DRAFT FINDINGS AND RECOMMENDATIONS OF THE COMPLIANCE COMMITTEE WITH REGARD TO COMMUNICATION ACCC/C/2009/37 CONCERNING COMPLIANCE BY BELARUS WITH ITS OBLIGATIONS UNDER THE CONVENTION

I. INTRODUCTION

1. On 14 March 2009, members of the public (hereinafter the communicant) submitted a communication to the Committee alleging a failure by Belarus to comply with its obligations under article 4, paragraph 1, and article 6, paragraphs 2, 3, 6, 7, 8, and 9, of the Convention.

2. The communication alleges that by failing to make information available to the public with regard to the hydro power plant project on Neman river in Belarus (HPP project), which is currently under implementation, the Party concerned failed to comply with article 4, paragraph 1, and article 6, paragraph 6, of the Convention. The communication further alleges that by failing to notify and consult adequately with the public in the decision-making process for the HPP project, the Party concerned failed to comply with the requirements of article 6, paragraphs 2, 3, 7, 8 and 9, of the Convention.

3. At its twenty-third meeting (31 March – 3 April 2009), the Committee determined on a preliminary basis that the communication was admissible. The communicant in its communication asked that certain parts of the communication, including parts that could reveal its identity should be kept confidential. The Commission held that this request should be honoured on the basis of paragraph 29 of decision I/7. The redacted text of the communication is available on the web site of the Compliance Committee.[1] The Committee also invited the communicant to address a number of questions clarifying the matters raised in the communication.

4. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 1 May 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.

5. At its twenty-fourth meeting (30 June–3 July 2009), the Committee agreed to discuss the content of the communication at its twenty-sixth meeting (15-18 December 2009).

6. On 5 August 2009, the communicant brought to the attention of the Committee the information submitted by the Ukrainian non-governmental organization (NGO) Ecoclub before the Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context (1991 Espoo Convention) and concerning compliance by Belarus with the provisions of the Espoo Convention.

7. On 30 September 2009, the communicant addressed some of the questions posed by the Committee to the Party concerned, especially with regard to the applicable legislation.

8. On 8 October 2009, the Committee received information in the form of amicus memorandum from the NGO European ECO Forum. The amicus memorandum alleged that the legislation recently

[1] See the text at http://www.unece.org/env/pp/compliance/C2009-37/Communication/CommunicationACCC-C-2009-37public.pdf.

introduced in Belarus on public participation in decision-making on nuclear issues was inadequate; and that the requirements set by the Convention on access to information and public participation in decision-making concerning the construction of a nuclear power plant were not fulfilled. On 24 November 2009, Council of Public Association "Ecohome" and the Belarusian Party of "Greens" sent a joinder motion to the amicus memorandum. The Committee noted that some elements of the amicus memorandum went beyond the scope of the original communication, in that for instance one of the main allegations of the amicus memorandum concerned the allegedly inadequate national legislation on public participation in decision-making on nuclear issues, and the substantial transboundary character of the NPP. It decided through its electronic decision-making procedure not to expand the consideration of the present communication to any new facts or allegations brought about by the amicus memorandum or the joinder motion that fall out side the scope of or are not directly relevant to the original communication

9. On 25 November 2009, the Party concerned addressed the questions raised by the Committee, but did not specifically comment on the allegations of the communication.

10. The Committee discussed the communication ACCC/C/2009/37 at its twenty-sixth meeting (15-18 December 2009), with the participation of representatives of the communicant and the amicus. The Party concerned did not respond to the invitation to participate in the meeting and was not represented at it. At the same meeting, the Committee confirmed the admissibility of the communication.

11. The Committee prepared draft findings at its twenty-eighth meeting. Due to the issue of confidentiality, the draft findings were first sent to the communicant on 14 July 2010, seeking its agreement for the information contained therein to become public. The communicant provided its agreement on 14 July 2010 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 3 August 2010. Both were invited to provide comments by 31 August 2010.

12. The Party concerned and the communicant provided comments on […].

13. At its […] meeting, 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. National Legal Framework in Belarus

Regulatory framework for access to information

14. According to Article 34 of the Constitution of the Republic of Belarus of 1994 (as amended in 1996 and 2004) and Article 6 of the Law "On information, informatisation and the protection of information", citizens of Belarus are guaranteed the right to receive, store and disseminate complete, reliable and timely information on the activities of State bodies and public associations, on political, economic,

[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.

cultural and international life, and on the state of the environment. State bodies, public associations and officials must afford citizens the opportunity to familiarise themselves with material/information that affects their rights and legitimate interests, in accordance with the procedure established by law. The right to information may be restricted by legislation with the purpose of safeguarding the honour, dignity, and personal and family life of citizens and the full implementation of their rights.

15. In addition, the Law on Environmental Protection of 26 November 1992 (as amended), specifies the composition and the types of environmental information in particular and the forms of, and procedures for, its provision and dissemination. The Law defines environmental information and provides the grounds that would allow for limiting access to such information, such as in case of a state secret or harm of a judicial process, preliminary investigation and administrative process. It should be noted that according to the Constitution of the Republic of Belarus and the Law on State Secrets of 29 November 1994 (Article 14), information about the state of the environment cannot be regarded as trade secret.

Regulatory framework for development control in Belarus

16. The regulatory framework for development control in relation to the HPP project, at the time of activities subject to communication, consisted of the Law on State Environmental Expertiza of 18 June 1993, as amended on 14 July 2000 (hereinafter the Environmental Expertiza Law) and the Decision No. 8 of the Ministry of Environmental Protection of 11 May 2001 (as amended on 22 April 2001) on the Instructions on the procedure for state environmental expertiza (hereinafter the Environmental Expertiza Instructions). The scheme was supplemented with the Instructions on the procedure for environmental impact assessment of the planned economic and other activities in the Republic of Belarus (hereinafter the OVOS Instructions) and the "List of types and objects of economic and other activities which are subject to mandatory environmental impact assessment" (hereinafter the OVOS List) both adopted by the Decision No. 30 of the Government of Belarus of 17 June 2005.

