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REVIEW

The Ruling of the Court of Justice in Sweetman:
How to avoid a death by a thousand cuts?

Hendrik Schoukens

Transitional National Plan derogations for Large Combustion
Plants under the IED: EEB legal challenge

Christian Schaible

Selected problems of implementation of the Espoo Conventi-
on in Ukraine (based on the example of Bystroe Canal Case)

Victoria Rachynska

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Editorial

This current issue of the elni Review is set in the light of the tragic loss of a friend of ELNI, Marc Pallemmaerts (see the obituary below).

The topical spectrum of elni Review 1/2014 encompasses EU nature protection and pollution control law as well as the implementation of international law on transboundary impacts on the environment in Ukraine.

Hendrik Schoukens analyses the ECJ *Sweetman*-Case and new developments in the judicial fixation of the scope of Art. 6(3) Habitats Directive about the permissibility of industrial or infrastructural interventions in Natura 2000 areas. The author argues that the Court's ruling should be welcomed since it provides an additional safeguard for the EU's most vulnerable habitats.

The article by *Christian Schaible* illuminates shortcomings of the Industrial Emissions Directive as regards transparency in the elaboration and evaluation of certain derogations for large combustion plants. The focus lies on an

EEB action concerning a Greek derogation approval decision of the European Commission, which the NGO has since contested before the General Court on 18 June 2014.

Victoria Rachynska examines the implementation of the "Espoo Convention" in the Ukraine. Based on a case study she identifies the country as one of the most persistent violators of the Convention and traces this in part back to the political and economic situation in Ukraine.

The next issue of the elni Review will concentrate on the current TTIP negotiations. Contributions concerning the clash of international trade and environmental protection, the role of arbitral jurisdiction and related topics are most welcome. Please inform us of your interest in a publication. Please send contributions to the editors by mid-September 2014.

Julian Schenten/Gerhard Roller
July 2014

Obituary Marc Pallemmaerts

Most elni-Members have already learnt about the very sad news. Marc Pallemmaerts, one of the co-founders of elni, has died at the age of only 53. Marc participated in the first elni conference in Frankfurt in 1990. In the final discussion of the conference he took the floor once again and argued for an international treaty providing for procedures to enforce environmental legislation (see the minutes kept by Gabriele Britz and Sven Deimann, in: Führ/Roller, *Participation and Litigation Rights of Environmental Associations in Europe*, p. 181): in nucleo the aim of the Aarhus-Convention. The "Aarhus" issue has been one important of the numerous subjects of Marc's work. His book on "The Aarhus Convention at Ten", to which also elni members contributed, was an outstanding example of Marc's research. This also holds true for his contributions to the debate on WTO rules and product regulation as well as in the field of chemicals legislation (his PhD was about Toxics and Transnational Law) where he served as a member of the Management Board of the European Chemicals Agency (ECHA) and – until his final weeks – as an alternate member of the Board of Appeal of ECHA. He was also UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes since November 2012 (see <http://www.ohchr.org/EN/Issues/Environment/ToxicWaste/Pages/MarcPallemmaerts.aspx>) and had planned two new missions for 2014 in that regard, in the Middle-East and in Europe.

Climate change was also one of the many fields in which Marc excelled and reached very important achievements. He played a truly decisive role in the international climate change negotiations, as a chief negotiator under the Belgian presidency of the EU in 2001, as an architect of the Marrakesh Accords, as a member of the Kyoto Protocol Committee and much more (see <http://www.climat.be/fr-be/news/2014/hommage-marc-pallemmaerts> - (<http://www.ieep.eu/about-us/in-memory-of-marc-pallemmaerts/>)).

In 2013, he was awarded the prestigious Elizabeth Haub Prize for environmental law by the University of Stockholm "in recognition of his extensive and outstanding contributions to the development of environmental law and his successful efforts to combine theory and practice in pursuit of concrete results in multilateral negotiations".

Not the least and most importantly for him, as a lawyer and a political scientist, Marc was an academic. He was a professor in various universities, in Belgium and abroad, much appreciated by its students and always ready to engage into new scientific research projects.

Marc was brilliant and had a very sharp mind. He always knew and explained where the real issues were. He rarely hesitated to speak his mind and frankly stated his opinions.

