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in Environmental Matters

Compliance Committee

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Item 9 of the provisional agenda

Communications from members of the public

Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2010/51 concerning compliance by Romania

Adopted by the Compliance Committee on 28 March 2014

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I. Introduction

1. On 2 September 2010, Greenpeace Central and Eastern Europe (Greenpeace CEE) Romania and the Romanian non-governmental organization (NGO) Centre for Legal Resources (collectively, the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The communication alleged the failure of Romania to comply with its obligations under article 3, paragraphs 2 and 9, article 4, paragraphs 1, 4 and 6, article 6, paragraphs 3, 4, 6, 7, 8 and 9, article 7 and article 9, paragraph 4, of the Convention in relation to Romania's energy strategy and the planned construction of a nuclear power plant (NPP).¹

2. Specifically, the communication alleges non-compliance by the Party concerned with respect to three decisions: the decision to build a new NPP; the decision(s) regarding the location, technology, and other matters for the proposed construction of the NPP; and the adoption of the energy strategy.

3. Regarding the decisions relating to the NPP, the communication alleges that the Party concerned failed to comply with article 3, paragraph 2, and article 4, paragraphs 1, 4 and 6, of the Convention, because the authorities did not assist members of the public in seeking access to information and did not respond to requests for information concerning the project. The communication also notes that because of the lack of project-related information available to the public, there is no clarity on whether the decisions fall under article 6 or 7 of the Convention, but that, in any event, those decisions were taken without public consultation in contravention of the Convention's public participation provisions. The communication also alleges that the available remedies are not adequate, effective, fair, equitable, timely and publicly available, as required by article 9, paragraph 4, of the Convention.

4. In addition, the communication alleges that the energy strategy was approved without public consultation, in contravention of article 7 of the Convention. The communication also alleges that, because the authorities did not make any effort to consult the interested public and because they refused to provide information in English, the Party concerned failed to comply with article 3, paragraphs 2 and 9, of the Convention. Finally, by not responding to information requests, the Party concerned failed to comply with article 4, paragraph 1, of the Convention.

5. At its twenty-ninth meeting (Geneva, 21–24 September 2010), the Committee determined on a preliminary basis that the communication was admissible.

6. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 14 October 2010. On the same date, the communicant was sent a letter with questions by the Committee seeking clarification on several points of the communication.

7. In its response of 14 March 2011, the Party concerned requested the Committee to consider that domestic remedies had been pursued concerning the subject matter of the communication, which constituted effective and sufficient means of redress, and that therefore the Committee should decide not to consider the communication any further until

¹ The communication and related documents are available from <http://www.unece.org/env/pp/compliance/Compliancecommittee/51TableRO.html>.

the Court of Appeal delivered its judgment. The Committee, at its thirty-second meeting (Geneva, 11–14 April 2011) decided to seek the views of the communicant on the issues raised by the Party concerned. The communicant replied on 6 June 2011 informing the

Committee about the judgements of the Court of Appeal, which in both cases had accepted the appeals of the authorities challenging the prior decisions of the courts of first instance that had ruled in favour of the communicant. At its thirty-third meeting (Chisinau, 28–29 June 2011), the Committee, having considered the arguments of the communicant, confirmed that it would discuss the substance of the communication at its thirty-fourth meeting (Geneva, 20–23 September 2011).

8. The Committee discussed the communication at its thirty-fourth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication.

9. At the request of the Committee, the communicant and the Party concerned submitted additional information to the Committee on 31 October and 4 November 2011, respectively.

10. The Committee prepared draft findings at its thirty-ninth meeting (Geneva, 11–14 December 2012), completing the draft through its electronic decision-making procedure. 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 29 January 2013. Both were invited to provide comments by 26 February 2013.

11. The Party concerned and the communicant provided comments on 27 February and 6 March 2013, respectively.

12. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee noted that the comments received indicated that some aspects of the facts had possibly been incorrectly reflected in the findings, and requested the secretariat to enquire with the parties in order to verify the information. It agreed that it would consider the relevant parts of its draft based on the replies received at its next session, with a view to adopting its findings in closed session. It also agreed that should the draft be substantively changed, it would be resent to the Party concerned and the communicants for comment in accordance with the procedure set out in paragraph 34 of the annex to decision I/7.

13. The questions were sent to the parties on 22 April 2013. Both parties were invited to reply by 20 May 2013. The Party concerned provided its reply on 17 May 2013 and further clarification on 7 June 2013. The communicant replied on 20 May 2013.

14. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee considered the relevant parts of its draft based on the replies received from the communicant and the Party concerned. As the Committee made substantive changes in the light of the comments received, it requested the secretariat to send the new draft findings to the Party concerned and the communicant for comment. The Committee agreed that it would take into account any comments when finalizing the findings at its forty-second meeting.

15. The new draft findings were sent to the Party concerned and to the communicant on 16 July 2013. Both were invited to provide comments by 13 August 2013.

16. The communicant provided comments on 13 August 2013. No comments were received from the Party concerned. In its comments the communicant drew the attention of the Committee to some remaining factual inconsistencies in the draft findings, in particular to the fact, not explained clearly in its comments to the previous draft findings, that the information which was eventually disclosed to the public did not include important parts of the information that had been requested by the communicant in its third request for information.