17. The above regulatory framework for development control in Belarus is based on the concept of the "state expertiza". This includes a requirement that the planned activities which have potential impact on the environment are subject to "state environmental expertiza" conducted by the competent environmental authorities or by the external experts nominated by the competent environmental authorities. The procedure is finalised with the "expertiza conclusion", which is subject to approval by the Ministry of Environmental Protection and binding for the developer (Article 14 of the Environmental Expertiza Law). The activity can be implemented only if the conclusion is positive (see also para. [21] below).

18. The activities that are considered to have significant potential impact on the environment are subject to "OVOS" which in direct translation means "assessment of impact upon environment ". There is a list of activities which always require OVOS but conducting the OVOS may also be required by environmental authorities in case of any other activity subject to environmental expertiza.

19. Expertiza and OVOS are two closely interlinked procedures whereby OVOS precedes expertiza. According to Article 6 of the Environmental Expertiza Law, both are required at the stage of developing a feasibility study for the project and at the stage of developing a construction design of the project.

20. The OVOS is the procedure during which the developer collects all necessary information concerning the impact of the project on the environment and compiles the relevant impact assessment documentation. The OVOS procedure is not of permitting nature and is closely connected to the

developing of the overall project documentation. The role of the authorities is limited: at the beginning of the OVOS procedure, in reply to the "declaration of intent" ("*zajavka*") submitted by the developer, the authorities issue the "environmental conditions for developing project documentation" ("*ecologicieskije uslovia na projektovanije*") which serve as a basis for the terms of reference (ToR) for the OVOS. The ToR is to be developed by the developer and approved by the environmental authorities. Following the ToR, the developer (or the consultant hired by the developer) conducts necessary investigation and studies, and prepares a "statement on potential environmental impact" ("*zajavlenije o vozmoznom vozdiejstvie*" - hereinafter OVOS Statement). The OVOS Statement should be made subject to wide consultation with the interested authorities and the public ("*obszczestviennyje sluchanija*"). It is the developer who is responsible for notifying the public, providing respective information to the public and conducting public consultations. Once the consultations are completed, the developer is responsible for preparing the OVOS Report summarising the results of the OVOS ("*otchiet*").

21. The OVOS Report, along with the other required documentation, is submitted by the developer to the relevant authorities for environmental expertiza. At the environmental expertiza phase, the authorities (or the external experts nominated by them) examine the compliance of the submitted documentation, including the information on public participation, with the requirements set by law. The environmental expertiza procedure is finalised with the "expertiza conclusion": the project in question can be implemented only if the authorities issue positive conclusions.[3]

Regulatory framework for public participation in the development control

22. According to Article 37 of the Constitution of the Republic of Belarus of 1994 (as amended in 1996 and 2004): "Citizens of the Republic of Belarus shall have the right to participate in the solution of state matters, both directly and through freely elected representatives. The direct participation of citizens in the administration of the affairs of society and the State shall be safeguarded by the holding of referenda, the discussion of draft laws and issues of national and local significance, and by other means specified in law. In instances determined by the law the citizens of the Republic of Belarus shall take part in the discussion of issues of state and public life at republican and local meetings".

23. With regard to public participation in development control, the Environmental Expertiza Law in its Article 12 states that the developer has the responsibility to provide the citizens or their associations, who are willing to participate in the OVOS process, with the relevant information and ensure their participation in the development of the OVOS documentation.

24. The OVOS Instructions detail the obligations of the developer relating to public participation procedure.[4] The procedure, according to paragraph 44 of the OVOS Instruction, involves four stages:

(a) public notice;
(b) examination by the public of the OVOS Statement and other project documents;
(c) public discussion;
(d) preparation.

25. The OVOS Instructions do not require any particular form for the public notice about the hearings. They only state (paragraph 45) that such public notice may be communicated through: publishing the

[3] Expertiza Law article 14, and Law on Environmental Protection article 34.
[4] See OVOS Instructions Part VI.

OVOS Statement (as a whole or its short version) in the mass media, publication and dissemination of special information materials like leaflets or bulletins, direct information via mail, email or other electronic means. Where hearings are to take place at the national level, the developer has the obligation to publish the notice about the hearings through the national mass media. The notice should contain information about the duration, date and location of the public hearings, and on how the public may access the OVOS Statement and other project documents (paragraph 48).

26. As already mentioned, the main means of public consultation is the organization of public discussion at the meeting (hearing) with the developer, the OVOS consultant and the interested authorities. Examination by the public of the OVOS Statement and other project documents generally occurs mainly through the publication of the OVOS Statement (as a whole or its short version) in the mass media, but the law envisages also that they can be made available in the places indicated in the public notice. The developer is responsible (paragraph 59) for the active dissemination of the OVOS Statement during the period between the public notice and the public hearings and also for making the OVOS Statement and other project documents available for inspection during the entire project design procedure (paragraph 51).

27. The developer is responsible for the organization of the hearings and shall conduct them together with the OVOS consultant who prepared the OVOS Statement. The explanations they give regarding the OVOS Statement and other documents shall constitute the basis for the hearings (paragraph 50). The hearings shall be organized no earlier than 30 days from the date of the public notice and shall last as a rule no longer than one month and only in exceptional cases may this time-frame be extended (paragraph 59).

28. According to paragraph 52 of the OVOS Instructions, within 5 working days after the hearing a record of hearing should be prepared, which should include the list of participants as well as the list of all comments and suggestions submitted. The developer and the OVOS consultant are bound to consider the comments and suggestions submitted and attach them to the record, together with the indication whether they were approved or rejected and the grounds for their rejection or approval. The record of the hearing should be distributed (paragraph 58) to the "subjects who participated in OVOS", namely, according to paragraph 3, the developer, the consultant who prepared the OVOS Statement and various interested authorities. The record is to be stored by the developer with a view to be attached to the OVOS Report.