He will be greatly missed by us, as a colleague as well as personally. European Environmental Law has lost an important figure

Selected problems of implementation of the Espoo Convention in Ukraine (based on the example of Bystroe Canal Case)

Victoria Rachynska

1 Introduction

The impact of human activities on the environment has rapidly increased in the last two centuries, which has eventually aggravated health and living conditions of the wide population. Tremendous growth of production and consumption, an irresponsible attitude towards the implementation of the latest achievements of technological advancement as well as wide usage of outdated and hazardous equipment with the only aim of reaching the most possible profits pose a serious threat to further human well-being. Nowadays people are capable of influencing the lives of other people (who may be even hundreds of thousands of kilometers away from them) to a large degree. It seems equitable to entitle those likely to be affected people to express their opinion, to submit their comments and concerns regarding the proposed activity with future consideration the received information in taking the final decision regarding this activity.

The Espoo Convention provides an indispensable framework for international cooperation in assessing environmental impact, particularly in a transboundary context¹. This Convention facilitates the realization of the several principles stipulated by the Rio Declaration (including the states' obligation to provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse transboundary environmental effect and to consult with those states at an early stage and in good faith)².

Ukraine ratified the Espoo Convention by adopting the Law of Ukraine "On ratification of the Convention on Environmental Impact Assessment in a Transboundary Context" № 534-XIV of 19.03.1999³. However, Ukraine fails to undertake the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Espoo Convention, as it is required under art. 2 para. 2 of the Convention. Main Ukrainian laws in this field, namely laws "On Environmental Protection" and "On Ecological Expertise" do not even mention the need of transboundary

environmental impact assessment. Even though under Article 9 of the Constitution of Ukraine effective, appropriately ratified international agreements constitute a part of the domestic legal order⁴, the Espoo Convention cannot be implemented without adopting adequate legal provisions. The problems in this context were noticed by international experts. Furthermore, inappropriate legislation lead to Ukraine's non-compliance with the Espoo Convention while authorizing concrete projects. One of the striking examples of such a situation is the Bystroe Canal Case.

Different general issues related to the compliance mechanism of the Espoo Convention and (less so) the Aarhus Convention⁵ are explored in specialized literature (including the analysis of distinct aspects of the Bystroe Canal Case)⁶. The problems of Ukraine's

1 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, February 25, 1991 (entered into force Sep. 10, 1997) [hereinafter Espoo Convention].
2 Rio Declaration on Environment and Development (in) Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I., see: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.
3 Zakon Ukrainy "Pro Ratyfikatsiju Konvencii pro Ocinku Vplyvu na Navkoly-snie Seredovyscie u Transkordonnomu Konteksti" № 534-XIV of 19.03.1999. Vidomosti Verhovnoj Rady Ukrainy, 1999, № 34, p. 296.

4 Konstytucija Ukrainy of 28.06.1996 № 254k/96-BP, see: <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.
5 Aarhus Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention].
6 Theory and Practice of Transboundary Environmental Impact Assessment. Edit.: Kees Bastmeijer and Timo Koivurova. Brill/Martinus Nijhoff Publishers, Leiden/Boston, 2008, 397 p. (regarding the inquiry procedure in the Bystroe Canal Case see pp. 46-47);
Governing International Watercourses: River Basin Organizations and the Sustainable Governance of Internationally Shared Rivers and Lakes. Susanne Schmeier. Routledge, 2012, 344 p. (for general description of the Bystroe Canal Case see pp. 209-211);
International Courts and the Development of International Law: Essays in Honour of Tullio Treves. Edit.: Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni. Springer, 2013, 990 p. (the Bystroe Canal Case is mentioned while analyzing the causes of non-compliance with the Espoo Convention - pp. 176-177);
Fresh Water in International Law. Laurence Boisson de Chazournes. Oxford University Press, 2013, 288 p.;
Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment. Edit.: Simon Marsden, Timo Koivurova, Routledge, 2013, 352 p.;
Yearbook of International Environmental Law Volume 20, 2009. Edit.: Ole Kristian Fauchald, David Hunter, Wang Xi. Oxford University Press, 2011 - pp. 229-231;
Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality. Caroline E. Foster. Cambridge University Press, 2011, 375 p. (in terms of the activity of the Inquiry Commission see pp. 161-162) and
The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements. Svllana Kravchenko. (in) Colorado Journal of International Environmental Law and Policy, Vol. 18, No. 1, 2007, see: http://papers.ssm.com/sol3/papers.cfm?abstract_id=1076746;
Beyond Territoriality: Transnational Legal Authority in an Age of Globalization. Edit.: Gunther Handl, Joachim Zekoll, Peer Zumbansen Martinus Nijhoff Publishers, 2012, 566 p. (in terms of the activity of the Inquiry Commission see p. 187).
Environmental Discourses in Public and International Law. Edit.: Brad Jessup, Kim Rubenstein. Cambridge University Press, 2012, 536 p.;
Jerzy Jendroška, Practice and Relevant Cases that Emerged in the Context of the Espoo Convention Implementation Committee. (in) Non-Compliance Procedures and Mechanisms and the Effectiveness of International Envi-

