define what the plans, programmes and policies of article 7 encompass and leaves it to the national legislature to detail the specificities of the decisions within the general framework of the Convention.

50. The EIA law subjects "planned activities" to public participation process on three occasions during the decision-making process and lists the activities for which the EIA procedure is necessary to be carried out (art. 4), while thresholds for each activity are to be determined by the Government (see also para. 15 above). The Committee has not been provided information on whether any threshold is applicable in the mining activity in question. The Committee notes that the Law appears to defer broad discretion to the executive and the administration on the setting of such thresholds without giving any further guidance and that therefore there is a risk that the setting of thresholds may be arbitrary and decided on a case-by-case basis.

51. With respect to plans and programmes, article 7 of the Convention establishes a set of obligations for Parties to meet on public participation during the preparation of plans and programmes "relating to" the environment.

52. The Concept for the exploitation of the Teghout deposits may be considered a regional development strategy and sectoral planning which falls under article 15 of the EIA law and article 7 of the Convention, as a plan relating to the environment; or it may be the first phase (expressed as an "intention") for a planned activity under article 6 of the EIA law and article 6 of the Convention. While Armenian law provides for public participation in different phases of an activity and as early as possible, it does not indicate with precision the particular features of an "intention to carry out a planned activity", a "planned activity" or a "concept". It is further not clear what were the legal effects of the approval of the Concept on 30 September 2005 by the inter-agency commission. As already observed in the past it is sometimes difficult to determine prima facie whether a decision falls under article 6 or 7 of the Convention, but in all cases the requirements of paragraphs 3, 4 and 8 of article 6 apply (see ACCC/C/2005/12, para. 70) for plans and programmes. However, it is important to identify what the legal effects of an act are - whether an act constitutes a decision under article 7 or a first phase/intention for a planned activity under article 6, because only some of the public participation provisions of article 6 apply to decisions under article 7.

53. The Committee also observes that the EIA law lacks clarity in the following elements: the distribution of tasks between the public authorities and the developer, with respect to public participation (information of the public authorities from the Ministry, distribution of the documentation, organization of the hearings, etc.) may create duplication of effort or a confusion on the responsibilities to be borne by each actor; and the determination of the deadlines for the public authorities and/or the developer to organize hearings and give public notice are not consistent.

54. For the intention to carry out a planned activity (art. 6 of the EIA Law) and the EIA documentation (art. 8 of the EIA Law), the law does not specify how many days in advance of the public hearings, organized by the public authorities/developer the public notice should take place, whereas for the public hearings organized for the expertise conclusions (art. 10 of the EIA Law), the law specifies that the public notice should be in written form, should indicate the date and place and should be given at least seven days before the meetings.

55. The Committee also notes the lack of clarity in Armenian legislation with respect to the exact stage of the mining permitting procedure at which the EIA procedure should be carried out (see para. 14 above). The 2002 Law on Concessions (art. 60) implies that the EIA procedure should be carried out already before the issuance of the license. However, the facts of the present case indicate that the EIA procedure was carried out by the developer in 2005 after the issuance of the license in 2001 (as renewed in 2004). In addition, according to Armenian legislation, any license becomes valid from the date of signing of the license agreement and the agreement should be signed within nine months after the issuance of the license (see also para. 13 above). According to the facts presented by the parties, the license (renewal) was issued on 23 March 2004 and the license agreement was signed on 8 October 2007, which means that the agreement was actually signed almost two years and a half after the license was issued. If the law defines (see art. 3 of the Law on Concessions) that "a special license is a written permit to carry out mining activities on a certain site", this implies that the special license already is a permit to carry out activities. However it is not clear what the consequences are if the license agreement is never signed. These features of the Armenian legislation and practice create uncertainty as to when the public participation process would take place.

56. For these reasons, the Committee while it notes with appreciation the progress inferred in the Armenian legislation further to the recommendation of the MoP decision III/6b, it finds the Party concerned failed to maintain a clear, transparent and consistent framework for implementation of the public participation provisions of the Convention, as required by article 3, paragraph 1.