29. According to the OVOS Instructions, public discussions (hearings) are not held in cases where the planning documentation of the proposed activities contain information classified as state secret as well as other information of limited distribution.[5]

30. The Environmental Expertiza Law does not envisage any procedure for public participation at the stage of expertiza itself. The public may however, if certain conditions are met, initiate a "public environmental expertiza" whereby the independent specialists nominated and paid by the initiators (usually public associations) examine the compliance of the submitted documentation, including the information on public participation, with the requirements set by law and submit their conclusions to the authorities responsible for the state environmental expertiza.[6] The conclusions of the public expertiza

[5] *Ibid*. paragraphs 20.4 and 60.
[6] Article 61 of Law on Environmental Protection of 26 November 1992.

have only recommendatory character,[7] but they need to be considered by the authorities responsible for the state environmental expertiza.[8]

31. The Environmental Expertiza Law requires the conclusions of the state environmental expertiza to be notified to the developer and the relevant authorities. It does not envisage any requirement to inform the public of the environmental expertiza decision.

B. Facts

32. The Neman River is a major eastern European river of 937 km in length, most of which is navigable. It rises in Belarus, flows through Lithuania and drains into the Baltic Sea. It is the natural border between Lithuania and Russia's Kaliningrad Oblast. Moreover, according to the communicant, it is a habitat for 250 bird species, including 156 breeding species and up to 50 species with special conservation status.

33. The communication concerns alleged failure by the Party concerned to comply with the requirements of the Convention on access to information and public participation with regard to the ongoing construction of the first phase of a hydro power plant project on Neman river (HPP project) which has the following features: 17MW power capacity (approx. 87.6 mln MWH/year), 10 meters dam height, a reservoir of 43 km length and 1 km wide, and approx. 48 million cubic meters water storage capacity.

34. The proposed activity, as confirmed by the Party concerned, belongs to the category of activities ("major dams and reservoirs") which according to the OVOS List are subject to mandatory environmental impact assessment.

35. In 2002, Hrodnaenerga (the developer, regional energy company) developed the project feasibility study which was submitted to the Ministry of Environment for environmental expertiza.

36. On 7 February 2003 the Ministry of Environment of Belarus approved the positive conclusion of the environmental expertiza of the feasibility study. This granted an overall environmental permit for the project implementation.

37. The project for construction of the HPP on Neman River was approved by the Cabinet of Ministers of Belarus on 17 July 2007. There is no information whether the construction project had been submitted for environmental expertiza prior to its approval by the Cabinet of Ministers.

38. In spring 2008, the local population noticed that construction works had started on Neman River. This provoked a number of local initiatives against the construction as well as requests for information related both to the activity itself and to the procedure of its approval.

Substantive Issues

Access to information

[7] *Ibidem*- article 61.
[8] Article 11 of the Law on state environmental expertiza.

39. The public concerned filed a number of requests to various public authorities for access to information concerning the OVOS and expertiza related to the HPP project.[9] In particular it requested access to the following information:

a) project documentation
b) information on when and where the OVOS Statement had been published;
c) information on how and when the public had been informed about public hearings;
d) conclusions of the environmental expertiza.

40. In their written response, which in most cases, according to the communicant, came later than one month after the requests had been submitted, the public authorities informed the public that the requests had been forwarded to the developer. Subsequently, the developer provided general information to the requesters about the project and informed that public consultations had taken place, since the project was extensively discussed by the press and at television programmes starting in 2001 and more extensively in 2005 and 2007. The developer claimed to have kept a number of the press releases informing the public about the project and the protocols that recorded the feedback from the public.

41. Specifically, the communicant alleges that while the developer, Hrodnaenerga, provided general information on the project, it never addressed the specific points of the requests and refused to provide more specific project-related documentation. In some instances access to information was denied on the grounds that there was no clear purpose for the use of the requested information from the public.

42. The communicant alleges that all the information was environmental information as defined in article 2, paragraph 3(b), of the Convention and that none of the grounds for refusal of access to environmental information (i.e. lack of individual concern and unspecified purpose of the request) fall under the exceptions mentioned in article 4 of the Convention. Hence, the communicant alleges that by not providing the information on the HPP project as requested by the public, the Party concerned was not in compliance with the requirements of article 4, paragraph 1, and article 6, paragraph 6, of the Convention.

43. The Party concerned in its written reply does not address any of the above allegations, nor does it provide any explanation in relation to the above described situation. It limits itself to answering a question posed by the Committee concerning access to information relating to decision-making. It maintains that national legislation does not restrict provision of information relating to decision-making and that the information contained in the conclusions of the State environmental expertiza and of the environmental impact assessment are generally available and may be provided through:
- a verbal statement of the information requested;
- an examination of the documents containing the information requested and/or providing excerpts from them;
- a written reply containing the requested information

Application of article 6 to the decision-making regarding the HPP project

44. According to the communicant, under the national legislation of Belarus, the environmental expertiza is a permitting process in the meaning of article 6, paragraph 1; whereas the OVOS procedure preceding

[9] The exact dates of the requests and the public authorities were submitted to the Committee but are not revealed for the sake of confidentiality.

the expertiza shall be considered as an EIA procedure and its particular feature is the fact that it is the task of the developer to inform the public and to hold public consultations on the proposed project.