implementation of the Espoo Convention have been explored in some research papers⁷. However, the issues of Ukraine's noncompliance with the Espoo Convention with, in particular, the aim of revealing the reasons for it, have not been the subject of any recent in-depth research. Therefore, this article aims to analyze the approach of the Ukrainian government toward the compliance process under the Espoo Convention and problems of the implementation of the Espoo Convention in Ukraine using the example of the Bystroe Canal Case as well as the possible pre-conditions of these problems.

2 The general characteristic of the Espoo Convention and its Implementation Committee

The Espoo Convention is regarded as "a key step to bringing together all stakeholders to prevent environmental damage before it occurs"⁸.

It sets out the obligations of Parties to assess the environmental impact of activities that are likely to cause a significant adverse transboundary impact on the environment. It also lays down the general obligation of States to notify and consult each other on all such activities at an early stage of planning. The Espoo Convention provides for ten mandatory steps and one voluntary step for its Parties to undertake before the activity that is likely to have a significant adverse environmental impact across boundaries is authorized.

The mandatory steps are:

1. the necessary legal, administrative or other measures to implement the provisions of the Espoo Convention (art. 2.2, 2.5),
2. notification (art. 3.1),
3. confirmation of participation (art. 3.3),
4. transmittal of information (art. 3.6),
5. public participation (art. 3.8),
6. preparation of EIA documentation (art. 4),
7. distribution of the EIA documentation for the purpose of participation of authorities and public of the affected country (art. 4.2),

8. consultation between Parties (art. 5),
9. final decision (art. 6.1),
10. transmittal of final decision documentation (art. 6.2).

The voluntary step is post-project analysis (art. 7.1).

It should be mentioned that the opinion of "the affected Party" is not binding for "the Party of origin" when taking the final decision. In the opinion of the Implementation Committee, "initiation of the transboundary procedure under the Convention does not prevent the Party of origin from undertaking such proposed activities after having carried out the transboundary procedure, provided that due account is taken of the transboundary procedure's outcome in the final decision (art. 6, para. 1)"⁹.

In order to assist Parties fully to comply with their obligations under the Espoo Convention the Meeting of the Parties to the Convention established an Implementation Committee in 2001 "for the review of compliance by the Parties with their obligations under the Convention with a view to assisting them fully to meet their commitments"¹⁰. The Implementation Committee usually meets at least once a year and consists of eight members appointed by eight Parties to the Espoo Convention. These Parties are re-elected at each Meeting of the Parties¹¹. The main Implementation Committee's function is to consider submissions made by one or more Parties to the Espoo Convention regarding non-compliance by a Party with its obligations. The Implementation Committee reports on its activities at each meeting of the Parties¹². The operating rules of the Implementation Committee were established by the Meeting of the Parties in the Annex to decision IV/2, annex IV¹³, amended by decision V/4¹⁴. Thus, the Implementation Committee is a special body geared to dealing with reviewing compliance in non-adversarial and assistance-oriented non-compliance procedure of the Espoo Convention. The first breach of the Espoo Convention that was submitted to the

ronmental Agreements, T.M.C.ASSER PRESS, The Hague, 2009, p. 328-331, see: http://air.unimi.it/bitstream/2434/57918/2/treves_240109.pdf;

Yelyzaveta Alekseyeva, Once again about the Aarhus Convention and Ukraine's failure to comply with its obligation. (in) *Environment People Law Journal* № 9-10 (49-50), p. 9-12, see: http://epl.org.ua/uploads/media/EPL_2011_09_10_web_01.pdf.

7 Olga Melen', Dunajs'ka Sprava Tryvaje. (in) *Visnyk Ekologichnoji Advokatury* № 28-29, 2005, p. 40-41. [interactive]. [accessed on 02-02-2014], see: <http://epl.org.ua/uploads/media/V28-29.pdf>;

Olga Melen', Kanal Dunaj-Chorne More - Nevyriseni Pytannia. (in) *Visnyk Ekologichnoji Advokatury* № 30, 2006, p. 21-23. [interactive]. [accessed on 02-02-2014], see: <http://epl.org.ua/uploads/media/V30.pdf>.