17. At its forty-second and forty-third meetings (Geneva, 24–27 September and 27–28 June 2013, respectively) the Committee considered again the relevant parts of its draft in the light of the comments provided by the communicant in its letter of 13 August 2013. In particular it re-examined the available evidence and considered that it had been under the inaccurate impression that the information which was eventually disclosed to the public was indeed an important part of the information that had been requested by the communicant, and that the only disputed matter was whether it was “the main” part of the information requested. However, in the light of comments submitted by the communicant in its letter of 13 August 2013, the Committee now understands that indeed the information which was declassified and eventually disclosed to the public cannot be considered as the information that had been requested by the communicant in its third request for information. Since declassifying and disclosing part of the information was the only fact that proved that the Party concerned had applied the Convention’s requirement to interpret grounds for refusal in a restrictive way, and taking into account the public interest served by disclosure, the Committee decided to take the extraordinary measure of revising for a second time its findings regarding compliance in this respect. In the light of the above considerations the Committee decided to make the necessary changes to the draft findings and to request the secretariat to send the new draft findings to the Party concerned and the communicant for comment in accordance with the procedure set out in paragraph 34 of the annex to decision I/7. The Committee agreed it would take into account any comments when finalizing the findings at its forty-fourth meeting.

18. At its forty-fourth meeting (Geneva, 25–28 March 2014), 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 a formal pre-session document for the Committee’s forty-sixth meeting. It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of facts, legal framework and issues²

A. National legal framework

Access to information

19. The Constitution of Romania provides that the right to access any information of public interest cannot be restricted and that public authorities have the obligation to provide accurate information (art. 31). Also, the Constitution envisages that, if a person’s rights are adversely affected by an administrative act or the lack of action in response to an application, that person is entitled to request annulment of the act and redress (art. 52).

20. Law 544/2001 on free access to information of public interest regulates the rights of the public to request and obtain information of public interest from public authorities and institutions. Public interest information is generally defined as any information regarding the activities and/or results of the activities of a public authority or institution, which is obliged to ensure that the information is provided in writing or orally. The exemptions stipulated for refusal of the authorities to provide information of public interest are broadly aligned to the exemptions under article 4 of the Convention.

21. Government Decision 878/2005 on public access to environmental information was adopted pursuant to Law 86/2000 ratifying the Convention and transposing European

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.

Union (EU) Directive 2003/4 on access to environmental information.³ The decision regulates access to environmental information in particular, and it closely reflects the provisions of article 4 of the Convention.

22. Law 182/2002 concerning protection of classified information aims to protect classified information and any confidential sources providing this kind of information (art. 2). The Law makes clear, however, that, regarding the right to receive and provide information, its provisions are not to be interpreted as limiting access to public interest information or as ignoring the Constitution, the Universal Declaration of Human Rights, or the pacts and other treaties to which Romania is a party (art. 3). Its main objectives include “protecting classified information against intelligence, discredit and unauthorized access actions, altering or modifying their content, as well as against sabotage or unauthorized damaging” (art. 4).⁴ Law 182/2002 defines classified information as any information, data or document of interest for national security that, due to the level of its importance and the consequences that might result from its unauthorized disclosure or dissemination, must be protected (art. 5). The Law distinguishes two classes of secrecy: State secret and professional secret. A “State secret” is any information related to national security the disclosure of which could be detrimental to national security and State defence. A “professional secret” is any information the disclosure of which could be detrimental to legal entities of private or public law. Law 182/2002 is supplemented by two Government decisions: Decision 585/2002 concerning national standards for classified information; and Decision 781/2002 concerning information classified as secret of service (professional secret).

Public participation

23. Law 52/2003 concerning transparency of public decision-making provides, inter alia, for public participation in the preparation of normative acts. Accordingly, draft acts should be published on the website of an authority and the public should be able to submit comments, which should then be taken into account by the agency responsible for the procedure.

24. Government Decision 1076/2004 on environmental impact assessment for certain plans and programmes, transposing the EU strategic environmental assessment (SEA) Directive,⁵ requires that an SEA be carried out for plans and programmes in certain sectors, including energy. A mandatory part of the assessment under this act is public participation, and the respective provisions follow the requirements of article 7 of the Convention.

25. Government Decision 445/2009 on environmental impact assessment (EIA) of public and private projects, transposing the EU EIA Directive,⁶ requires that an EIA procedure be carried out for certain categories of projects, including nuclear power projects. A mandatory part of the assessment under this act is public participation, and the respective provisions follow the requirements of article 6 of the Convention.

³ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

⁴ Translation provided by the Party concerned (attachment 2 to letter of 4 November 2011).

⁵ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

⁶ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended.

Legal framework regarding nuclear power project

26. The legislation of the Party concerned includes a number of legal acts regulating issues related to nuclear energy (Law 111/1996, Law 13/2007 and Government decision 7/2003). The authorization process for a nuclear power project involves several stages of approval until the final construction and operation permits are issued.

B. Facts

27. The communication concerns the alleged non-compliance by the Party concerned with the provisions of the Convention in relation to:

- (a) The decision-making process for the proposed construction of a new NPP;
- (b) The adoption of the energy strategy.

Decision-making process for the proposed construction of a new NPP

28. Articles in the press and statements of the Ministry of Economy, Commerce and Business Environment (Ministry of Economy) informed the public about the exploratory/research studies commissioned by the Ministry regarding possible locations for a new NPP.

29. Further to such a statement made by the Minister of Economy in 2009, on 6 February 2009 Greenpeace CEE submitted a request to the Ministry of Economy to access the following information relating to the proposed NPP: the list of the locations that were examined for the construction; the 10 possible and the 2 preferred locations; a copy of the official decision regarding the 2 preferred locations; and all other documents related to the selection procedure.

30. The Ministry did not respond to this request and Greenpeace CEE submitted a new request on 24 March 2009. No response was received (see annex 1 to the communication).

31. In March 2009, Greenpeace CEE brought the matter to the Court. In October 2009, the Bucharest Court ordered the Ministry to provide the requested information (annex 2 to the communication). On 27 November 2009, the Ministry appealed the court decision, on the grounds that the information requested was not “public information” (annex 3 to the communication). The case was postponed twice. On 22 April 2010, the Ministry declassified the list of the 102 locations studied at the beginning of the project, but not the rest of the information (annex 4 to the communication). In the meantime, in March 2011, the Court of Appeal decided in favour of the Ministry.

