Communication to the Aarhus Convention Compliance Committee concerning compliance by Republic of Albania (PRE/ACCC/C/2019/171)

Comments on the preliminary admissibility

Tirana, 4 November 2019

Dear members of the Committee,

The Republic of Albania would like to thank the Compliance Committee for the opportunity to participate in this session on the preliminary admissibility of new communications, including also the communication raised against Albania, with allegations about its non-compliance with article 6 and article 9 (2) and (3) of the Convention.

Albania respectfully invites the Committee to take into consideration the facts and analyses, provided as preliminary comments, which might be of relevance for the assessment of the preliminary admissibility of communication with reference number PRE/ACCC/C/2019/171. This Response is not intended to be exhaustive and contains only a summary of the Albanian's position in this case. Also, these preliminary comments are served without prejudice to the Albanian right, to supplement, amend or make any further submissions in response to the Communication in due course, as required, including also the admissibility matter.

Furthermore, Albania considers this communication, to be an archetypal case of inadmissibility, according to paragraph 20 (c) , and paragraph 21 of the decision 1/7, namely that the fact and allegations set out in the communication are manifestly unreasonable and that the communicant failed to make use of the available domestic remedies provided for under national law.

There are several incontrovertible facts that lead to this legal interpretation. The following is a summary of factual and legal background that appears to be uncontroversial.

Firstly, by considering the construction of the playground in the Artificial Lake Park as **a theme park,** the communicant purport to identify it as a part of the project that should be subject to the preliminary environmental impact assessment procedure construction. Whereas, according to the European Guidlines "interpretation of definitions of project categories of Anex I and II of the EIA Directive, mainly water parks and zoos should be considered as a typical "Theme Park". In some some Member States the environmental impact assessment is required for Sports statdiums and goulf courses (e.g 10 Ha).

In accordance with the above, our domestic law no.10440 dated 7.7.2011 "*On Environmental Impact assessment"*, with its annex II, it is clearly that the construction of the playground is not listed in annex 2 of the above mentioned law, which determinate the projects that should be subject of the screening procedure.

Moreover, Albania would like to emphasize the fact that the scope of the above-mentioned law is in coherence with the scope of Aarhus Convention as well as the EU legislation. With this regard, we clarify also that, Annex I and II of our law "*On Environmental impact assessment*" namely, "*Project subject to profound Environmental Impact Assessment Procedure (EIA procedure, according to Article 5 of the EIA directive mentioned above)*" and "*Project subject to the preliminary environmental impact assessment procedure (EIA procedure, according to Article 4 of the EIA directive mentioned above)*" do comply with Annex I and II of the Council Directive 2011/92/EU of 13 December 2011 "*On the assessment of the effects of certain public and private projects on the environment"* as amended by Directive 2014/52/EU .

The Ministry of Tourism and Environmental (than the Ministry of Environment) concluded that the project for playground construction, should not be subject to the screening process of the environmental impact assessment procedure based on:

1. The construction of the playground project is not listed in annex 2 of the National Law no.10440 dated 7.7.2011 "On Environmental Impact assessment";
2. The children's playground is not activities that meets the criteria of thematic park which mention in the European Guidelines "interpretation of definitions of project categories of Annex I and II of the EIA Directive";
3. The last but not list the construction of the playground project it's just a rehabilitation project for this part of Tirana Lake Park and not to change the nature of the park.

The last but not the least, Albania finds that the communicant's allegation “for no public consultation into the project had been held as required by law in the relation to all project for which an Environmental Impact Assessment is required” , clearly manifest a lack of legal interpretation of the Aarhus Convention, as the convention itself, with its article 6, stipulates that "***the party shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in Annex I".*** If we refer to this annex, the playground projects results not to be a part of it.

In line with the above argument, the Convention stipulates that following that "screening" process, public participation provisions apply only to those activities which may have a significant effect on the environment. Also, the implementation guide to the Aarhus Convention specifies that "The Convention states that Parties must determine the applicability of article 6 where the proposed activities may have a significant effect on the environment", which is certainly not the case of constructing a playground.

With regards to the communicant's allegation for the violation of the right of access to justice, Albania finds that the communicant had failed to use all the available domestic remedies provided under national legislation such as:

Article 48 of the law no.10431 dated 9.06.2011 *“On Environmental Protection*” which stipulates that: “*In case of a threat to the environment, its pollution and damage, the public has the right:*

a) to require the relevant public authorities, taking appropriate measures within the duly time periods, and in accordance with the authority granted by the law;

b) to sue in court, in accordance with the conditions stipulated by the Code of Civil Procedure, against the public authority or the natural person or legal entity that has caused damage to the environment or threatens to harm it”;

Article 15 of the law no.49/2012 “*On the Administrative Courts and Adjudication of Administrative Disputes*” which stipulates that: *“The following have the right to bring a lawsuit:*

a) Every subject that claims that a lawful interest or right has been infringed by an action or failure to act of a public organ”;
ç) Every subject that claims that he has been violated in his lawful rights and interests because of unlawful interferences of a public organ that do not have the form of an administrative act;
d) Every association or interest group that claims that a lawful public interest has been infringed
i) By a normative act;
ii) By an administrative act, if such a right is recognised by law;
dh) Every other subject to whom this right is expressly recognised by law”.

