To: Compliance Committee of the UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

through the Secretary to the Aarhus Convention
United Nations Economic Commission for Europe Environment and Human Settlement Division
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From: Environment-People-Law

COMMUNICATION
CONCERNING NON-COMPLIANCE BY UKRAINE WITH THE UN ECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

1. This communication is filed in relation to the State of Ukraine and alleges its noncompliance with Article 3 (1), Article 4 (1), Article 4 (3), Article 4 (6), Article 6 (1-4), Article 6 (6-9) and Article 9 (2) of the Aarhus Convention.

2. This communication alleges that the Government of Ukraine failed to comply with its obligations under the Aarhus Convention in the course of negotiation and entry into product sharing agreements (hereinafter - PSAs) with multinational oil and gas corporations in 2013.

   I. Information on correspondent submitting the communication

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II. State concerned

5. Ukraine

III. Facts of the communication

A. Access to information

6. The Communicant - Environment-People-Law (EPL) is the Ukrainian non-governmental organization duly registered in accordance with domestic legislation in 1994. Protection of the environment is EPL’s main statutory goal.
7. On January 24, 2013, the Government of Ukraine, the Dutch-British company Shell, and Nadra Yuzivska Ltd. (Ukraine) signed a 50 year long Production Sharing Agreement for exploration and production of hydrocarbons at Yuzivska field (hereinafter – Yuzivska PSA). The field is situated in the Dnieper-Donetsk oil and gas basin on the territory of Donetsk and Kharkiv regions of Ukraine. Its size is 7886 km². Yuzivska PSA is the second PSA in Ukraine’s history and the first shale gas deal.

8. Prior to this in November 2011, the Government of Ukraine by its decree announced a tender for Yuzivska field. In May 2012 Shell was announced to be a winner. Since then the negotiations of the terms of the PSA began.

9. On January 16 and 17, 2013, the draft Yuzivska PSA was approved by Donetsk and Kharkiv regional councils. Neither of the regional councils published the draft Yuzivska PSA, invited or collected comments from the public.

10. On January 23, 2013, the Government of Ukraine by its decree approved the final draft of the PSA and appointed its representative to sign the agreement.

11. Nevertheless, neither of the Yuzivska PSA preliminary drafts, nor its final draft approved by the Governmental Decree, and not even its signed text have been released to the public up to this day. Both the Government and the investors claim that in accordance with international custom they agreed on confidentiality of all and any terms of the Yuzivska PSA.

12. From the Draft Yuzivska PSA unofficially leaked to the Internet we found out that the PSA contains a confidentiality clause that reads as follows -

“Confidential Information means (a) any and all data on Contracting Area, (b) this Agreement, (c) any and all documents, information, data, samples of rocks and reports of any nature related to (i) the terms of this Agreement or the activities of the Parties to this Agreement, (ii) any negotiations in respect of the said Parties, (iii) any discussion or decision of the State Authority or any of its subcommittees or (iv) the content and status any budget or work program and (d) any and all other documents, information, data, samples of rocks and reports (i) originated in the result of oil and gas activity, or (ii) received by a Party in connection with this Agreement, including the results of work.

Except for the cases when the agreement stipulate otherwise, none of the Parties to the agreement shall disclose, disseminate, or spread any of the confidential information received from another Party, or in the course of execution of the agreement to any third parties without prior written consent of the other Party”.

13. Meanwhile the news in media on prospective shale gas extraction in Ukraine raised a wave of protests in environmental civil society groups as well as in the local communities of Yuzivska field. Environment-People-Law, many other private citizens and NGOs filed numerous public information requests to various public authorities asking about the terms of Yuzivska PSA or asking for a copy of a draft or a signed text of the PSA. The unanimous position of all public authorities was that since the parties agreed on the confidentiality of the terms of the agreement, they are not in the position to provide any third Party with any draft, signed text of the PSA, or any information on the terms of the PSA.

14. In March 2013, EPL filed a request # 65 to the Ministry of Ecology and Natural Resources of Ukraine asking for access to the text of Yuzivska PSA (Add.1). The answer from the State Geology and Minerals Service of Ukraine to EPL’s request # 65 (request was forwarded) said that the information is confidential and the State Geology and Minerals Service of Ukraine cannot provide it (Add. 2).

15. In March 2013, EPL filed a request # 69 to the State Geology and Minerals Service of Ukraine asking for access to the text of Yuzivska PSA (Add.3). The answer from the State Geology and Minerals Service of Ukraine to EPL’s request # 69 said that the information is confidential and the State Geology and Minerals Service of Ukraine cannot provide it (Add. 4).
16. In April 2013, EPL filed a request # 145 to the State Geology and Minerals Service of Ukraine asking for access to the draft of Yuzivska PSA submitted for approval to Kharkiv and Donetsk region councils (Add.5). The answer from the State Geology and Minerals Service of Ukraine to EPL’s request # 145 said that the information is confidential and the State Geology and Minerals Service of Ukraine cannot provide it (Add. 6).