45. Furthermore, the communicant submits that the HPP project is an activity subject to paragraph 13 of the annex 1 to the Convention, because it envisages construction of a dam with water storage capacity of approx. 48 million cubic meters (which is well above the threshold of 10 million cubic meters envisaged in paragraph 13). Alternatively, the communicant argues that the HPP project falls within the ambit of paragraph 20 of the annex to the Convention, which envisages the application of the requirements of article 6 to any activity not specifically mentioned in the annex, for which national legislation on EIA requires a public participation process to take place. In support of this argument, the communicant refers to the OVOS Instructions, according to which the construction of the HPP is a type of activity that requires the conduct of an OVOS and the public consultation process is necessary for the carrying out of the OVOS.

46. Consequently, the communicant alleges that before issuing the state environmental expertiza conclusion in relation to the HPP project, the Party concerned was under obligation to follow the procedure as envisaged in article 6 of the Convention and that the procedure was not followed; in particular paragraphs 2, 3, 6, 7, 8 and 9 of article 6 were not complied with.

47. The Party concerned acknowledges application of article 6 to the HPP project but maintains that it was in full compliance with the applicable requirements of the Convention in the respective decision-making.

Public participation procedure

48. The communicant alleges that it was not aware of any public notice on public consultations to be carried out before the approval of the HPP project and on possibilities to get access to the respective OVOS Statement. Furthermore, the fact that the above documents, despite repeated requests, were never provided after the procedure had ended, proves - according to the communicant - that the public was not informed in an adequate, timely and effective manner, about the proposal for the HPP project, and this constitutes non-compliance with article 6, paragraph 2, of the Convention.

49. The Party concerned acknowledges that national legislation specifies no specific form of public notice or uniform requirements for its content, and refers to the already mentioned provisions of paragraph 45 of the OVOS Instructions indicating possible means of notification. In this context, the Party concerned stated that the procedure for informing the public of the planned construction of the HPP project was initiated on 10 May 2001 with an article entitled “The idea of an HPP on the Neman: first public hearings” published in the *Birzha informatsii (*“Information Stock”) newspaper and that in January 2003, Hrodna provincial television broadcasted a programme at which a representative of Hrodnaenerga presented the reasons for constructing an HPP. Furthermore, the Party concerned referred to a number of articles in newspapers published in the year 2003.

50. The communicant doubts whether informing the public through articles in the newspapers and through TV programs is an adequate procedure for ensuring effective public notice. It also draws attention to the fact that the above mentioned article in the newspaper *Birzha informatsii* about the HPP public hearings clearly indicates that “the organizer of the public hearings regretted that neither the developer nor the designer of the project participated”.

51. Furthermore, the communicant claims that the public concerned was not aware of the public consultations that took place before the approval of the HPP project. In response to the request by the public concerned for relevant information on public hearings, the developer referred to a number of TV programs and publications as well as roundtables, but did not provide the requested records from public hearings. The communicant claims that the discussion of the proposed project in the newspapers and through TV programs is not an adequate procedure for ensuring effective public participation. The communicant claims also that the public has no other possibility to submit comments to the authorities, after the conclusion of the discussions organized by the developer. Therefore, the communicant alleges that the public participation procedures undertaken by the developer did not fulfil the conditions set by article 6, paragraphs 3 and 7, of the Convention.

52. The Party concerned informs in its written reply that according to Article 4 of the Law of the Republic of Belarus "On applications by citizens", citizens of the Republic of Belarus have the right to present applications (i.e. suggestions, remarks and complaints) to the officials of State bodies and other organisations. Foreign citizens and stateless persons in the territory of the Republic of Belarus have an equal right to that of citizens of the Republic of Belarus to present applications within the limits of their rights and liberties specified by the legislation of the Republic of Belarus.

53. The communicant alleges that public authorities are not bound by the law to take into account comments that the developer received from the public. Both the Environmental Expertiza Law and the Instructions are silent on the subject. Consequently, the communicant alleges also non-compliance with article 6, paragraph 8.

54. The Party concerned denies all allegations and states that the procedure for the HPP project was in full compliance with the Convention. According to the Party concerned, the approval was preceded by conducting OVOS by the developer and the expertiza report No. 45 of 7 February 2003 approved the project on the condition that the developer carry out public consultations at the following stage of the project because of the significant public interest. Public consultations, according to the Party concerned, took place in 2005 and 2007, as required by Belarusian law and the Convention, and involved discussion of the project in the press and television programmes.

55. Finally, the communicant alleges that the Environmental Expertiza Law does not contain any requirement for communication of the environmental expertiza conclusions/decision to any person other than the developer and that a copy of such conclusions was not disclosed despite the requests by the public concerned. Thus, the communicant claims that by not providing the public concerned with the conclusions of the environmental expertiza, the Party concerned was not in compliance with article 6, paragraph 9, of the Convention.

56. The Party concerned informs that national legislation does not stipulate a form for the public notice of the final decision on the planned activities. In accordance with the Laws of the Republic of Belarus "On the media" and "On the legislation of the Republic of Belarus", in each specific case, the final decision may be notified to the public through: publication in official newspapers of record, posting to the internet site of the National Centre for Legal Information of the Republic of Belarus, posting to the official internet sites of Republic-level State administrative bodies and local executive and administrative bodies, and general notification through the print media, television and radio.

III. CONSIDERATION AND EVALUATION BY THE COMMITTEE

A. Legal basis and scope of considerations of the Committee

57. Belarus signed the Aarhus Convention on 16 December 1998. The Convention was approved through the Decree No. 726 of the President of the Republic of Belarus on 14 December 1999, and the notification of approval was filed with the depositary on 9 March 2000. The Convention entered into force for Belarus on [7 June 2000].

58. All the activities regarding the HPP project that are the subject of the communication started in 2001, i.e. when the Convention was fully applicable in Belarus.