32. Further to another press statement made by a Romanian news agency, Mediafax, in October 2009, that there were four possible locations for the proposed NPP at Somes River, in November 2009 Greenpeace CEE Romania submitted a third request for access to information about: the four possible locations on Somes River that were being studied; the quantity of the water that could be used as a cooling agent; and the capacity that the new NPP could have.

33. The Ministry responded that the information requested was not public and that no decision had yet been made regarding the NPP (annex 6 to the communication). The Ministry in its response evoked the exceptions of Law 544/2001 and stated that “exploratory technical and [economic] data (as well as any social and political information belonging to the Romanian State) regarding a new nuclear power plant in Romania are secret; ... such data need to be supplemented until a decision can be made” (translation provided by the communicant in annex 6 to the communication). The main points of the response were that: (a) the location study had not been completed yet; (b) the study was classified; (c) the exact location would be established when all elements had been analysed;

and (d) all relevant information would be available to the public, and the public would be notified and consulted, when the study was finalized and the location was known. The Ministry could not address the specific questions on the water used as a cooling agent and the possible NPP capacity, because the study was still in progress. The Ministry also included in an attachment all the binding legislation that provided for public consultation before the construction of a nuclear facility in the country, including international treaties to which Romania is a party (such as the Treaty establishing the European Atomic Energy Community and the Law ratifying the Convention on Environmental Impact Assessment in a Transboundary Context) and national laws on nuclear and electricity matters.

34. In 2009, the communicant brought the matter to court. In March 2010, the Bucharest Court decided in favour of the communicant's request and ordered the Ministry to provide the requested information (annex 7 to the communication). However, the Court of Appeal accepted the arguments submitted by the Ministry and ruled that the requested information was not final.

The Energy Strategy

35. The "Romanian Energy Strategy for 2007–2020" was approved in 2007 (Decision 1069/2007).

36. In February 2010, the SEA procedure, including public consultations, was initiated. In August 2010, a document was posted on the website of the Ministry of Environment and Forests (Ministry of Environment) describing the SEA procedure (annex 8 to the communication). That document mentioned that the Ministry of Economy had informed the Ministry of Environment that the Strategy had been approved by a Government Decision. It also mentioned that, although the provisions of the SEA Directive required that an SEA be carried out before approving a strategy, the Energy Strategy had been approved in 2007 without having applied the environmental assessment procedure. Depending on the outcome of the SEA procedure (which started after the approval of the Strategy), the Strategy would then be revised or updated.

37. In 2009, Greenpeace CEE Austria requested the Ministry of Economy to provide an English translation of the Energy Strategy. No response was received and the matter was brought to court. The courts decided in favour of the Ministry, both at first instance and on appeal.

38. Later, the communicant asked the Ministry whether any public consultation had taken place before the approval of the Energy Strategy in 2007. No response was received.

C. Substantive issues

Decision-making process for the proposed construction of a new NPP

Article 3, paragraph 2

39. The communicant alleges that the authorities did not make any effort to assist and provide guidance to the public in seeking access to information and facilitating public participation regarding the proposed NPP; therefore the Party concerned failed to comply with article 3, paragraph 2, of the Convention.

40. The Party concerned disagrees with the communicant. In its view, this provision of the Convention aims at environmental education and awareness-raising efforts by the Parties in general. It argues that the fact that the information requested by the communicant was not provided does not imply non-compliance with article 3, paragraph 2.

Article 4, paragraphs 1, 4, 6 and 7

41. The communicant alleges that by not responding to the first and second requests for information and by responding to the third request saying that the information was classified and as such it could not be disclosed, the Party concerned failed to comply with article 4, paragraph 1, of the Convention.

42. The communicant then alleges that by refusing to disclose information that does not fall under any of the exemptions under the Convention, and by not adequately justifying why the information could not be disclosed, the Party concerned failed to comply with article 4, paragraphs 4 and 7, of the Convention. It argues in particular that the study concerning the proposed NPP cannot be considered as part of internal communications, as argued by the Party concerned, but is in itself an administrative normative act.

43. The communicant also alleges that while article 4, paragraph 6, of the Convention is not clearly reflected in Romanian legislation, it is directly applicable in the national legal order. In its view, the public authorities had an obligation to sort out the classified information from all the information that had been requested and make available the remainder. Since they did not act in this manner, the Party concerned failed to comply with article 4, paragraph 6, of the Convention.

44. The Party concerned denies the allegations and refers in particular to article 4, paragraph 3 (c), of the Convention: the information requested related to a study commissioned by the Ministry, which was material in the course of completion or part of internal communications of public authorities, and this is classified material under national law, until a final decision is made on the matter. The Party concerned also mentions that part of the study was declassified because the Ministry took into account the public interest served. At that preparatory stage of the project, and considering public security and the confidential character of information relating to the economic interests associated with nuclear energy matters, it was not possible to make more information publicly available. The Party concerned asserts that the authorities refused to disclose the requested information in accordance with Law 544/2001 and Government Decision 878/2005 (see paras. 20 and 21 above).

Article 6 and article 7 decisions

45. The communicant alleges that because of the lack of information available to the public, it has difficulties indicating whether the decisions at issue fall under article 6 or 7 of the Convention. Therefore, the communicant requests the Committee to examine the decision concerning the details of the construction (location, technology, etc.) as a project under article 6, and the decision to construct the NPP as a plan under article 7.

46. The Party concerned contends that no decisions falling under article 6 or 7 of the Convention have been adopted. The Ministry of Economy frequently commissions studies from experts in order to explore the viability of economic opportunities for the country. The studies in questions were commissioned to explore energy security options in Romania and cannot be considered as decisions under the Convention.

Article 6, paragraphs 1, 2, 3, 4, 6, 7, 8 and 9

47. The communicant alleges that the decision concerning a new NPP falls under article 6, paragraph 1 (a), of the Convention and that, by not making any public announcement of the project, the Party concerned failed to comply with article 6, paragraph 2, of the Convention. According to the communicant, press releases cannot be considered as equivalent to a public notice under the Convention.