17. In April 2013, EPL filed a request # 146 to the Cabinet of Ministers of Ukraine asking for access to the draft of Yuzivska PSA submitted for approval to Kharkiv and Donetsk region councils (Add.7). The answer from the Ministry of the Ecology and Natural Resources of Ukraine to EPL’s request # 146 (request forwarded) said that the information is confidential and the Ministry cannot provide it (Add. 8).

18. In April 2013, EPL filed a request # 156 to the Cabinet of Ministers of Ukraine asking for access to the final draft of Yuzivska PSA approved by its decree (Add.9) and to the text of the signed Yuzivska PSA. Answer from the State Geology and Minerals Service of Ukraine to EPL’s request # 156 (request forwarded) said that the information is confidential and the State Geology and Minerals Service of Ukraine cannot provide it (Add. 10).

19. The response from Shell, dated July 2013, was the same (Add. 11).

20. In February 2013, the Cabinet of Ministers of Ukraine held a closed meeting discussing among other things Yuzivska PSA and issue of access to this document. EPL filed a request # 70 asking for an excerpt from the minutes of the governmental meeting (recording a decision taken) regarding Yuzivska PSA (Add. 12). Response from the Cabinet of Ministers said that excerpt from the minutes of the governmental meeting regarding Yuzivska PSA constitutes information with limited access and is labeled as “for official use only” (Add. 13).

21. In March 2013, the State Geology and Minerals Service of Ukraine amended its List of “official use only” information to include “information on the terms of Yuzivska PSA” to its list of information with limited access (Add.14). Later on in one of EPL’s cases – described in Use of domestic remedies section – the court cited this List in its decision justifying legality of a denial to provide a copy of permit for mineral extraction on EPL’s request.

22. In August 2013, EPL filed a request # 248 to the State Geology and Minerals Service of Ukraine asking for a copy of a mineral extraction permit issued to Shell under Yuzivska PSA (Add.15). In its response to EPL’s request # 248 the State Geology and Minerals Service of Ukraine said that the permit is classified as “for the official use only” information (Add.16).

23. On November 5, 2013, the Government of Ukraine, Chevron Ukraine BV, and Nadra Oleska Ltd. (Ukraine) signed a 50 year long Production Sharing Agreement for exploration and production of hydrocarbons at Oleska field (hereinafter – Oleska PSA). The field is situated within Lviv-Lublin basin on the territory of Lviv and Ivano-Frankivsk regions of Ukraine. Its size is 6 324 km². Oleska PSA is the third PSA in Ukraine’s history and the second shale gas deal.

24. According to Unconventional Gas in Ukraine¹, already at the stage of geological exploration of Oleska field 13 exploration wells are planned to be drilled (8 vertical wells and 5 horizontal wells) with further performance of multi-stage hydraulic fracturing operations. The expected amount of investment at the geological exploration stage is USD 350 million, including:

- USD 120 million for drilling of 8 vertical wells,
- USD 75 million for drilling of 5 horizontal wells,
- USD 30 million for seismic studies,
- USD 75 million for engineering and geotechnical studies,
- USD 50 million for construction works.

25. Prior to that in February 2013, EPL filed a request # 40 to the Ministry of Ecology and Natural Resources of Ukraine asking for access to a draft Oleska PSA (Add.17). In its response to EPL’s request # 40, the State Geology and Minerals Service of Ukraine (request forwarded) said

¹ http://shalegas.in.ua/en/oleska-ploscha/
that the requested information is confidential and the State Geology and Minerals Service of Ukraine cannot provide it (Add.18).

26. In November 2013, EPL filed a request # 456 to the Ministry of Ecology and Natural Resources of Ukraine asking for access to a signed text of Oleska PSA (Add.19). In its response to EPL’s request # 456, the Ministry said that the requested information is confidential (Add.20).

27. Chevron in its response from March 2013 to EPL’s request also claimed confidentiality of Oleska PSA (Add.21).

28. In October 2014, EPL filed a request # 547 to the State Geology and Minerals Service of Ukraine asking for a copy of a mineral extraction permit issued to Chevron under Oleska PSA (Add.22). In its response to EPL’s request # 547, the State Service denied access and that the requested information is “for official use only”(Add.23).

B. Public participation in decision-making

29. From the press we found out that in July-August 2013 the Ministry of Ecology and Natural Resources of Ukraine sent letters to the Lviv and Ivano-Frankivsk regional councils asking for their approval of the draft Oleska PSA. There was no official invitation for public comments from local councils or public authorities. Yet, within this period on our own initiative EPL submitted its comments on unofficial text of Oleska PSA to both councils.