Moreover, as should be obvious from the lawsuit filed in the administrative court of first instance, contrary to what communicant asserts in paragraphs 18-24 of its communication, it wasn’t the communicant itself, which filed the administrative lawsuits and request for interim measures as well as the absolutely invalid of the building permit.
Henceforth, the allegation raised by the communicant that “it encountered difficulties in exercising its right to access to justice”, is irrelevant in the circumstances that the communicant didn’t used those remedies at all.

Contrary to what communicant assert in paragraph 20 of its communication, and precisely that “Last, the domestic courts also considered that the communicants should have undertaken a deposit a (sizeable) financial guarantee in order to compensate the construction company for any loss if would incur from the suspension of the construction of the playground; such an onerous requirement could only serve to further narrow, if not completely extinguish, the communicant’ right of access to justice”, our domestic law “on the Administrative Courts and Adjudication of Administrative Disputes” provides as follows below:

Article 28
Securing the lawsuit
1. With the submission of the lawsuit, the plaintiff may ask the court to take measures to secure the lawsuit in cases when he shows that during the time necessary for the proceeding, until the taking of a decision on the merits is reached, the possibility exists of incurring serious and irreparable damage that comes from the execution of the administrative action.

2. The request for securing the lawsuit, because of the circumstances of the case, may also be submitted before the lawsuit is brought. In those cases, when the court permits the securing of the lawsuit, it also sets a time limit, no longer than 10 days, within which the lawsuit should be brought.
3. A request for securing the lawsuit according to point 1 and 2 of this article should be examined within five days from the date of the submission to court. As a rule, the request is examined in the presence of the parties, but in urgent cases, it may be examined even without the parties being called.
4. A decision for securing the lawsuit is given at any phase and level of the judicial examination, so long as the decision has not become final. In all cases, the court should reason its decision. The decision is given by the court where the lawsuit is located.

Article 29
Conditions for securing the lawsuit
The court decides to secure a lawsuit if the following conditions are met:
a) A reasonable suspicion exists, based on written documents, of the possibility of the causing of a serious, irreparable and immediate damage to the plaintiff;
b) The public interest is not seriously violated;
c) If it is seen necessary by the court, the plaintiff gives a guarantee, in the type and amount set, for the damage that might be caused to the defendant from securing the lawsuit.

Article 30
Types of measures for securing the lawsuit
The lawsuit is secured through:
a) The suspension of implementation of the administrative act, administrative contract or other administrative action;
b) The taking by the court also of other appropriate measures, in cases when suspension alone does not offer sufficient protection.

The article 29(c) of the above-mentioned law , is applied by the court only in exceptional cases (in an alternative way), and when the court deem it appropriate, which was certainly not this case. The grounds for securing the lawsuit, as set out in article 29, are unconditional for each other.
On a final note, the claim raised by the communicant with regards to the prolongation of the judicial proceedings in High Court, is based just on a hypothetical analysis, taking into consideration the fact that the case is still not closed at the Administrative Court of Appeal. Therefore, the communicant can not pretend to claim for the prolongation of the proceedings in High Court, as long as there is no final and binding decision taken by the Administrative Court of Appeal, moreover without knowing whether it will be in its favour (or not).
Assuming arguendo that the case is pending before the High Court, Republic of Albania wishes to emphasise the fact that in 2014, the Albanian State, prioritized the need to adapt the legislation of the main institutions of the judicial system (the so-called reform of the system of justice), to the expectations of the Albanian society, mainly to such elements that affect the increasing of the system integrity, its efficiency, and transparency.
On this reform, the Venice Commission, inter alia, in its opinion 824/2015, stated that: “54.With regard to the extraordinary measures to vet judges and prosecutors, the Venice Commission remains of the opinion that such measures are not only justified but are necessary for Albania to protect itself from the scourge of corruption which, if not addressed, could completely destroy its judicial system”.
Referring to the above, despite of the fact that the situation created by the implementation of the Veting’ process has led to a temporary malfunction of the High Court, Republic of Albania considers that its domestic legislation guarantees the fair remuneration and acceleration of the domestic judicial proceedings in the event of their prolongation (Article 399/1, 399/12 of the Civil Procedure Code).