59. The communicant submits that the allegations relate only to the application of the Convention in the specific instance of the HPP project and do not pertain to the compliance of the respective national legal framework with the relevant provisions of the Convention. The Committee however finds it useful to make also some observations concerning features of the relevant national legal framework in force at the time of events being subject to the communication, without engaging in a comprehensive review of the legal system

60. The Committee regrets that it did not have any opportunity to discuss the matter with both the communicant and the Party concerned, and that where the observations of the Party concerned do not address specifically some of the communicant's allegations, the Committee must rely mostly on the facts and evidence provided by the communicant, bearing in mind, however, that the Party concerned was provided with the opportunity to discuss the matter but chose not to do so.

B. Admissibility and use of domestic remedies

61. The communicant has attempted to challenge the decision without success, but their attempts were limited because of fear that it might be penalized.

C. Considerations by the Committee

Access to information – general issues

62. Without attempting to assess the definition of "environmental information" as adopted in Belarus law, the Committee notes that under the applicable Belarus law the documents requested by the members of the public (see para. [41] above) are considered to be "environmental information", because article 74 of the Environmental Protection Law of 1992 clearly mentions information related to both OVOS and environmental expertiza as "environmental information". Hence, there is no debate that the information requested by the communicant should be considered as "environmental information" in the meaning of article 2, paragraph 3, of the Convention.

63. The Committee notes that the requests for information concerning the HPP project were originally submitted to the competent authorities, but they were all forwarded to the developer. In this context the Committee would like to observe that while the "onward referral" is a legitimate practice under article 4, paragraph 5, of the Convention, this practice is allowed provided that certain conditions are met.

64. The first condition for "onward referral" under article 4, paragraph 5, is that the request for information is referred to another "public authority". The Committee notes that in Belarus, the OVOS

process, including public participation, is carried out by the developer, which may be a privately owned legal entity, and that the OVOS outcome constitutes the basis for the environmental expertiza, the final decision of permitting nature, which is issued by the public authorities. While reliance on the developer in the context of public participation may raise doubts as to the compliance with the Convention (see para. [75] below), the issue may be seen differently in the context of access to information.

65. The Committee considers that it is not conflicting with the Convention when national legislation delegates some functions related to maintenance and distribution of environmental information to private entities. Such private entities, depending on the particular arrangements adopted in the national law, should be treated for the purpose of access to information as falling under the definition of a "public authority", in the meaning of article 2, paragraph 2(b) or (c).

66. In this context, the Committee notes that in Belarus the Environmental Expertiza Law and the relevant Instructions make the developer responsible for maintaining the OVOS- and expertiza-related documentation. Therefore, for the purpose of access to information issues, which are the subject of the present communication, the developer should be treated as a public authority under the obligation to provide access to environmental information in compliance with the requirements of article 4 of the Convention.

67. The possibility to delegate some functions related to the maintenance and distribution of environmental information to private entities should be seen in the context of article 5; in particular the obligation to ensure that public authorities possess environmental information which is relevant to their functions and the obligation to establish practical arrangements to ensure that environmental information is effectively accessible to the public, as required in article 5, paragraphs 2(a) and 2(b) respectively. Thus, the second condition to be met under article 4, paragraph 5 is that an onward referral does not compromise compliance with the above obligations under article 5.

68. The Committee does not have sufficient information about the national framework for recordkeeping and distribution of environmental information in Belarus, but it is concerned that the Environmental Expertiza Law and the relevant Instructions bestow the whole responsibility for maintaining the OVOS- and expertiza-related documentation, including the documents evidencing public participation, upon the developer only, and do not include any obligation in this respect for the competent authorities to examine the results of the OVOS and to issue the expertiza conclusions.

Access to information - article 4, paragraphs 1 and 3

69. The public authorities, including the developer, did not address the request of the members of the public and, in some instances, requested that a specific purpose for the use of the information be stated. The Committee notes that the statement of a specific interest is not included in the grounds that may justify the refusal of the public authorities to provide access to information, which are listed in article 4, paragraphs 3 and 4, of the Convention. Besides, article 4, paragraph 1(a), of the Convention, specifically provides that the requested information shall be available "without an interest having to be stated".

70. The Committee notes that there is a dual regime on access to information in Belarus: on the one hand, the general law on access to information requires that an interest be stated for access to information; on the other hand, the requirement to state an interest to access information does not apply in the case of access to environmental information (see paras. [14 and 15] above). In the present case, the requested information is environmental information and access should have been allowed, according to

Belarusian legislation and the Convention. The Committee finds that the failure of the public authorities to provide the requested information constitutes a failure of the Party concerned to comply with article 4, paragraph 1, of the Convention; alternatively, the failure of the public authorities might constitute non-compliance by the Party concerned with article 6, paragraph 6, of the Convention, but the Committee in this case deems that it is not important to identify whether the Party concerned failed to comply with article 4, paragraph 1, or with paragraph 6, paragraph 6, of the Convention.

Access to information - article 4, paragraph 2

71. While the communicant indicated that replies from the public authorities came later than one month after the requests had been submitted, the information presented to the Committee is not sufficient to assess whether indeed there were any instances of non-compliance with the requirements of article 4, paragraph 2, of the Convention.

Application of article 6 to the decision-making regarding the HPP project

72. In the view of the Committee, the conclusions of the environmental expertiza shall be considered as a decision whether to permit the HPP project; OVOS and the expertiza in Belarus shall be considered jointly as the decision-making process constituting a form of an EIA procedure: the procedure starts with the developer submitting to the competent authorities the "declaration of intent" ("*zajavka*"), includes the development of the EIA documentation and the carrying out of the public participation process (see also paras. [20 and 21] above), and ends with the issuance of the conclusions by the competent authorities, which is the decision of permitting nature.