30. On August 27, 2013, prior to approval by the Government of the final draft of Oleska PSA its text was submitted to the Ministry of Ecology and Natural Resources of Ukraine (hereinafter - MoE) for state ecological expertiza. The Environmental Expert Assessment (hereinafter - EEA) of the draft Oleska PSA was prepared by the State Environmental Academy of Postgraduate Education and Management under the MoE. Having reviewed the EEA of the draft Oleska PSA, MoE issued a positive Conclusion of state ecological expertiza (Add.24).

31. On December 27, 2013, almost one year after the signature of Yuzivska PSA, its text was submitted to the MoE for state ecological expertiza. The EEA of Yuzivska PSA was prepared by the same State Environmental Academy of Postgraduate Education and Management under the MoE. Having reviewed the EEA of Yuzivska PSA, MoE issued a positive Conclusion of state ecological expertiza (Add.25).

32. Both Conclusions of state ecological expertiza noted that they were performed pursuant to the Law of Ukraine on Ecological Expertiza and Article 11.2 of the Law on PSAs.

33. There was no public participation in either process of preparation of the EEA, or issuance of the positive conclusions of state ecological expertiza on either PSAs. The drafts of neither Oleska, nor Yuzivska PSA have been disclosed in course of state ecological expertiza, no comments from the public were invited and collected. In no other way has public participated in decision-making of the MoE or the Cabinet of Ministers of Ukraine with regard to Yuzivska or Oleska PSAs.

34. The MoE, however, did publish EEA and Conclusion of ecological expertiza on Oleska PSA as well as Conclusion of ecological expertiza on Yuzivska PSA on its web-page. EEA on Yuzivska PSA was provided to EPL on its request.

35. Permits for extraction of mineral resources in Yuzivska and Oleska fields were issued after the conclusion of the PSAs. Yet, all terms of these permits were negotiated during the negotiation of the agreements. Moreover, texts of the two corresponding permits were included as addendums to the PSAs. Later on the State Geology and Minerals Service of Ukraine merely dated signed them and issued to the investors.

36. The State Geology and Minerals Service of Ukraine denied EPL’s requests for copies of the permits for mineral extractions issued to Shell and Chevron claiming that these documents are classified as “official information” (Add. 16, 23).
C. Access to justice

37. In August 2013, EPL filed an administrative lawsuit claiming the breach of its right to participate in decision-making process by failure to carry out ecological expertiza of Yuzivska PSA and asking the court to declare the omission of the Cabinet of Ministers of Ukraine to carry out state ecological expertiza of Yuzivska PSA and thus entrance into the PSA without prior obligatory ecological expertiza of Yuzivska PSA to be illegal and to oblige the Cabinet of Ministers of Ukraine to refrain from entrance into Oleska PSA (which at a time was still under negotiation) prior to performance of the ecological expertiza of Oleska PSA.

38. The court of the first instance declared actions of the Government to be lawful and dismissed all EPL’s claims (Add.36).

39. EPL filed an appeal. The court of appeal revoked the decision of the lower court in part of its reasoning. The court ruled that EPL does not have standing in this case and thus it was prematurely for the lower court to adjudicate the case (Add.37).

IV. Key applicable national legislation

A. Access to information

General access to public information rules and access to environmental information

40. According to the Constitution of Ukraine, everyone shall have the right to freely collect, store, use, and disseminate information by oral, written, or other means at his/her discretion. The exercise of such rights may be restricted by law in the interests of national security, territorial integrity, or public order, for the purposes of preventing disturbances or crimes, protecting the health of the population, protecting the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice (Article 34).

41. According to the Constitution of Ukraine, the right to free access to environmental information is guaranteed to anyone. No one can classify this information (Article 50).

42. According to Article 1 of the Law on Access to Public Information, all information possessed by public authorities is considered to be public information, which is open unless the law provides otherwise (Add.26). Pursuant to the Law, there are three types of information with limited access – secret, for official use, and confidential (Articles 6). According to Article 6.2 limitation of access to information can only be imposed under the combination of the following conditions (Article 6.2 test):

1) exclusively in the interests of the national security, territorial integrity and civil order with the purpose of prevention of unrests or crimes, protection of public health, protection of reputation and rights of other people, prevention of the disclosure of information received confidentially, promotion of the authority and impartiality of justice;

2) disclosure of information can significantly harm these interests;

3) harm from disclosure of this information outweighs public interest in its obtaining.