48. The communicant further alleges that, since no public consultations took place before the adoption of the decisions in question, the Party concerned failed to comply with article 6, paragraphs 3 and 4, of the Convention, because there were no reasonable time frames allowing for sufficient time to inform the public so that the public could prepare and participate effectively, and no early public participation, when all options were open. The communicant adds that, for projects of such size and importance as an NPP, the study of 120 possible locations and the subsequent narrowing down of the locations to 10 and then to 4, constitutes an early phase of the decision-making for a specific activity under article 6 and the public should participate.

49. The communicant also alleges that, since no information was provided to the public for the purpose of public participation, the public did not submit any comments and hence no account was taken of the result of public consultations. Therefore, the Party concerned failed to comply with article 6, paragraphs 6, 7 and 8, of the Convention.

50. The communicant finally alleges that, since information about the project and the specific decisions, including the reasoning, to proceed with a new NPP were never communicated to the public, the Party concerned failed to comply with article 6, paragraph 9, of the Convention.

51. The Party concerned refutes these allegations and states that it did not fail to comply with any of the provisions of article 6 of the Convention. It claims that the communicant misinterprets the purpose of article 6, because the public participation provisions of the Convention apply to “decisions on whether to permit proposed activities listed in annex I” and any preliminary study that could possibly lead to a decision to permit the construction of an NPP cannot be considered as a permitting decision under article 6.

Article 7, in conjunction with article 6, paragraphs 3, 4, and 8

52. According to the communicant, the decision to construct the NPP, if considered as a plan or policy under article 7, was taken without any consultations within a transparent and fair framework. Thus, according to the communicant, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

53. The Party concerned claims that the preliminary studies on a possible NPP project commissioned by the Government are not a plan or policy. Therefore, they do not fall under article 7 and there was no obligation for the Party concerned to provide for public participation. Consequently it was not in non-compliance with the relevant provisions of article 7.

Article 9, paragraph 4

54. According to the communicant, the first court decision issued in November 2009 (seven months after the application was made in April 2009) was suspended when the Ministry filed its appeal and that decision was not executed (i.e., no access was provided to the information as requested) (see para. 31 above). In the meantime, the Court of Appeal decided in favour of the Ministry. In addition, the second court decision, issued in August 2010 (eight months after the application was made in December 2009), had also been issued in favour of the Ministry (see para. 34 above).

55. The communicant alleges that judges assigned to hear cases related to classified information must be certified, which extends the timing necessary to render a judgement.

56. The communicant further alleges that court decisions are not publicly available with the exception of those parts that relate to the trial, and are considered confidential because of the overly broad interpretation of personal data protection laws.

57. The communicant finally alleges that, due to the deficient transposition of the requirements of the Convention into the national legal order, in practice Romanian courts would never grant injunctive relief in environmental cases.

58. For all these reasons, the communicant alleges that the Party concerned fails to provide for adequate and effective remedies, which are fair, equitable, timely and publicly accessible, as required in article 9, paragraph 4, of the Convention.

59. The Party concerned refutes the communicant's allegations and states that it does not fail to comply with article 9, paragraph 4, of the Convention. First, it claims that remedies are adequate, as evidenced by the fact that the communicant was able to access court remedies when it considered that the authorities had infringed the Convention, and the Court of first instance had actually decided in favour of the communicant. Second, the Party concerned claims that remedies are effective, because any final decision is binding and is immediately executed. The Party concerned adds that it is normal that the appeal lodged by the losing party has suspensory effect. Third, the Party concerned finds that the communicant did not substantiate its allegations that remedies are unfair or inequitable, and it therefore does not deem it appropriate to comment at all. Fourth, the Party concerned claims that remedies are timely, as demonstrated by the fact that the courts issued their decisions in a maximum of seven months after the applications had been filed and the parties were immediately notified. Finally, the Party concerned mentions that court cases concerning access to public information are free of charge and that all court decisions are transparent and accessible to the public through Internet databases and specialized journals.

The Energy Strategy

Article 3, paragraphs 2 and 9

60. The communicant alleges that no effort was made by public authorities to encourage the public, within the country and in neighbouring countries, to participate in public consultations for the Energy Strategy, and therefore the Party concerned failed to comply with article 3, paragraph 2, of the Convention

61. The communicant further alleges that public authorities, by refusing to provide an English translation of the information requested, discriminated against foreign members of the public (i.e., Greenpeace CEE Austria), and therefore the Party concerned failed to comply with article 3, paragraph 9, of the Convention.

62. The Party concerned reiterates its arguments on the interpretation of article 3, paragraph 2, of the Convention (see para. 40 above), that the provision aims at environmental education and awareness-raising activities in general to promote the relationship between authorities and the public concerned. Therefore, according to the Party concerned, consideration of alleged non-compliance with article 3, paragraph 2, is not relevant in the present context.

63. As for article 3, paragraph 9, the Party concerned states that foreign members of the public, such as Greenpeace CEE Austria enjoy the same rights as any Romanian members of the public, including registered NGOs, in respect of the language in which the requested documentation is available, and in this case the information was available only in Romanian. Therefore, the Party concerned states that it is not in non-compliance with article 3, paragraph 9, of the Convention.

Article 4, paragraph 1

64. The communicant alleges that for a document of great importance in a transboundary context, such as the Energy Strategy, there is an obligation for the Party concerned to provide translation of the text in a language other than Romanian, and

preferably in English, so as to enable the public concerned of neighbouring countries to understand the content. In addition, by failing to provide to a foreign member of the public, i.e., Greenpeace CEE Austria, the Energy Strategy in the form requested, i.e., in English, the Party concerned failed to comply with article 4, paragraph 1, of the Convention.