Applicability of article 6

57. The following decisions are at issue in the present case: (a) the license of February 2001; (b) the renewal of the license in 2004, further to formal amendment of the law; (c) the approval of the Concept for exploitation by the inter-agency commission on 30 September 2006; (d) the positive expertise conclusion of 3 April 2006 concerning the EIA documentation for the mining activities; (e) the positive conclusion of 7 November 2006 concerning the project working document; (f) the license agreement of 8 October 2007; and (g) the decision for allocation of land on 1 November 2007.

58. The license of February 2001 was issued before the Convention entered into force. However, with its 2004 renewal the 2001 license became a special license under the 2002 Law on Concessions and this had a impact on the operating conditions of the activity, such as the following: a special mining license has a longer duration, it provides for the possibility of a concession agreement, while the law (art. 53, para. 1 of the 2002 Law of Concessions) sets out a number of operational conditions that can be established by a concession agreement on the basis of a special mining license, such as the possibility of limited liability on environmental matters. Therefore, the Committee concludes that the 2004 renewal was not a mere formality and falls under article 6, paragraph 10 of the Convention. Thus, the Party concerned had to ensure that the public participation provisions of article 6, paragraphs 2-9, be applied *mutatis mutandis* and where appropriate for the renewal.

59. For the Concept of 30 September 2006, it is not clear to the Committee whether this was an early stage of an activity under article 6 or a plan or programme under article 7 of the Convention (see also para. 52 above). While some of the public participation provisions of article 6 apply for plans and programmes under article 7, the Committee has not received sufficient information to examine this decision.

60. For the positive expertiza conclusion of 7 November 2006 concerning the project working document, the Committee has not received sufficient information to examine this decision. While the communicant challenged it at the administrative Court, this decision has not been the subject of this communication.

61. Thus, the Committee here focuses on the 2004 license renewal, the expertise conclusion of 3 April 2006 and the license agreement of 8 October 2007. The decision for allocation of land on 1 November 2007 is a decision derivative of the license agreement of 8 October 2007, as it operationalizes the latter, and is thus not examined separately by the Committee.

62. The expertiza conclusion of 3 April 2006 and concerning the EIA documentation for the exploitation of the Teghout deposits is a type of decision which according to Armenian EIA Law (article 4, paragraph 1(b) relating to mining activities) is subject to public participation. Hence, this decision falls within the scope of article 6, paragraph 1(a), of the Convention, in conjunction with paragraph 20 of annex I.

63. The exploitation of the Teghout deposits is an activity listed in paragraph 16 of annex I to the Convention (quarries and opencast mining where the surface of the site exceeds 25 hectares) and falls within the scope of article 6, paragraph 1(a) of the Convention, in conjunction with paragraph 16 of annex I.

Notification of the public about the decision-making - article 6, paragraph 2

64. The public concerned may be informed through public or individual notice. In the present case, the notice was made by means of (inter alia) national press, the Internet and local television programs (three times).

65. The first hearing of 23 March 2006 was organized on the basis of article 8 of the EIA Law, which does not define the timing of the notice, and the public notice was announced on 17 March 2006, that is six days in advance of the hearing. The second hearing of 12 October 2006 was organized on the basis of article 10 of the EIA Law, which defines that the public notice should be given at least seven days in advance, and was indeed announced two weeks before the hearing, on 28 September 2006.

66. The requirement for early public notice in the environmental decision-making procedure is not detailed in article 6, paragraph 2, of the Convention. Article 6, paragraph 4, points to the purpose of giving notice early in the environmental decision-making procedure, that is that the public has the possibility to participate when all options are open and participation may be effective. The timing needed from the moment of the notification until the hearing, in which the public concerned would be expected to participate in an informed manner, namely after having had the opportunity to duly examined the project documentation, depends on the size and the complexity of the case.

67. The Committee has already observed in the past that: [t]he requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn

about proposed activities and their possibilities to participate (C/16, Lithuania, ECE/MP.PP/2008/5/Add.6, para. 66).