43. Access to environmental information, except for information on location of military facilities, cannot be limited (Article 7.1, Article 13.3 of the Law of Ukraine on Information). Moreover, the rule concerns not only public authorities, but also private entities possessing environmental information (Article 13.2 of the Law on Access to Public Information).

44. Article 13 of the Law of Ukraine on Information (Add.27) defines environmental information similarly to the Aarhus Convention. According to Article 13.1, environmental information means, among other things, any information on factors affecting or likely to affect the elements of the environment (substances, energy, noise and radiation, as well as activities or
measures, including administrative measures, environmental agreements, policies, legislation, plans and programs).

45. In conformity with the Aarhus Convention, the Law on Access to Public Information (Article 6.7) provides that, if information exempted from disclosure can be separated without prejudice to its confidentiality, public authorities make available the remainder of the information that has been requested.

46. According to Article 9 of the Law on Access to Public Information, information for official use is:

1) Information in the documents of public authorities which constitute their internal official correspondence, memoranda, and recommendations, if they concern development of a direction of activities of a public authority, performance of control and oversight functions, or decision making process and precede public discussion and/or passing of the decisions;

2) Information collected in the process of search, operative, and counterintelligence activities, in the area of state security and not classified as state secret.

47. According to Article 7 of the Law on Access to Public Information, confidential information is information, access to which is limited by a person or legal entity, except for public authorities, and that can be disseminated at their wish and under their conditions. Furthermore, the Law explicitly says that environmental information cannot be considered confidential.

48. In respect of confidential information of legal entities, the legislation of Ukraine provides for the protection for commercial secrets from unlawful gathering, disclosure and use of commercial secret information.

49. Article 36 of the Economic Code of Ukraine provides that information, associated with production, technology, management, financial or other activity of a business entity, disclosure of which may damage the interests of a business entity, may be declared its commercial secret. The composition and volume of information classified, as a commercial secret, as well as a means of its protection shall be determined by the economic entity according to the law. The Law prohibits unlawful gathering (obtaining through illegal means) of commercial secret information, if this has or could have caused damage to the business entity.

50. According to Article 162 of the Economic Code of Ukraine, a business entity that holds technical, organizational or other commercial information shall have the right to protection against illegal use of such information by third persons, if such information has certain commercial value, is not known to third persons, is not legally accessible by other persons, and the holder of such information takes appropriate measures to protect its confidentiality. The timeframes of legal protection of a commercial secret shall be limited by the validity of conditions set forth above.

51. Yet, as an International Monetary Fund (IMF) report with regard to mineral extraction contracts observed: “Little by way of strategic advantage... seems to be lost through publication of contracts. Indeed, it could be argued that the obligation to publish contracts should in fact strengthen the hand of government in negotiations, since the obligation to disclose the outcome to the legislature and the general public increases pressure on the government to negotiate a good deal”.

Legislation on product-sharing agreements

52. According to the Constitution of Ukraine, minerals are the property of the People of Ukraine and public authorities exercise ownership rights on behalf of the People of Ukraine (Article 13).

53. According to Article 4.1 of the Law of Ukraine on Product Sharing Agreements (hereinafter – Law on PSAs), a production-sharing agreement – is a contract by which one party, Ukraine

(hereinafter "the State"), assigns the other party, the investor, to prospect for, explore and extract mineral resources in the designated subsoil area(s) and to perform the works provided for by the agreement for a specified period of time, whereas the investor undertakes to perform the assigned works at its own cost and risk, with further compensation of the costs and receipt of payment (remuneration) in the form of a portion of the profit production. The full text of the Law on PSAs in English is attached in Add.28.

54. According to Article 8.2 of the PSA Law, a PSA shall stipulate: a list of types of the investor's activities and a program of mandatory works, indicating performance deadlines, scopes and types of financing, technological equipment and other indexes which shall not be lower than those proposed by the investor in the tender application, as well as other essential terms and conditions, including a plan for restoration of the lands damaged in the course of prospecting, exploring and extracting mineral resources; requirements regarding rational and comprehensive use and protection of the subsoil and the environment, safety and protection of the personnel involved in the works stipulated by the agreement; the procedure for conserving or liquidating of mining facilities.

55. Pursuant to Article 9 of the PSA Law, PSAs made with respect to hydrocarbons, in addition to the essential terms and conditions specified in Article 8, shall also stipulate the following essential conditions: procedure and time-frames for evaluating the environmental pollution level in the subsoil exploitation area as well as the scope and time-frames for the implementation of environmental protection measures.

56. According to Article 24 of the PSA Law, geological, geophysical, geochemical, technical, economic and other information, as well as samples of rocks (including cores) and other data received by the investor as a result of performing the works stipulated in the PSA, shall be the property of the State. Provided that the confidentiality conditions stipulated by the agreement are observed, the investor shall have the right to freely use said information free of charge to perform the works stipulated by the agreement. The Parties to the agreement shall be liable for disclosure of confidential information received in the course of implementation of a production-sharing agreement pursuant to the requirements set forth in the agreement and the legislation of Ukraine.