65. The Party concerned disagrees with the communicant. It recalls that article 4, paragraph 1, requires a public authority to provide the requested information in the form requested, namely in paper, electronic media or other physical means for storing information, but not to translate the information requested into a language different from the language in which the information is available; this would not be a reasonable interpretation of the provision. The Party concerned adds that according to article 4, paragraph 1 (b), public authorities have to provide the information in the form requested “unless it is reasonable to make it available in another form, in which case reasons shall be given for making it available in that form”. The Energy Strategy was not available in any language other than Romanian and it was not reasonable that the authorities were requested to translate it. The Party concerned finally comments that, from the information submitted by the communicant so far, it is obvious that the communicant had the means to finance the translation of the Strategy.

Article 7, in conjunction with article 6, paragraphs 3, 4, and 8

66. The communicant alleges that, since the Energy Strategy is an environmental policy, and since sufficient public participation did not take place during its preparation, the Party concerned failed to comply with article 7 in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention.

67. In response to the assertion by the Party concerned that NGOs had participated in a working group preparing the Strategy, the communicant submitted a letter from an NGO that according to the Party concerned had participated in the working group, denying participation in any working group but admitting that it had provided comments to the draft Strategy (see annex 3 to the communicant’s response of 6 June 2011).

68. The Party concerned explained that the Energy Strategy was drafted by a large working group with the participation of representatives from various stakeholders, including NGOs, and that the draft was subject to public consultation. Specifically, the draft was published on the websites of the Ministry of Economy and of the Secretariat General of the Government. There had been a 30-day comment period and comments were taken into account in finalizing the Strategy. At the Committee’s thirty-fourth meeting in September 2011, the Party concerned had informed the Committee that an SEA procedure was being conducted and that, upon the conclusion of that procedure, the Strategy would be updated or revised as appropriate. Therefore, the Party concerned stated that it was not in non-compliance with article 7 of the Convention.

Domestic remedies

69. The communicant brought the matter of the failure of the Ministry of Economy to grant access to information three times before the courts (see paras. 31, 34 and 37 above). In the first two cases, the courts decided in favour of the communicant/applicant, but the Court of Appeal decided in favour of the Ministry. In the third case, both the courts of first instance and of appeal decided in favour of the Ministry.

70. The communicant filed a complaint against the authorities for failure to organize public participation (in the framework of the SEA procedure) before the approval of the Energy Strategy. The Court of Appeal rejected the case. The communicant has also submitted a complaint on this issue with the European Commission (CHAP (2011)01398).

III. Consideration and evaluation by the Committee

71. Romania ratified the Convention on 11 July 2000. The Convention entered into force for Romania on 30 October 2001.

72. With respect to access to information, the Committee considers that the information requested by the communicant is “environmental information” in the meaning of article 2, paragraph 3, of the Convention.

73. The Committee was requested by the communicant to examine the decision concerning the details on the construction of the NPP (location, technology, etc.) as an activity under article 6, and the decision to construct a new NPP as a plan under article 7. The Committee notes, however, that the only document acknowledged by both the communicant and the Party concerned to have been issued in relation to the project is a study for the selection of possible locations for the NPP, and the Committee has not been provided with any further information to prove that any decision in this respect has been taken. The Committee does not consider a study aiming at examining possible locations for a project, according to certain criteria (geographical, scientific, etc.), and making proposals for the preferred location(s) to be a decision under article 6, or as a plan, programme or policy under article 7, of the Convention. Nor is there any other evidence provided to the Committee that there was a decision taken to permit the NPP. Therefore, in relation to the study for the possible locations, the Committee will not examine any allegations of non-compliance with the public participation provisions of articles 6 and 7 of the Convention.

74. Bearing in mind the fact that the issue of timeliness of judicial procedures related to access to information is the subject of another communication involving the same communicant and the same Party concerned, the Committee also decides not to address this issue in the present case.

Decision-making process for the proposed construction of a new NPP

Endeavours to ensure that public authorities assist and guide the public (art. 3, para. 2)

75. The communicant alleges non-compliance with article 3, paragraph 2, of the Convention in relation to the decision-making for the proposed NPP, because the public authorities did not make any effort to assist, provide guidance or encourage members of the public in Romania and abroad to be informed and participate in the decision-making.

76. Article 3, paragraph 2, of the Convention contains a general obligation for the Party to endeavour to ensure that its officials and public authorities assist and provide guidance to the public in exercising its rights under the Convention. This provision follows the guidance of the eighth preambular paragraph, which acknowledges that “citizens may need assistance in order to exercise their rights”.

77. The information provided to the Committee, in particular in annex 6 to the communication, shows that the authorities provided some guidance to the public regarding the nature of the relevant information and the legal framework for the respective decision-making concerning the NPP. Moreover, there was no evidence provided to the Committee that the guidance, although not meeting the expectations of the communicant, was manifestly and intentionally misleading. The allegations of the communicant are not substantiated and therefore the Committee does not find that the Party concerned failed to comply with article 3, paragraph 2, of the Convention.

Failure to respond to requests for environmental information (art. 4, paras. 1, 2 and 7)

78. The communicant submitted three requests for information concerning the proposed NPP.

79. The general obligation of the public authorities to respond to requests of members of the public to access environmental information is enshrined in article 4, paragraph 1, of the Convention. In addition, authorities have to respond to a request within one month after the request was submitted (art. 4, para. 2) and, in case of a refusal, this should be in writing (art. 4, para. 7), giving the reasons for the refusal, and as soon as possible, but at the latest within one month, unless the complexity of the information justifies an extension of up to two months after the request.

80. In the present case, the Party concerned has not provided any evidence to substantiate its claims that the authorities duly addressed all requests for information despite the Committee's request. The Committee thus considers that the allegation of the communicant that its first and second requests for information were ignored represent the actual facts. Therefore, since the authorities did not respond at all to two of the three information requests submitted by the communicant in relation to the decision-making process regarding the proposed construction of a new NPP, the Committee finds that the Party concerned failed to comply with article 4, paragraph 1, in conjunction with paragraphs 2 and 7, of the Convention.