8 Introduction to Espoo Convention from the Convention's website, see: <http://www.unece.org/env/eia/welcome.html>.

Regarding the possibility of "public trigger" (allowing the public to formally initiate the compliance procedure) under the Espoo Convention compliance mechanism and other features of the mechanism, see: Jerzy Jendroška, *Practice and Relevant Cases...*, pp. 328-331.

9 Decision IV/2, annex I, para. 55, see: <http://www.unece.org/fileadmin/DAM/env/documents/2008/eia/ece.mp.eia.10.e.pdf>;

Findings and recommendations further to a submission by Romania regarding Ukraine (EIA/IC/S/1), see: <http://www.unece.org/fileadmin/DAM/env/documents/2008/eia/ece.mp.eia.2008.6.e.pdf>.

10 ECE/MP.EIA/4, decision II/4, see: <http://www.unece.org/fileadmin/DAM/env/documents/2001/eia/decision.II.4.e.pdf>

11 Ibid., annex IV, para. 1, 2.

12 Ibid., annex IV, para. 4, 9.

13 Operating rules of the Implementation Committee. decision IV/2 of the Meeting of the Parties, doc. ECE/MP.EIA/10, p. 116, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/IC_operatingrules_en.pdf.

14 Amendment of the operating rules of the Implementation Committee. decision V/4 of the Meeting of the Parties on Review of compliance, doc. ECE/MP.EIA/15, annex, see: <http://www.unece.org/fileadmin/DAM/env/documents/2011/eia/decision.V.4.e.pdf>

Implementation Committee was the Bystroe Canal Case.

3 Investigation of the Bystroe Canal Case under the Espoo Convention

3.1 Subject and the Parties of the Case

The Bystroe Canal Case¹⁵ between Romania (the affected Party) and Ukraine (the Party of origin) concerns the “The Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian Sector of the Danube Delta” project. This navigation canal joins the Danube (the river that flows in both Ukraine and Romania) with the Black Sea. The canal existed before, but needed some renovation in order to be used again.

The project fell under the scope of Article 1(V)¹⁶ and of item 9 in Appendix I to the Espoo Convention (“inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes”). Thus, the project was subject to the Espoo Convention.

The project was divided into two separate phases: Phase I and Phase II, each subject to the different state ecological examination procedure (“ekologiczna ekspertyza”). This procedure has been given different names in the documents of the Compliance Committee of the Aarhus Convention (“environmental expertisa”, “state environmental review” or “ecological expertise”). However, its explanation of this mechanism should be mentioned: “it is an evaluation and, where appropriate, approval of the EIA by an authorized public authority”¹⁷, “formally established in the former Soviet Union in the second half of the 1980s”¹⁸.

3.2 Facts and legal basis

3.2.1 Authorization of Phase I

The procedure for authorizing Phase I was initiated in 2002. The Government of Ukraine notified Romania about the project without fulfilling all the requirements of the Espoo Convention. The final decision was taken in April 2004 and the works were initiated the following month.

The Government of Ukraine only provided Romania with the environmental impact assessment documentation (the EIA report) concerning Phase I on 5 August

2004 - a few months after the final decision had been taken and works had begun, while the report should have formed the basis of the bilateral consultations concerning the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Obviously, these consultations should have taken place before the final decision had been taken.

In spite of the fact that the Government of Romania had contacted the Government of Ukraine several times requesting to be properly notified and involved in the transboundary procedure as envisaged in the Convention, Ukraine did not fulfill all the necessary procedures.

Before receiving the EIA report, but after the implementation of Phase I started on 26 May 2004, Romania made a submission about the case to the Implementation Committee.

As Ukraine denied that the project was likely to have a significant adverse transboundary impact on the environment, which would mean that the Espoo Convention should not be applied in this case, Romania wanted an inquiry commission to be established to investigate the case and to find an answer to the question of whether the project could have such an impact or not.

The final opinion of the Inquiry Commission, in accordance with Article 3, paragraph 7, of the Convention, was that the project was likely to have a significant adverse transboundary impact. In such a situation, the requirements of the Espoo Convention did apply to the project and the opinion of the Implementation Committee was that Romania should be considered as the “affected Party”¹⁹.

Thus, after being informed about the opinion of the Inquiry Commission, Ukraine should have notified Romania and taken other necessary measures in accordance with the Espoo Convention.