57. Yet the Law has no provisions precluding the parties to a PSA to limit access to the terms of a PSA, to the drafts of a PSA or its signed text.

58. Furthermore, the world best practice is indeed a disclosure of the said information.

59. The IFC Policy on Environmental and Social Sustainability (January 1, 2012)³ “encourages governments and corporations to make extractive industry contracts public, and two years from the date of its Board approval of this policy⁴ it will require that, in the case of extractive industries projects it finances, the principal contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract, be public. IFC will allow the redaction of commercially sensitive information that is not essential to understand the terms and conditions under which the resource is developed” (paragraph 50).

60. EBRD’s Energy Sector Strategy⁵, which was adopted in December 2013, also addresses contracts transparency in upstream hydrocarbon projects. The Strategy in its page 60 reads: “Transparency over the award of, and payments under, subsoil contracts and licenses, which include inter alia host government agreements and production sharing contracts, are useful tools for a country's civil society to hold a government accountable for the way national extractive assets are being attributed and the revenues generated are being spent. Through its investments in upstream hydrocarbon projects, the Bank will encourage its clients to make subsoil contracts and licenses of the project public, and one year from the date of the approval of this strategy it will require that, in

³http://www.ifc.org/wps/wcm/connect/7540778049a792deb87efaa8e6a8312a/SP_English_2012.pdf?MOD=AJPERES
⁴Since January 1, 2014
the case of upstream hydrocarbon projects it finances, the principal contract or license with government for the project that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that license or contract, be public.”

61. A growing number of States are requiring contract disclosure under their constitutions or legislation, including Guinea, Liberia, Niger, Peru, and São Tomé and Príncipe. Therefore, it is becoming accepted practice to publicly disclose natural resource contracts⁶.

B. Public participation in decision-making

62. The main legal act governing PSAs in Ukraine is the Law on PSAs (1999).

63. According to the Law the procedure looks as follows:

- the Cabinet of Ministers of Ukraine takes a decision to hold a tender for conclusion of a PSA regarding a specific mineral deposit (Article 7),

- the winner of a tender is determined based on the tender conditions and the winner’s bid (Article 7),

- the prospective investor drafts the text of a PSA within three months from the day of the official publication of the results of the tender (Article 10),

- the initial draft of a PSA is registered by the Interdepartmental Commission⁷ (Article 11),

- a draft of PSA is subject to mandatory state expertizas in respect of financial, legal, environmental and other matters in accordance with domestic legislation (Article 11),

- Interdepartmental Commission provides the investor with the conclusions, comments, results of the accomplished state expertizas or a new version of the agreement, on the basis of which the investor shall revise the agreement or prepare its conclusions and comments on the new draft agreement. The new version of the draft agreement is reviewed and approved again by the Parties (Article 11),

- a draft PSA is approved by local councils in the territory of which the subsoil area to be transferred for use under the agreement is located (Article 11),

- upon final approval and review, a draft PSA is approved by the Cabinet of Ministers and the investor, registered again by the Inter-Departmental Commission and thereafter submitted to the Parties to the agreement for signing (Article 13),

- a PSA is signed (Article 13).

64. According to Article 4.3 of the Law on PSAs, the State is under the obligation after the signing of the PSA to ensure the issuance to the investors of all approvals, quotas, special permits to use subsoil and licenses to carry out the activity associated with the prospecting (exploration) and exploitation of mineral deposits, acts for the provision of mining allotments, the documents certifying the right to use land, as well as other permits, authorizations, licenses related to the use of subsoil, performance of the works, construction of the facilities stipulated by a PSA.

65. The Law on PSAs is silent on the matter of involvement of the public concerned neither at the stage of state expertiza on environmental matters, nor at the stage of approval of the draft PSA by the local councils, approval of the final draft of a PSA by the Cabinet of Ministers of Ukraine or at any other stage. The Law is also silent on publication or any other disclosure of the terms of the negotiated PSA to the general public or public concerned. However, the Law does not preclude the Government from these actions. There is nothing in the law, which would prohibit the Government to carry out public consultations or to disclose drafts or signed PSAs.

⁷ A special governmental body established exclusively for negotiation and execution of PSAs on behalf of the State.
66. The Procedure for issuance of special permits for the use of mineral resources, according to which permits for Yuzivska and Oleska fields were issued, does not contain any provisions on public participation either.