Refusal of environmental information in relation to the NPP (art. 4, paras. 3 and 4)

81. The authorities responded to the third request for environmental information submitted by the communicant. In that case, the authorities refused to grant access. The Committee examines whether this refusal can be justified on the basis of article 4, paragraphs 3 (c) and 4 (a), (b) and (d).

82. With respect to article 4, paragraph 3 (c), the Committee notes that authorities may refuse to grant access to material which is in the course of completion only if this exemption is provided under national law or customary practice. Indeed, the legislation of the Party concerned specifies that public authorities may refuse a request for environmental information if the request concerns material in the course of completion of unfinished documents or data (Government Decision 878/2005, art. 11, para. 1).

83. The Committee recalls that even if not mentioned under article 4, paragraph 3 (c), as a principle of law exemptions are to be interpreted restrictively. This is particularly important in view of the public interest served by the disclosure and the aims and objectives of the Convention.

84. The study which included the information requested by the communicant was prepared by the Centre of Designing and Engineering for Nuclear Projects under the Romanian Authority for Nuclear Activities (RAAN-SITON), a specialized agency of the central public administration, acting as a legal person, coordinated by the Ministry of Economy and responsible for providing technical assistance to the Government in nuclear matters. Although the agency is somehow related to the Ministry of Economy, it is not an internal unit of that Ministry and is formally independent.

85. The Convention does not define the "material in the course of completion". The Committee considers that the phrase "material in the course of completion" relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared.

86. The Party concerned also argues that this information constituted internal communications of public authorities.

87. The Committee finds that when a study that had been commissioned by a ministry from a somehow-related-to-it-but-separate entity has been completed, submitted to and approved by this ministry, such a study can neither be considered as “material in the course of completion” nor as “internal communications”, but rather as a final document which could and should be publicly available. Therefore, the authorities could not refuse information on this ground.

88. According to article 4, paragraph 4 (a), of the Convention, a public authority may refuse a request for environmental information when the disclosure may adversely affect the confidentiality of proceedings of a public authority, and this is provided for under national law. Indeed, the legislation of the Party concerned (Government Decision 878/2005, art. 12) provides for such an exception.

89. Yet, the Committee considers that the term “proceedings” in article 4, paragraph 4 (a), relates to concrete events such as meetings or conferences and does not encompass all the actions of public authorities. While national legislation may, according to this provision of the Convention, provide for the possibility to consider the minutes of a number of meetings held in order to select feasible locations for an NPP, as confidential, it cannot under this provision treat as confidential all the actions undertaken by public authorities in relation to selecting feasible locations for an NPP, including all the related studies and documents. In particular, national legislation may provide for the confidentiality of operational and internal procedures of an authority. The criteria in legislation for such exceptions should be as clear as possible, so as to reduce the discretionary power of authorities to select which proceedings should be confidential, because this might lead to arbitrary application of the exemption. This is in line with the principle that all exemptions to the requirement to provide access to requested environmental information are subject to a restrictive interpretation and must take into account the public interest served by the disclosure. Therefore, the authorities in this case could not refuse information on this ground.

90. Article 4, paragraph 4 (d), of the Convention allows authorities to refuse access to commercial and industrial information, where such information is protected by law in order to protect legitimate economic interests. The Convention does not define which information is “commercial and industrial”, but the criteria and the process for characterization of information as confidential on this basis should be clearly defined by law, so as to prevent authorities from withholding information in an arbitrary manner.

91. The Convention does not define “legitimate economic interests” either. While the exemption from the obligation to disclose information in article 4, paragraph 4 (d), is predominantly focused on protecting legitimate economic interests of private entities, it may also be used to protect legitimate economic interests of public bodies, for example those referred to in article 2, paragraph 2 (b) and (c), or, in certain exceptional circumstances, even of entire States, provided, however, that the requested information is of a commercial or industrial nature, according to the criteria and the process described in the law.

92. Even so, in the present case the Committee does not find that a study, prepared by an entity which is closely related to the public administration and aimed at selecting the possible locations for an NPP could be considered as “commercial or industrial information”, as referred to in article 4, paragraph 4 (d), of the Convention. Therefore, in practice the authorities in this case could not refuse information on this ground, even if the exemptions stipulated in the legislation for refusal of the authorities to provide information of public interest are broadly aligned to the exemptions under article 4 of the Convention.

93. Finally, according to article 4, paragraph 4 (b), public authorities may withhold information when the release would adversely affect international relations, national

defence or public security. Thus national law, generally, or the administration, in specific cases, may define information as involving State secrets if the release may harm State security and defence. The law of the Party concerned specifies that information of “scientific, technologic or economic activities and investments related to the national security or defence or which are of utmost importance for the economic, technical and scientific interests of Romania” and “scientific research in the field of nuclear technologies, excepting fundamental research, as well as the programmes for the protection and security of nuclear materials and facilities” (Law 182/2002, art. 17, paras. (k) and (l), respectively)⁷ may qualify as “State secrets”, and provides for the criteria and the procedures to be followed for the classification of the information.