68. The Committee considers that one week to examine the EIA documentation relating to a mining project (first hearing) is not an early notice in the meaning of article 6, paragraph 2, because it does not allow enough time to the public concerned to get acquainted with voluminous documentation of technical nature and participate in an effective manner. In general, the two-week public notice in the second hearing, after the expertise opinion, could be considered early public notice, mainly because a lot of the project-related documentation for the environmental decision-making is the same or is based on the documentation necessary to be consulted for the first meeting. However, through their comments to the draft findings, the Party concerned and the communicant informed the Committee that the project material under consideration for the second meeting was more voluminous than for the first hearing. The Party concerned added that the public did not raise the issue that the time was not sufficient to examine the project-related material. The Committee took note of the information submitted at a very late stage of the process for its attention but observes that the fact that no objection was made in respect of the time to examine project-related documentation is not material as to whether the requirements on early and effective public participation have been met.

69. With regard to the timing of the public notice and in relation also to the finding of non-compliance with article 3, paragraph 1, (see para. 56 above), the Committee finds that there is a systemic failure of the Armenian law, as it does not provide for any indication on when the public notice for the EIA documentation hearing should be given and thus the implementation of its article 8 may be arbitrary.

70. For these reasons, the Committee finds that the Party concerned failed to inform the public early in the environmental decision-making and in a timely manner as required by article 6, paragraph 2, of the Convention.

71. Whether the notification is effective depends on the particular means employed, which in this case include the national press, local TV and the Internet (web sites of the ministry and Aarhus Center). Some times, it may also be necessary to have repeated notifications so as to ensure that the public concerned has been notified. The Committee notes that the Teghout is one of the rural communities of the Lori region, close to the borders with Georgia, approximately 180 km north from the capital Yerevan, while the nearest urban center is at approximately 30 km. These circumstances make obvious that the rural population would not possibly have regular access to the Internet, while local newspapers may be more popular than national newspapers. However, the use of local television may be a useful tool to inform the public concerned in an appropriate manner. Hence, the Committee does not find here that the Party concerned failed to give effective public notice.

72. The Committee may assess the adequacy of the public notice on the basis of the information it received (public notices in the national newspapers, translation provided by the Party concerned). The notice is brief and not very clear about which public authority is responsible for the decision-making, but includes most elements of article 6, paragraph 2. Consequently, and since the Committee cannot assess the notice given through the TV and the Internet, there is not enough evidence to assert that the Party concerned failed to provide public notice reflecting the minimum features as provided in article 6, paragraph 2, of the Convention.

Reasonable time-frames for public participation - article 6, paragraph 3

73. Under Armenian EIA legislation, the public may submit their comments to the EIA documentation during a 30-days public comment period (para. 16 above) and have a possibility to consult the expertiza opinion at least seven days before the public hearings (para. 17 above). There were no specific allegations in this respect by the communicant and the Committee refrains from making any finding.

74. The requirement to provide "reasonable time frames" implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project. (see also ACCC/C/2006/16, Lithuania, ECE/MP.PP/2008/5/Add.6, paras. 69-70 and ACCC/C/2007/22, France, para. 44)

Early public participation when all options are open - article 6, paragraph 4

75. The mining license of 2001 was issued before the entry into force of the Convention, while the 2004 renewal, as a special mining license, was issued after the entry into force of the Convention. However, the EIA procedure, including public participation, was conducted in 2006, and after decisions on the mining activity, such as the Concept and the 2004 renewal of the license, had taken place.

76. As mentioned above (see para. 59), the Committee is not clear about the nature of the Concept of 30 September 2006, whether it is an article 6 or article 7 decision. For that reason, the Committee decides to focus on those aspects of the case where the obligations of the Party concerned are most clear-cut: regardless of whether the decisions are considered to fall under article 6 or article 7, the requirement of paragraph 4 of article 6 applies (see also ACCC/C/2005/12, Albania, ECE/MP.PP/C.1/2007/4/Add.1, para. 70).

77. In this case, a special mining license was issued for the developer to exploit deposits in the Teghout region in 2004 and the developer organized public participation in the framework of the EIA procedure in 2006. Providing for public participation only after the license has been issued reduced the public's input to only commenting on how the environmental impact of the mining activity could be mitigated, but precluded the public from having input on the decision on whether the mining activity should be pursued in the first place, as that decision had already been taken. Once a decision to permit a proposed activity has been taken without public involvement, providing for such involvement in the other subsequent decision-making stages can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide "early public participation when all options are open". This is the case even if a full environmental impact assessment is going to be carried out (see also findings on communication ACCC/C/2005/12, Albania, ECE/MP.PP/C.1/2007/4/Add.1, para. 79). Therefore, the Committee finds that the Party concerned failed to provide for early public participation as required in article 6, paragraph 4, of the Convention.