67. Procedure of sort of an EIA is envisaged in the Law Ukraine on Ecological Expertiza (1995). It has some similar futures to EU EIA procedure, but it also differs in many conceptual and technical ways. The full text of the Law in English is attached (Add.29).

68. According to Article 13 of the Law, performance of state ecological expertiza is obligatory for environmentally hazardous activities. The Cabinet of Ministers of Ukraine approves the List of Environmentally Hazardous Activities.

69. Extraction of any minerals including natural gas – regardless of the amount of extraction or the technology – is included in the List of Environmentally Hazardous Activities. Thus, projects on extraction of minerals are subject to mandatory ecological expertiza including public participation provisions in accordance with domestic legislation, which also makes it Aarhus Convention Annex 1 paragraph 20 activity.

70. According to the Law, ecological expertiza in Ukraine - is a type of scientific research and practice activity of authorized state bodies, environmental expert groups and associations of citizens, which is based on a cross-disciplinary ecological research, analysis and evaluation of pre-project, project and other materials or objects, implementation and operation of which adversely impacts or likely to impact the condition of natural environment, and is directed toward preparation of the conclusions about compliance of the planned or performed activities with regulations and requirements of the legislation on protection of the environment, rational use and renewal of natural resources, and ecological safety (Article 1).

71. According to Article 4 of the Law, the purpose of ecological expertiza is to prevent negative impact of anthropogenic activity on the state of the natural environment and public health, as well as evaluation of the degree of ecological safety of economic activity and ecological situation on certain territories and facilities.

72. The Law provides for some elements of public participation. According to Article 10, proponents of projects, listed as environmentally hazardous, are obliged to declare through mass media their intent to carry out such activity in special Statement on the ecological consequences of activity (Article 10). Public authorities carrying out ecological expertiza are obliged to inform public of its conclusions through mass media (Article 10). According to Article 11, the performers of ecological expertiza conduct public hearings or open meetings with the aim of taking into account of public opinion. In the course of ecological expertiza public can submit comments, suggestions and recommendations. Public opinion shall be taken into account during preparation of conclusions of ecological expertiza and taking of a decision in relation to further implementation of a project (development consent).

C. Access to justice

Neither the Law on Ecological Expertiza, nor the Law on PSAs contains any provisions on access to justice for the general public or public concerned.

IV. Nature of alleged non-compliance

73. This communication concerns 1) specific cases of Aarhus Convention violations in relation to two PSA’s concluded by Ukraine in 2013 and 2) general failure of Ukraine to implement access to information, public participation and access to justice provisions of the Convention into the domestic legal framework on PSAs, as well as 3) failure to enforce relevant provisions of the domestic legislation on access to public information and public participation in the course of ecological expertiza, which are in place.

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8 Approved by the Decree of the Cabinet of Ministers of Ukraine from May 30, 2011 #615
9 Approved by the Decree of the Cabinet of Ministers of Ukraine from August 28, 2013 #808
74. Although the laws of Ukraine do not directly contradict the Aarhus provisions, lack of clarity and details, as well as enforcement of domestic provisions on access to information and public participation in relation to PSAs, create a reality, where the public cannot enjoy either of these rights.

75. Thus, we allege that Ukraine not only violated all communicant’s Aarhus rights in the course of negotiation and entry into PSAs in 2013, but also failed to establish and maintain a clear, transparent and consistent framework to implement the respective provisions of the Convention into PSA legal framework.

V. Provisions of the Convention relevant for the communication

76. By this Communication, we allege that Ukraine has failed to comply with its obligations under Article 3(1), Article 4 (1), Article 4 (4), Article 4 (6), Article 6 (1), Article 6 (2), Article 6 (3), Article 6 (4), Article 6 (6), Article 6 (7), Article 6 (8), Article 6 (9) and Article 9 (2) of the Aarhus Convention.

77. We argue that
- information requested from the Government (as indicated in the Sub-Section “Facts of the communication” above) falls within the meaning of “environmental information” under subparagraph (b) of the paragraph 3 of the Article 3;
- Yuzivska and Oleska projects do fall under paragraph 20 of the Annex 1 of the Aarhus Convention. These projects may also fall under paragraphs 12 and 14 of the Annex 1 of the Aarhus Convention, but due to lack of information on the projects we cannot state this as a fact;
- PSAs together with the respective permits for mineral extraction constitute Article 6 decisions.