73. Also, in the view of the Committee, the HPP project belongs to activities listed in annex I to the Convention. According to the information submitted by the communicant and not questioned by the Party concerned, the HPP project involves the construction of a dam with water storage capacity of 48 million cubic meters, and hence it is an activity subject to paragraph 13 of the annex to the Convention. Furthermore, in light of the above considerations and the fact that the HPP project belongs to a category of activities listed in the OVOS List, as activities subject to mandatory OVOS, the HPP project is also an activity subject to paragraph 20 of the annex to the Convention. Thus, the public participation procedures in the context of the decision-making process of whether to permit the HPP project should be in compliance with the provisions of article 6 of the Convention.

74. In sum, the specific features of the regulatory framework for development control and EIA procedure in Belarus are as follows: that in the OVOS/expertiza system it is usually the responsibility of the developer to organize public participation at the OVOS stage of the procedure, while at the expertiza stage the possibility for public participation is usually provided only through the public environmental expertiza. The organization of public environmental expertiza is not a mandatory part of the decision-making and therefore it cannot be considered as a primary tool to ensure implementation with the provisions of article 6 of the Convention. It may, however, play a role as an additional measure to complement the public participation procedure required as a mandatory part of the decision-making. In the OVOS/expertiza system, the mandatory public participation procedure is required at the OVOS stage and the developer is usually responsible for organizing the procedure, including for notifying the public and making available the relevant information, and for collecting the comments (see also paras. [26 and 27] above).

75. The Committee has already noted (ACC/C/2006/16 Lithuania, para. 78) that such a reliance on the developer in providing for public participation raises doubts as to whether such an arrangement is fully in line with the Convention because it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2(d)(iv) and (v), and article 6, paragraph 6).

76. The above observations do not mean, however, that the responsibility for performing some or even all the above functions related to public participation should always be placed on the authority competent to issue a decision whether to permit a proposed activity. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a "public authority" in the meaning of article 2, paragraph 2(b) or 2(c).

77. To ensure proper conduct of the public participation procedure, the administrative functions related to its organization are usually delegated to bodies or persons who are quite often specialising in public participation or mediation, are impartial and do not represent any interests related to the proposed activity being subject to the decision-making.

78. While the developers (project proponents) may hire consultants specialising in public participation, neither the developers themselves nor the consultants hired by them can ensure the degree of impartiality necessary to guarantee proper conduct of the public participation procedure. Therefore, the Committee in this case finds that, similarly to what it has already observed in the past (ACCC/C/2006/16 Lithuania, para. 78) "reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention".

79. These observations regarding the role of the developers (project proponents) shall not be read as excluding their involvement, under the control of the public authorities, into the organization of the public participation procedure (for example conducting public hearings) or imposing on them special fees to cover the costs related to public participation. Furthermore, any arrangements requiring or encouraging them to enter into public discussions before applying for a permit are well in line with article 6, paragraph 5, provided the role of such arrangements is supplementary to the mandatory public participation procedures.

Exemption from public participation requirement - article 6, paragraph 1(c)

80. According to the OVOS Instructions, public discussions (hearings) are not held in cases where the planning documentation of the proposed activities contain information classified as state secret as well as other information of limited distribution. Article 6, paragraph 1(c) of the Convention allows the Parties not to apply the provisions of article 6 to activities serving national defence purposes, if providing public participation would have an adverse effect on these purposes. The Committee does not have sufficient information, in this case, to assess whether the exemption employed by the Belarus law is indeed broader than the scope allowed under article 6, paragraph 1(c) of the Convention; but it raises its concern that if the scope of the Belarusian legislation is broader that the scope of this provision, this might constitute a situation of non-compliance.

Adequate, timely and effective public notice – article 6, paragraph 2

81. Belarusian legislation (the OVOS Instructions) requires that the public be informed about the public consultation process and lists possible ways that the notification may take place, but leaves the decision on the form of the public notice at the discretion of the developer. The notice should contain information about the duration, date and location of the public hearings, and on how the public may access the OVOS Statement and other project documents. Thus, it covers only some of the issues to be included in the notice as required in article 6, paragraphs 2(a) to 2(e). Furthermore, there is no clear requirement that the public be informed in a timely, adequate and effective manner.

82. At the present example of the HPP project, there is no sufficient evidence to satisfy the above requirements of the national legislation and to prove that the public was informed in a timely manner to participate. The Party concerned refers to a number of press articles and says that the notification was initiated on 10 May 2001 with an article entitled "The idea of an HPP on the Neman: first public hearings" published in the *Birzha informatsii* newspaper (see also para.[49] above). The content of the article, however, was only a report from the meeting held and not a public notice informing about the meeting to be held. Furthermore, the article mentions that the meeting was found by the participants as premature in relation to the HPP project, because it preceded the submission of the declaration of intent (*zajavka*) and there was neither project documentation nor EIA documentation prepared at that stage. Therefore such a meeting, although it may be useful for early information and awareness, can not reasonably be considered as fulfilling the requirements for providing effective public participation procedure, and importantly it cannot substitute for the public notice, as required under article 6, paragraph 2.

83. All the other press articles referred to by the Party concerned are dated between 23 January and 8 November 2003, and therefore they cannot be considered to be public notice under article 6, paragraph 2, in relation to the expertiza conclusions issued on 7 February 2003. Moreover, the Committee doubts if they can serve for the purpose of the OVOS in relation to the construction design approved in July 2007, because the time span is too short to allow the developer to prepare the documentation on the basis of the conclusions issued on 7 February 2003 and too long time lapsed between the articles and the approval.

84. The Committee considers the legislation and the general practice followed for public notification in Belarus. There is a legal obligation for the developer to notify the public about the conduct of public hearings, but the law fails to set the details to ensure that the public is informed in adequate, timely and effective manner. The practice of publishing the OVOS Statement (in abridged or even full versions) cannot substitute for it. Also, in the view of the Committee, journalists' articles commenting on a project in the press or television programmes (as referred to by the Party concerned), in general, do not per se constitute a public notice for the purpose of public participation, as required under article 6, paragraph 2, of the Convention. For this reason, the Committee finds that the Party concerned failed in the case of the HPP to comply with article 6, paragraph 2; and also that there is a general failure in the Belarus system to comply with these provisions of the Convention.

