

**To:**

The Compliance Committee of the Aarhus Convention,

Ms. Aphrodite Smagadi, [Aphrodite.Smagadi@unece.org](mailto:Aphrodite.Smagadi@unece.org)

**CC:**

Republic of Belarus,

Ministry of Environment (focal point of the Aarhus Convention), [info@minpriroda.by](mailto:info@minpriroda.by)

**From:** European ECO Forum Legal Focal Point, represented by Andriy Andrusevych, Resource & Analysis Center "Society and Environment"

**Case Ref:** communication C/44 (Belarus)

October 26h, 2010

**Communicant's views on**

**Relevance of the recommendations in C/37 to issues raised in C/44**

1. This memo reflects communicant's views on the applicability of the recommendations adopted by the Compliance Committee in its Findings & Recommendations with regard to communication ACCC/C/2009/37 (Belarus) (hereinafter – *Recommendations*) to the subject-matter of communication C/44.
2. In its pleadings made during public hearing of the communication C/44, as well as in the corresponding records sent to the Committee, the communicant already briefly addressed the issue and brought attention of the Compliance Committee to the link between communications C/37 and C/44, both submitted in relation to compliance by Belarus with the Convention.
3. Upon receipt of the final Findings and Recommendations by the Compliance Committee with regard to communication C/37, the communicant wished to additionally address the following issue, which is subject of this memo:

*How relevant are the recommendations made with regard to the communication C/37 when applied for the subject matter of the communication C/44?*

4. In addressing this question we would like to express our opinion from two perspectives: **(a)** applicability/relevance of the *Recommendations* to nuclear decision-making, and **(b)** relevance of the Recommendations in light of the newly adopted EIA legislation.

**(a) applicability/relevance of the Recommendations to nuclear decision-making**

5. In its communication C/44 we alleged non-compliance by Belarus with the Aarhus Convention in the course of planning and authorizing construction of the nuclear power plant (nuclear decision-making).
6. As stressed in the communication (paragraphs 38-45), as well as in our oral pleadings, nuclear decision-making in Belarus is governed by both environmental and nuclear legislation.
7. *Recommendations* are based on Committee's considerations upon **(i)** relevant environmental legislation (especially EIA legislation), as well as **(ii)** its findings in relation to Articles 4 and 6, and partly 5, of the Aarhus Convention.
8. In light of the above (para.7), we believe that:
  - (i) *Recommendations* are not sufficient for C/44 since its specifically addressed nuclear decision making and nuclear legislation. Therefore, separate consideration is needed of the allegations made in respect to nuclear legislation;
  - (ii) *Recommendations* are not sufficient for C/44 since they only address Articles 4, 6 and 5, while C/44 additionally alleges non-compliance with Articles 3(1), 3(8), Article 7 and 8.
9. We re-confirm our allegation (see records of Oral Pleadings, para.21) that in the current situation specific nuclear legislation (*Regulation on the procedures for discussion of the issues in the area of the use of nuclear energy with participation of citizens associations, other organizations and citizens*, adopted by the Decision of the Cabinet of Ministers of Belarus No.571 on May 4, 2009) became completely inadequate due to the fact that newly adopted EIA legislation abolishes various procedural stages of national EIA and public participation procedures to which the *Regulation* makes references.
10. Lastly, we believe that nuclear decision-making for several reasons stands aside many other decision-making types. This means that a "regular" approach to ensuring application of the Aarhus Convention provisions is not always applicable and, therefore, may require additional advice or recommendation by the Compliance Committee. Especially, this might be useful in finding correct approach to ensuing early public participation when all options are open, in reaching adequate balance between applicability of the Article 7 and Article 6 for introducing nuclear projects in light of ensuring effective public participation, etc.

**(b) relevance of the Recommendations in light of the newly adopted EIA legislation**

11. Adoption of the new EIA legislation in Belarus introduced important new legal issues for consideration of the communication C/44 since public participation decision-making in nuclear issues is subject to both nuclear and EIA legislation in Belarus.
12. Our comments on the relevance of the *Recommendations* to C/44 comprise two issues: **(i)** applicability to facts and **(ii)** relevance to new legal framework.
  - (i)**
13. The communication and subsequent information submitted by the communicant refers to facts which took place before new EIA legislation came into force in Belarus (except for pending court cases). For this reason we believe that any findings and considerations related to shortcomings of the EIA legislation made in C/37 are fully relevant to C/44.

**(ii)**

14. Relevance of the Recommendations to new legal framework requires separate and new consideration by the Compliance Committee of that new legislation. In our view, the following items of the *Recommendations* remain relevant with the new EIA legislation (paragraphs' references made to Findings and Recommendations in C/37 as available on UNECE web-site):
- Recommendation 106 (a)(i) since new EIA legislation did not amend general law on access to information;
  - Recommendation 106(a)(ii) since the new system reflects previous approach where all public participation procedures are applied during OVOS stage which is not a decision-making process;
  - Recommendation 106(a)(iii) since new requirements for public notice (para.35 of OVOS Regulation) still lack various elements set in Article 6(2), namely subparagraphs (b), (c), (d)(ii)-(vi), (e). Lack of information required by Article 6(2) (d)(iii) is especially important because under new legislation the public has 10 days since public notice was made to request holding a public hearing. In addition, under the new OVOS Regulation of local authorities organize, together with the proponent, public participation process. Such authorities cannot be classified as "relevant" in the meaning of Article 6(2) since they do not take the decision (they are not carrying out environmental expertiza);
  - Recommendation 106(a)(iv) since new OVOS Regulation does not establish any limits nor criteria for the establishment of the length of the public consultation process (except for 10-days period for the public to request a hearing and minimum 30-days period for public hearing since application for the hearing was made).
  - Recommendations 106(a)(v)-(vii) since OVOS Regulation only sets the role of local authorities while ministry of environment (or its local bodies) are not involved at all during public consultation process. Relevant public authority (i.e. those carrying out environmental expertiza) are required to take account of the results of public consultation process but in no way they are not required to communicate its decisions or reasons on which they are based to the public (see generally new law on Environmental Expertiza).
  - Recommendation 106 (a)(viii) is partly relevant: new legislation does not require public authority to inform the public concerned of its decisions (only proponent is informed); responsible public authority is required to keep EIA documentation (e.g. OVOS report, para.16 of the EE Regulation) after decision is taken; Ministry of Environment and local authorities shall keep registries of decisions taken (conclusions of environmental *expertiza*, para.17 of the EE Regulation) but there is no clear requirement for the registry to be made accessible to the public under EE Regulation.
15. **To conclude**, we believe that most of the recommendation made by the Compliance Committee in its Findings and Recommendation with regard to communication ACCC/C/2009/37 are relevant to the new legal situation in Belarus. Yet, those are not sufficient to correct practical and legal shortcomings of the public participation process in relation to nuclear decision-making in Belarus.