94. The Committee finds that the study aiming at the selection of possible locations for the NPP can be a “State secret” under national law, and public authorities may thus refuse access to information on the basis of the exemption of article 4, paragraph 4 (b), of the Convention. However, the exemption is to be interpreted narrowly, taking into account the public interest served by the disclosure. In the present case, the Party concerned has not convinced the Committee that, in refusing access to the requested information on the ground that disclosure could adversely affect international relations, national defence or public security, the Party concerned interpreted the grounds for refusal in a restrictive way, so as to take account of the public interest served by disclosure, as set out in the final subparagraph of article 4, paragraph 4. The Committee notes that the reply of the Ministry of Environment to the third request for information submitted by the communicant (see para. 33 above) is limited to indicating that the decision regarding location of the NPP in question has not been taken yet and therefore according to applicable Romanian legislation the requested information should be considered as secret. The Committee also notes that neither in this document nor in any other document submitted by the Party concerned is there any mention of taking into account the public interest served by the disclosure, or about balancing the interests for and against the disclosure of the information requested by the communicant in its third request for information. In its reply of 14 March 2011 to the questions of the Committee (see para. 7 above) the Party concerned indicates only that such information regarding pre-decisional studies is “of no relevance for the public”. Furthermore, the Committee notes that the only official document presented to the Committee which includes an attempt to consider the public interest served by disclosure is the judgement of the Bucharest Court (see para. 34 above), which notably decided in favour of the communicant and ordered the Ministry to provide the requested information. The Committee also notes that the judgement of the Court of Appeal which overturned the above judgement of the Bucharest Court does not include any discussion in this respect except for stating that pre-decisional studies should not be disclosed until authorities decide that the issue is ready to be submitted for public debate required by applicable procedures. In this respect, the Committee considers that access to information under article 4 of the Convention should not be identified with access to information in the context of public participation procedures. The obligation under article 4 to make available environmental information to the public upon request is not limited to matters being subject to public participation procedures and — unless legitimate reasons for refusal are being applied according to appropriate procedures — covers all environmental information which is held by public authorities, not least the information which public authorities themselves, in press releases or elsewhere, reveal that they hold (as was true in the present case, see para. 32).

95. The Committee concludes that in the present case the Party concerned has not been able to show that any of the grounds for refusal referred to in article 4 provide a sufficient

⁷ Translation provided by the Party concerned. (See attachment 2 to the letter of the Party concern of 4 November 2011.)

basis for not disclosing the information requested regarding the possible locations for the NPP. Although part of the information originally requested was eventually declassified and made available to the public, the rest of the information requested, in particular the information requested by the communicant in its third request for information, was not disclosed without giving sufficient reasons and without demonstrating that consideration had been given to the public interest in disclosure. Thus, with respect to the communicant's third information request, by not ensuring that the requested information regarding the possible locations for the NPP was made available to the public, and by not adequately justifying its refusal to disclose the information requested under one of the grounds set out in article 4, paragraph 4, of the Convention, taking into account the public interest served by disclosure, the Party concerned failed to comply with article 4, paragraphs 1 and 4, of the Convention.

96. The Committee also considers that the relationship between the legal regimes of the Party concerned with respect to general access to information, access to environmental information and classified information, in particular the apparent broad discretion of public authorities to classify information as a "professional secret", give rise to concerns as to whether there is a clear, transparent and consistent framework to implement the respective provisions of the Convention. However, based on the information before it in the context of the current communication, the Committee does not go so far as to find the Party concerned to be in non-compliance with article 3, paragraph 1, of the Convention.

Separation and disclosure of the part of information that is not exempted (art. 4, para.6)

97. The communicant claims that the Party concerned failed to comply with article 4, paragraph 6, of the Convention, by not separating and disclosing part of the information that could be separated without prejudice to its possible confidentiality, so as to make available the remainder of the information requested. The Committee observes that this provision is clearly reflected in Romanian legislation (Government Decision No. 878/2008 on public access to environmental information, art. 15). The Committee also notes that part of the study was declassified and made available to the public, although this was done with some delay.

98. The Committee is concerned about the clarity, transparency and consistency of the relevant legal framework, in particular the fact that it includes broadly defined categories of information that can be classified as confidential, which may lead to the classification of the whole information; and the fact that the authorities classified the information evoking different grounds. Furthermore, there are indications that article 4, paragraph 6, may not be regularly observed in practice by the public authorities of the Party concerned (e.g., information and documents submitted by the communicant, such as the Constanta Court Civil sentence No. 1359, file no 6584/118/2008). Nevertheless the Committee has not been provided with sufficient information to ascertain whether the above-mentioned features of the Romanian legal framework and practice amount to systemic non-compliance with article 4, paragraph 6, of the Convention.

Procedure for refusal of an information request (art. 4, para. 7)

99. The Committee observes that, apart from the cases where the requests for information were ignored, reasons for the refusals have been stated. While it is a different matter, dealt with above, as to whether the reasons given were accurate and in compliance with the Convention, and while the Committee has already expressed concerns as to the clarity of the legal framework concerning access to information, the Committee does not find that the evidence submitted demonstrates that the Party concerned failed to comply with article 4, paragraph 7, of the Convention.

Effective, fair and publicly accessible review procedures (art. 9, para. 4)

100. The communicant makes several allegations with respect to non-compliance with article 9, paragraph 4, of the Convention. First, regarding the allegation concerning the availability of injunctive relief in environmental cases, on the basis of the information before it in the context of the current communication, the Committee is not in a position to make any findings concerning compliance in this respect.

101. Second, the communicant did not substantiate how the requirements in the law of the Party concerned that judges assigned to hear cases related to classified information must be certified to do so as such result in delayed, ineffective or unfair procedures. Therefore the Committee does not find that the Party concerned failed to comply with article 9, paragraph 4, with respect to access to justice in these respects.

102. Third, with respect to the allegations that the suspensive effect of an appeal affects the effectiveness of judicial procedures, the Committee notes that this constitutes a rather a common feature of law and practice in most jurisdictions, and the Committee considers that this feature serves well the rule of law. Therefore the Committee finds that the Party concerned did not fail to comply with article 9, paragraph 4, of the Convention as regards its obligation to provide for effective remedies.