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

85. The Belarus legislation (OVOS Instructions) provides that the hearings shall be organized no earlier than 30 days from the date of public notice and shall last as a rule no longer than 1 month; and that only in exceptional cases this time-frame may be extended. The period between the public notice and the public hearings is meant to allow the public to access the relevant documentation and prepare itself. The comments however can be submitted practically only during through the public consultation procedures.

86. The Committee recalls its earlier findings with regard to the reasonable time-frames, in particular in relation to communication ACCC/C/2006/16 (Lithuania) (para. 69) whereby some general interpretation rules were established, according to which 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.

87. In this context the Committee appreciates a flexible approach to setting the time-frames aiming to allow the public to access the relevant documentation and prepare itself, and considers that while a minimum of 30 days between the public notice and the start of public consultations is a reasonable time-frame, the flexible approach allows to extend this minimum period as may be necessary taking into account, inter alia, the nature, complexity and size of the proposed activity.

88. The Committee, however, does not consider appropriate a flexible approach, whereby only the maximum time-frame for public participation procedures is set, as this is the case in Belarus in relation to the time-frames for public consultations and submitting the comments. Such an approach, regardless of how long the maximum time-frame is, runs the risk that in individual cases time-frames might be set, which are not reasonable. Thus, such an approach, whereby only maximum time-frames for public participation are set, cannot be considered as meeting the requirement of setting reasonable time-frames under article 6, paragraph 3, of the Convention.

89. In the particular case of a public participation procedure regarding the HPP project, given all the problems with establishing whether and when the public was notified and whether and when any consultations did take place - the Committee is not in a position to assess whether the Party concerned was in compliance with article 6, paragraph 3, of the Convention.

Access to documents relevant to decision-making - article 6, paragraph 6

90. The Belarus legislation (OVOS Instructions) provides that the obligation to provide the public with the relevant information rests only with the developer, an approach that in the view of the Committee is not in line with the Convention (see paras. [75 and 78] above).

91. Furthermore, the Belarus law envisages specifically the OVOS Statement to be made publicly available, but does not envisage the OVOS Report to be made available to the public. There is also no clear obligation to provide the public with the records of the hearings. Bearing in mind the significance of both documents as a basis for the decision, this seems to be a considerable shortcoming of the legislation; however, given that such documents seem to be covered by the definition of environmental information available to the public [see paras. [20 and 21] above], this shortcoming does not necessarily amount to non-compliance with the Convention.

Public discussions and submission of comments – article 6, paragraph 7

92. The Belarus legislation (OVOS Instructions) provides that the main means of public consultation is the organization of the public discussion at the meeting (hearing) with the developer, OVOS consultant and the interested authorities. The developer is responsible for the organization of the hearings and shall conduct them together with the OVOS consultant who prepared the OVOS Statement. The comments can be submitted practically only during the hearings and the law does not envisage the possibility for

the public to submit the comments at the stage of expertiza directly to the authority competent to issue the conclusions of the expertiza. Although there is a requirement to record the comments submitted by the public at the OVOS stage and to provide them to the authority competent to issue the expertiza conclusions, the Committee is of the view that the above arrangements do not ensure that the competent authority has direct access to all the comments submitted and is in a position to take due account of them. Bearing this in mind and also the views about the role of the developer in the procedure (see paras. [75 and 78]), the Committee is of the opinion that the arrangements in the Belarus law regarding public discussions and submission of comments are not in compliance with the requirements of article 6, paragraph 7, in conjunction with article 6, paragraph 2(d)(v).

93. The Committee notes that on the basis of the information submitted and the lack of any evidence to the contrary, it appears that the public did not have sufficient possibilities to submit any comments, information, analyses or opinions relevant for the HPP project, before this was permitted. The Committee is of the view that the organization of discussions on the proposed project in the newspapers and through TV programs is not a sufficient way to assure compliance with article 6, paragraph 7, of the Convention.

Due account taken of the outcomes of public participation - article 6, paragraph 8

94. Under the Belarus legislation, some obligations related to taking due account of the outcomes of the public participation rest with the developer and the OVOS consultant, who are bound to consider all the comments and suggestions submitted by the public and to include them to the record of hearings, together with an indication on whether these comments were approved or rejected and the grounds for their rejection or approval. The applicable laws do not, however, envisage similar obligations in relation to the competent authorities (or the experts) when issuing the expertiza conclusions. They are bound only to consider the conclusions of the public expertiza, which as non-mandatory element of the procedure (see para. [30] above) cannot be considered as a measure implementing the provisions of article 6 of the Convention. Bearing the above in mind, the Committee is of the opinion that the Belarus law fails to comply with the requirements of article 6, paragraph 8, of the Convention

95. Considering the discussed deficiencies in providing public participation in relation to the HPP project, the Committee is not sure if there were any outcomes of public participation that could have been taken into account in the expertiza conclusions and therefore is not in a position to assess whether the Party concerned was in compliance with article 6, paragraph 8, of the Convention in this respect.

Informing the public of the final decision – article 6, paragraph 9

96. The Belarus legislation does not envisage a clear requirement to inform the public about issuing the expertiza conclusions and possibilities to have access to the text of the conclusions along with the reasons and considerations on which they are based. In fact, there is no clear requirement to prepare such a statement of reasons and no requirement for public authorities to keep the files of such conclusions. Thus, the Committee is of the opinion that the Belarus law fails to comply with the requirements of article 6, paragraph 9 of the Convention, in particular by not establishing appropriate procedures to promptly notify the public about the environmental expertiza conclusions and by not establishing appropriate arrangements to facilitate public access to such conclusions.