Due account of the outcome of public participation – article 6, paragraph 8

78. According to the EIA Law (art. 11.1), the ministry of nature protection must take into account the minutes of the public hearings on the EIA documentation (conducted further to art. 9 of the EIA Law), before it issues the environmental expertiza. The Committee has not received any evidence that the outcome of the public hearings of 23 March and 12 October 2006, documented in the minutes provided to the Committee by the Party concerned, were not taken into account by the public authorities for issuing the expertiza. The text from the excerpts of the public hearings provided to the Committee does

not show strong opposition to the project, and one of the outcomes of the hearings was the preparation of the "Environmental Management Plan" by the developer and an NGO to deal with environmental concerns.

Prompt information on the final decision – article 6, paragraph 9

79. According to the EIA law (art. 11.8), the environmental expertiza conclusions should be published and interested parties should be notified. There is no factual evidence that the positive conclusion of 3 April 2006 concerning the EIA documentation or the one of 7 November 2006 concerning the project working document, have been published or that the public concerned has been notified accordingly, as required by Armenian law and by the Convention. The Ministry's web site includes notifications relating to the taking place of public hearings, but no information on decisions taken by the Ministry. In the view of the Committee, the Party concerned failed to comply with article 6, paragraph 9, of the Convention.

Review procedures, including standing requirements, relating to public participation – article 9, paragraph 2, in conjunction with article 2, paragraph 5

80. In respect of the case referred to paragraph 29 above, Transparency International was refused standing on the grounds that that environmental protection is not among its statutory objectives.

81. The communicant has clarified that its statutes do not explicitly refer to "environmental protection" as such. However, its objectives comprise the promotion of democratic principles, including human rights and public participation. Based strictly on the objectives of the organization stipulated in its statutes, the court refused standing.

82. The Committee does not look at the argumentation of the administrative court in its decision of 24 March 2010, currently under appeal (see also para. 48 above). It notes that according to the Convention, NGOs promoting environmental protection and meeting any requirements under national law have sufficient interest to pursue an action under article 9, paragraph 2. Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, including, but not limited to, the provisions of its statutes and its activities. Parties may set requirements under national law, but such requirements should not be inconsistent with the principles of the Convention. Despite the fact that Transparency International was not granted standing, the information given to the Committee does not demonstrate that the criteria that only organizations with explicitly mentioning environmental protection have standing, has been applied in a way that the Party concerned would be in non compliance with the Convention. In this context the Committee notes that Ecodar was granted standing.

IV. CONCLUSIONS AND RECOMMENDATIONS

83. 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

84. While acknowledging the continuous efforts of the Party concerned in implementing decision III6/b, the Committee finds that there are still shortcomings in Armenian law and practice, and due to these shortcomings in the present case, the Party concerned failed to comply with article 3, paragraph 1, of the

Convention (para. 56); and article 6, paragraphs 2, 4 and 9, of the Convention (paras. 70, 77 and 79 respectively).

B. Recommendations

85. The Committee, pursuant to paragraph 35 of the annex to decision I/7 and taking into account the cause and degree of non-compliance, recommends the Meeting of the Parties to:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned to take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(i) thresholds for activities subject to EIA procedure, including public participation, are set in a clear manner;

(ii) the public is informed as early as possible in the decision-making procedure, when all options are open and that reasonable time frames are set for the public to consult and comment on project-related documentation;

(iii) the responsibilities of different actors (public authorities, local authorities, developer) on organizing of public participation procedures are defined as clearly as possible;

(iv) a system of prompt notification of the public concerned on final conclusions of environmental expertiza is arranged, e.g. through the web site of the Ministry of Nature Protection

(b) Pursuant to paragraph 37 (c) of the annex to decision I/7, invite the Party concerned to:

(i) to draw up an action plan for implementing the above recommendations with a view to submitting an initial progress report to the Committee by 1 December 2011 and the action plan by 1 April 2012;

(ii) to provide information to the Committee at the latest six months in advance of the fifth Meeting of the Parties on the measures taken and the results achieved in implementation of the above recommendations.