103. Fourth, with respect to the allegations regarding the accessibility of court decisions, the Committee notes that the Party concerned referred to a number of arrangements already undertaken or planned to be undertaken to provide full accessibility to court decisions. The requirements in article 9, paragraph 4, are limited to the procedures referred to in article 9, paragraphs 1, 2 and 3, of the Convention. However, any reasons not to disclose a decision relating to the matters governed by the Convention, such as data protection, should be considered under the article 4 of the Convention and not under article 9, paragraph 4. Therefore the Committee finds that the Party concerned did not fail to comply with the requirement of article 9, paragraph 4, that decisions be publicly accessible.

The Energy Strategy*Endeavours to ensure that public authorities assist and guide the public (art. 3, para. 2)*

104. According to the communicant the public authorities failed to encourage the public, within the country and in neighbouring countries, to participate in the procedures regarding the Energy Strategy. Yet, the communicant did not sufficiently substantiate how the lack of such efforts in relation to this particular procedure should be seen as evidence of a systematic failure of the Party concerned to assist the public and facilitate its participation in decision-making. Therefore, the Committee does not find that the Party concerned failed to comply with article 3, paragraph 2, of the Convention.

Non-discrimination (art. 3, para. 9)

105. The communicant claims that the authorities discriminated against foreign members of the public (i.e., Greenpeace CEE Austria), because they refused to grant information in English. While article 3, paragraph 9, is intended to prevent not only formal discrimination but also factual discrimination, this provision cannot be interpreted as generally requiring the authorities to provide a translation of the information into any requested language. If, on the other hand, national law provides for translations to different official languages or sets criteria also for other translations, article 3, paragraph 9, of the Convention implies that these criteria must be applied in a non-discriminatory way. Moreover, if the authority at the time of the request was in possession of such a translation, it would have been obliged under article 4 of the Convention to disclose the translated version to the public. In the present case, however, the Party concerned confirmed that at that time the public authorities

did not hold such a translation, and the communicant did not provide evidence to the contrary.

106. In this situation the fact that the Party concerned did not provide English translations of the requested information cannot be considered as discrimination, and therefore the Committee finds that the Party concerned did not fail to comply with article 3, paragraph 9, of the Convention.

Access to information in the “form requested” and translation (art. 4, para. 1 (b))

107. The communicant also claims that the authorities were under the obligation to provide the Energy Strategy in “the form requested”, i.e., in English, to a member of the public from abroad, i.e., Greenpeace CEE Austria. The Committee clarifies that article 4, paragraph 1, of the Convention relates to the material form of the requested information, such as such as paper, electronic media, videotape, recording, etc., and does not include an obligation to translate the document into another language. Thus, failing to provide the English translation of the requested document (the Energy Strategy), since such translation was not already available with the authorities, does not constitute non-compliance with article 4, paragraph 1 (b), of the Convention.

Public participation for plans and programmes (art. 7, in conjunction with art. 6, paras. 3, 4, and 8)

108. Regarding the allegation that no proper public participation was provided during the preparation of the Energy Strategy, the Committee notes that while it is undisputed that the Strategy is a document subject to article 7 of the Convention and some public participation took place during its preparation, there are different views in relation to the participation of NGOs in the working group drafting the Strategy.

109. In this context, it should be stressed that whether a particular NGO participated or not in the working group drafting the Strategy is irrelevant from the point of view of meeting the requirements of article 7 of the Convention, because the inclusion of representatives of NGOs and “stakeholders” in a closed advisory group cannot be considered as public participation under the Convention. Furthermore, whatever the definition of the “public concerned” in the law of a Party to the Convention, it must meet the following criteria under the Convention: it must include both NGOs and individual members of the public; and it must be based on objective criteria and not on discretionary power to pick individual representatives of certain groups. In this context, participation in closed advisory groups cannot be considered as public participation meeting the requirements of the Convention.

110. Furthermore, the Committee notes that, while indeed the draft 2007 Strategy was published on the websites of the Ministry of Economy and the Secretariat General of the Government, formally the general public had only 11 days to get acquainted with the draft and submit comments. Despite the fact that some members of the public had been able to submit comments also outside the scope of these 11 days, the Committee considers that the Party concerned failed to ensure a reasonable time frame for public participation in the case of such a document. Thus, by not providing sufficient time for the public to get acquainted with the draft and to submit comments thereon, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention.

IV. Conclusions and recommendations

111. 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

112. The Committee finds that:

(a) Since the authorities did not respond at all to two of the three information requests submitted by the communicant in relation to the decision-making process regarding the proposed construction of a new NPP, the Party concerned failed to comply with article 4, paragraph 1, in conjunction with paragraphs 2 and 7, of the Convention (see para. 80 above);

(b) With respect to the communicant's third information request, by not ensuring that the requested information regarding the possible locations for the NPP was made available to the public, and by not adequately justifying its refusal to disclose the requested information under one of the grounds set out in article 4, paragraph 4, of the Convention, taking into account the public interest served by disclosure, the Party concerned failed to comply with article 4, paragraphs 1 and 4, of the Convention (see para. 95 above);

(c) By not providing sufficient time for the public to get acquainted with the draft 2007 Energy Strategy and to submit comments thereon, the Party concerned failed to comply with article 7, in conjunction with article 6, paragraph 3, of the Convention (see para. 110 above).

B. Recommendations

113. The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommend that the Party concerned:

(a) Take the necessary legislative, regulatory and administrative measures to ensure that public officials are under a legal and enforceable duty:

(i) To respond to requests of members of the public to access environmental information as soon as possible, and at the latest within one month after the request was submitted, and in the case of a refusal, to state the reasons for the refusal;

(ii) To interpret the grounds for refusing access to environmental information in a restrictive way, taking into account the public interest served by disclosure, and in stating the reasons for a refusal, to specify how the public interest served by disclosure was taken into account;

(iii) To provide reasonable time frames, commensurate with the nature and complexity of the document, for the public to get acquainted with draft strategic documents subject to the Convention and to submit its comments;

(b) Provide adequate information and training to public authorities about the above duties.