97. In light of the evidence provided, the Committee is of the view that the public concerned was not informed about the environmental expertiza conclusions regarding the HPP project and that its requests

to access to these conclusions were denied (see also paras. 41 and 46 above). Consequently, the Committee finds that the public authorities failed to ensure that the public concerned was promptly informed of the decision for the construction of the HPP and, hence, that the Party concerned was not in compliance with article 6, paragraph 9, of the Convention.

Anti-harassment – article 3, paragraph 8

98. The communicant and the amicus inform the Committee that one may face criminal charges and be prosecuted for the act of engaging in the activities of a group that is not registered. Furthermore, they argue that the current regulatory framework for the establishment of NGOs and associations is very restrictive in Belarus.

99. The communicant in its communication did not submit any allegation of non-compliance with article 3, paragraph 8, of the Convention and the Committee has not received any evidence to support such allegation, in particular any copies of the relevant provisions restricting freedom of associations or providing for criminal charges in case of involvement in group initiatives with peaceful objectives, if the group is not registered. Although in this situation the Committee is not in a position to assess whether there is any non-compliance with article 3, paragraph 8, of the Convention, the Committee, sympathizes with the communicant, who has requested that its identity be kept strictly confidential for the fear that it may be penalized, prosecuted or otherwise harassed.

IV. CONCLUSIONS AND RECOMMENDATIONS

100. 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

101. The Committee finds that in relation to the HPP project the Party concerned:

(a) by failing to provide the requested information, it failed to comply with article 4, paragraph 1, of the Convention (paras. [69 and 70] above);

(b) by not providing for adequate, timely and effective public notice, according to the criteria of the Convention, it failed to comply with article 6, paragraph 2 (paras. [81 through 84] above);

(c) by not providing the public with sufficient possibilities to submit any comments, information, analyses or opinions relevant for the HPP project, it failed to comply with article 6, paragraph 7 (paras. [92 and 93] above);

(d) by not informing promptly the public about the environmental expertiza conclusions, namely a decision of the construction of the HPP project, it failed to comply with article 6, paragraph 9 (para. [97] above).

102. Moreover, the Committee finds that the following general features of the Belarusian legal framework are not in compliance with the Convention:

(a) requiring an interest be stated for access to environmental information (article 4, paragraph 1);

(b) not adequately regulating the public notice requirements, in particular not providing mandatory means of informing the public, insufficient requirements as to the content of public notice and lack of a clear requirement for a public to be informed in an adequate, timely and effective manner (article 6, paragraph 2);

(c) setting only maximum time-frames for public hearings and allowing thereby in individual cases to set the time-frames which might be not reasonable(article 6, paragraph 3);

(d) making developers (project proponents) rather than relevant public authorities responsible for organizing public participation, including for making available the relevant information and for collecting the comments (article 6, paragraph 2(d)(iv) and (v), and article 6 paragraphs 6 and 7);

(e) not establishing a mandatory requirements for the public authorities that issue the expertiza conclusion to take into account the comments of the public (article 6, paragraph 8)

(f) not establishing appropriate procedures to promptly notify the public about the environmental expertiza conclusions and not establishing appropriate arrangements to facilitate public access to these conclusions (article 6, paragraph 9).

103. Furthermore the Committee is concerned that:

(a) in relation to compliance with article 5, paragraphs 1(a) and 1(b), the law in Belarus render only the developer responsible for maintaining the documentation relevant to OVOS and expertiza, including the documents evidencing public participation, and they do not include any obligation in this respect of the authorities competent to examine the results of OVOS and to issue expertiza conclusions;

(b) the law in Belarus concerning situations where provisions on public participation do not apply may be interpreted much broader than allowed under article 6, paragraph 1(c) of the Convention.

B. Recommendations and other measures

104. The Committee, pursuant to paragraph 36(b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37(b) of the annex to decision I/7, recommends to the Party concerned to take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that:

(a) The general law on access to information refers to the 1992 Law on Environmental Protection that specifically regulates access to environmental information, in which case the general requirement of stating an interest does not apply;

(b) There is a clear requirement for the public to be informed of decision-making processes that are subject to article 6 in an adequate, timely and effective manner;

(c) There are clear requirements regarding the form and content of the public notice as required under article 6 pragraph 2 of the Convention;

(d) There are reasonable minimum time frames for submitting the comments during the public participation procedure, taking into account the stage of decision-making as well as the nature, size and complexity of proposed activities;

(e) There is a clear possibility for the public to submit comments directly to the relevant authorities (i.e. the authorities competent to take the decions subject to article 6 of the Convention);

(f) There is a clear responsibility of the relevant public authorities to ensure such opportunities for public participation as are required under the Convention, including for making available the relevant information and for collecting the comments through written submission and/or at the public hearings;

(g) There is a clear responsibility of the relevant public authorities to take due account of the outcome of public participation and to provide evidence of this in the publicly available statement of reasons and considerations on which the decisions is based;

(h) There is a clear responsibility of the relevant public authorities to:

- inform promptly the public of the decisions taken by them and their accessibility;
- maintain and make accessible to the public: copies of such decisions along with the other information relevant to the decision-making, including the evidence of fulfilling the obligations regarding informing the public and providing it with possibilities to submit comments;
- establish relevant publicly accessible list or registers of the decisions held by them.

(i) Statutory provisions regarding situations where provisions on public participation do not apply cannot be interpreted to allow for much broader exemptions than allowed under article 6, paragraph 1(c) of the Convention.

105. The Committee, pursuant to paragraph 36(b) of the annex to decision I/7 and noting the agreement of the Party concerned that the Committee take the measure referred in paragraph 37(c) of the annex to decision I/7, recommends to the Party concerned:

(a) to draw up an action plan for implementing the above recommendations with a view to submitting an initial progress report to the Committee by […] December 2010 and the action plan by 1 June 2011.

(b) 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.