78. We allege that
- by including full confidentiality clauses (covering all and any terms of the PSA and all and any other documents issued by the Government in the course of negotiation and execution of the PSA) into the texts of agreements on large scale natural gas development projects between the Government and private investors; by not properly implementing access to information and public participation provision into domestic legal framework on PSAs, and by not enforcing those that are in place, Ukraine has violated Article 3 (1) of the Aarhus Convention;
- by denying public requests for information on the terms of the PSA, various drafts of the PSAs, signed texts of Yuzivska and Oleska PSAs, and a copy of permit for mineral extraction issued according to Yuzivska and Oleska PSA (submitted fully in line with domestic legislation), the Party concerned has violated Article 4 (1) of the Aarhus Convention;
- by denying public requests for information on PSA because of a claimed confidentiality the Government improperly struck the balance between such confidentiality and the public interest in disclosure of the requested information, and thus violated Article 4 (4) of the Aarhus Convention;
- by not applying - in case of necessity to treat some portions of information of a PSA confidential - the rule of exclusion of this portion and provision of the rest of the document to the public, the Government has violated Article 4(6);
- by performance of ecological expertise on Yuzivska PSA after its approval and signature by the Government; by not applying public participation provisions in both Yuzivska and Oleska environmental assessment processes; by not informing the public concerned early in an environmental decision-making procedure, and in adequate, timely and effective manner; by not establishing and applying reasonable time-frames for public participation; by not allowing for early public participation when all option are still open; by not providing access to information relevant to the decision-making; by not allowing for the public to submit comments; by not taking into account the outcomes of public
VI. Use of domestic remedies or other international procedures

79. In May 2013, EPL filed an administrative lawsuit seeking a declaratory judgment on illegality of access limitation with regard to the text of the Yuzivska PSA and asking the court to oblige the Cabinet of Minister of Ukraine to provide EPL with a copy of the agreement.

80. In June 2013, the court ruled that the current legislation on negotiation and approval of PSA does not include an obligation of public authorities to make drafts of PSAs publicly available. The court also erroneously rejected all plaintiff’s allegations made based on the Law of Ukraine on Access to Public Information, the most important one – failure of the Government to apply Article 6 test to any case of access limitation. The court cited Article 7 of the Law of Ukraine on Access to Public Information according to which “confidential information is information, access to which is limited by a person or legal entity, excluding public authorities and that can be disseminated at their wish and under their conditions. Public authorities possessing confidential information can disseminate it only upon consent of persons, who limited access to this information. If there is no such consent, the information can be disseminated only in the interests of national security, economic wellbeing, and human rights”. The court ruled that since parties to the contract did not give such a consent, the defendant acted in accordance to the law and dismissed EPL’s claims. The court disregarded the fact that the defendant itself – the Government of Ukraine – is one of the parties to the PSA. The court disregarded Article 6.2 test and never discussed whether the requested information given its environmental nature can be classified or whether public interest in disclosure of this information overweights confidentiality concerns, even though the plaintiff posed these questions (Add.30).

81. In October 2013, the court of appeal upheld the decision of the lower court on the same grounds (Add.31). In November 2013, the High Administrative Court of Ukraine dismissed EPL’s second appeal (Add.32).

82. In September 2013, EPL filed another administrative lawsuit seeking a court order against the State Geology and Minerals Service of Ukraine obliging it to provide EPL with a copy of a permit for minerals extraction issued to Shell under Yuzivska PSA. The court held that since the permit contained some terms of the Yuzivska PSA and those are confidential, the defendant’s denial of a copy of the permit was legal. To substantiate this conclusion the court cited the State Geology and Minerals Service of Ukraine’s List of “official use only” information, which includes information on the terms of Yuzivska PSA. The court has never factually established whether any of the PSA terms were indeed included in the text of the permit or discussed whether confidentiality of the PSA was legal in the first place (Add.33).

83. EPL filed an appeal. The court of appeal has opened the appellate proceedings on November 20, 2013 (Add.34). The case has not been considered yet, even though according to the Code of Administrative Judiciary of Ukraine the court of appeal considers a case within one month after the date when the court opened the appellate proceedings.

84. In August 2013, EPL filed yet another administrative lawsuit claiming the breach of its right to participate in decision-making process by failure to carry out ecological expertiza of Yuzivska PSA and asking the court to declare the omission of the Cabinet of Ministers of Ukraine to carry out state ecological expertiza of Yuzivska PSA and thus entrance into the PSA without prior obligatory ecological expertiza of Yuzivska PSA to be illegal and to oblige the Cabinet of Ministers of Ukraine
to refrain from entrance into Oleska PSA (which at a time was still under negotiation) prior to performance of the ecological expertiza of Oleska PSA.

85. Contrary to the requirements of the procedural code to consider the case within 2 month, the court rendered its decision in March 2014, when ecological expertiza of Oleska PSA has already been performed and the PSA signed. Thus, this claim was not addressed.

86. As to the other claims – the court disregarded all the proves and legal arguments – including the one that in case of Oleska PSA the Government has performed the ecological expertiza and in case of Yuzivska has not – and declared actions of the Government to be lawful dismissing all EPL’s claims (Add.35).

87. EPL filed an appeal. The court of appeal revoked the decision of the lower court in part of its reasoning. The court ruled that EPL does not have standing in this case and thus it was prematurely for the lower court to adjudicate the case (Add.36).

88. In October of 2014 the High Administrative Court of Ukraine dismissed EPL’s second appeal on procedural grounds. The court said that since EPL’s representative was present at the last court hearing when a short text of the court decision was pronounced, the deadline to file the second appeal was 20 days after that date. The High Administrative Court of Ukraine disregarded the fact that EPL in due time filed numerous requests for a copy of the full text of the court decision, which was finally issued to EPL 2 month after the pronouncement of its short text (the second appeal was prepared and posted 10 days after this date). EPL’s request to prolong the deadline for the second appeal based on late receipt of the text of the decision was denied.

89. No other international procedures have been invoked to address the issue of non-compliance, which is a subject of this communication.

VII. Confidentiality

90. None of the information contained in this communication shall be kept confidential.

VIII. Supporting documentation

1) EPL’s request # 65 of 06.03.2013 to the Ministry of Ecology and Natural Resources of Ukraine
2) Letter from the State Geology and Minerals Service of Ukraine of 27.03.2013
3) EPL’s request # 69 of 07.03.2013 to the State Geology and Minerals Service of Ukraine
4) Letter from the State Geology and Minerals Service of Ukraine of 15.03.2013
5) EPL’s request # 145 of 19.04.2013 to the State Geology and Minerals Service of Ukraine
6) Letter from the State Geology and Minerals Service of Ukraine of 07.05.2013
7) EPL’s request # 146 of 19.04.2013 to the Cabinet of Ministers of Ukraine
8) Letter from the Ministry of the Ecology and Natural Resources of Ukraine of 15.05.2013
9) EPL’s request # 156 of 25.04.2013 to the Cabinet of Ministers of Ukraine
10) Letter from the State Geology and Minerals Service of Ukraine from 14.05.2013
11) Letter from Shell of 15.07.2013
12) EPL’s request # 70 of 07.03.2013 to the Cabinet of Ministers of Ukraine
13) Letter from the Cabinet of Ministers of 18.03.2013
14) Order of the State Geology and Minerals Service of Ukraine approving a List of “official use only” information
15) EPL’s request # 248 from 01.08.2013 to the State Geology and Minerals Service of Ukraine
16) Letter from the State Geology and Minerals Service of Ukraine from 20.08.2013
17) EPL’s request # 40 of 13.02.2013 to the Ministry of Ecology and Natural Resources of Ukraine
18) Letter from the State Geology and Minerals Service of Ukraine of 25.02.2013
19) EPL’s request # 456 of 26.11.2013 to the Ministry of Ecology and Natural Resources of Ukraine
20) Letter from the Ministry of Ecology and Natural Resources of Ukraine of 04.12.2013
21) Letter from Chevron of 19.03.2013
22) EPL’s request # 547 from 21.10.2014 to the State Geology and Minerals Service of Ukraine
23) Letter from the State Geology and Minerals Service of Ukraine from 30.10.2014
24) Conclusion of state ecological expertiza and Environmental expert assessment of the draft Oleska PSA
25) Conclusion of state ecological expertiza and Environmental expert assessment of the Yuzivska PSA
26) The Law of Ukraine on Access to public information
27) The Law of Ukraine on Information, excerpt
28) The Law of Ukraine on Product Sharing Agreements
29) The Law of Ukraine on Ecological Expertiza
30) Decision of the Kyiv-city District Administrative Court of July 15, 2013
31) Ruling of the Kyiv Appellate Administrative Court of October 10, 2013
   http://www.reyestr.court.gov.ua/Review/34328606
32) Ruling of High Administrative Court of Ukraine of November 11, 2013
   http://www.reyestr.court.gov.ua/Review/35394307
33) Decision of the Lviv District Administrative Court of October 28, 2013
   http://www.reyestr.court.gov.ua/Review/34425352
34) Ruling of the Lviv Appellate Administrative Court of November 20, 2013
35) Decision of the Kyiv-city District Administrative Court of March 14, 2014
   http://www.reyestr.court.gov.ua/Review/37941748
36) Decision of the Kyiv Appellate Administrative Court of July 10, 2014
   http://www.reyestr.court.gov.ua/Review/39870780

Addendums # 1-23, # 30-37 are in Ukrainian language
Addendums # 30-36 contain links to the texts of the court decisions in the official State Register of Judicial Decisions
Addendums # 24-25 are in both Ukrainian and English (unofficial translation)
Addendums # 26-29 are in English (unofficial translation)

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November 17, 2014