However, at this stage of the findings Ukraine limited itself to expressing assurances that “the entire project would be conducted in line with relevant international obligations, which did not take place before the opinion of the Inquiry Commission was adopted because Ukraine did not think that the project was likely to have a significant adverse transboundary impact”. The following year, in a letter to the Executive Secretary of UNECE received on 30 May 2007, Ukraine stated that it was “studying further the issues raised in the final opinion of the Inquiry Commission” while continuing with the realization of Phase I.

Regarding this issue the Implementation Committee took note that the Espoo Convention does not provide for the Parties any opportunity to “study” an opinion of an inquiry commission, on the contrary, it requires

15 Case EIA/IC/S/1 bis – Romania vs Ukraine, see: http://www.unece.org/env/eia/implementation/eia_ic_s_1.html.

16 “Proposed activity” means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure.

17 Report of the Compliance Committee of the Aarhus Convention on its seventh meeting. Addendum, p. 3, see: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/S2004-01/S01C03findings.pdf>.

18 Report of the Compliance Committee of the Aarhus Convention on its thirty-first meeting. Addendum, p. 5, see: http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-31/ece_mp_pp_c.1_2011_2_add.9_adv%20edited.pdf

19 Findings and recommendations further to a submission by Romania regarding Ukraine.

Regarding the legal status of the decision of the Inquiry Commission see: Jerzy Jendroška Practice and Relevant Cases..., pp. 333-334.

notification to take place as early as possible and no later than when the public of the Party of origin is informed. If the public of the Party of origin has already been informed about the proposed activity, the notification should be sent immediately²⁰.

3.2.2 Authorization of Phase II

In the meantime, Ukraine started to design Phase II in 2004. The EIA report was finished in 2006. The report denied a significant adverse transboundary impact and failed to meet some other requirements of the Espoo Convention.

A formal notification was only submitted to Romania on 24 April 2007, more than 10 months after the final opinion of the Inquiry Commission had been delivered. Furthermore, the notification failed to meet the requirements of the Espoo Convention by not mentioning “the nature of the possible decision” (as required by art. 3, para. 2, of the Espoo Convention).

The EIA report was submitted to Romania even later. Romania and its public were not asked to deliver their comments, and no consultations between Ukraine and Romania took place.

The precise date of the authorization of Phase II varies in communications from the Government of Ukraine (19 April 2006 and 26 October 2006). Romania supposed that the final decision was the approval of Phase II given by the Cabinet of Ministers of Ukraine (30 May 2007). In the end, Ukraine provided the final decision taken on 28 December 2007 to the Government of Romania. However, as stated by a press release of the Ministry of Transport of Ukraine, the official opening of the canal was celebrated on 2 May 2007 (!).

3.3 Findings

3.3.1 In relation to Phase I of the project

The Meeting of the Parties, the fourth session (Bucharest, 19–21 May 2008), stated that the fact of authorizing and implementing Phase I could not be considered as being in clear non-compliance with the Espoo Convention at the time of the decision-making, because Ukraine thought that the project was not likely to have a significant adverse transboundary impact.

However, as Ukraine continued the implementation of the project after the matter had been submitted to the inquiry procedure and without carrying out the transboundary procedure, the Implementation Committee was of the opinion that, by doing so, Ukraine ignored the object and purpose of the inquiry procedure. This “made its obligation to prevent significant adverse transboundary environmental impact of Phase I of the project impossible to achieve”.

The Implementation Committee also found that not notifying Romania immediately after receiving the final opinion of the Inquiry Commission should be considered as non-compliance with the Convention.

Hence, Ukraine did not follow the requirements of the Espoo Convention to assure the proper involvement of the Romanian authorities and public in the respective EIA procedures. In particular, Ukraine:

- (a) did not notify Romania as envisaged in art. 3, para. 2;
- (b) did not submit information as envisaged in art. 3, para. 5(a);
- (c) did not take steps to ensure, together with Romania, that the Romanian public in the areas likely to be affected was informed and provided with possibilities for making comments, as required under art. 3, para. 8;
- (d) did not furnish, as envisaged in art. 4, para. 2, and art. 2, para. 3, the EIA documentation to Romania before the decision was taken;
- (e) did not take steps to arrange, together with Romania, for the distribution of the EIA documentation to the Romanian public as required under art. 4, para. 2;
- (f) did not enter into consultations with Romania concerning the potential transboundary impact and measures to reduce or eliminate such impact, as required under art. 5, and did not take steps to agree with Romania on a time frame for such consultations, as also required under art. 5;
- (g) did not ensure that the final decision authorizing implementation of Phase I had taken into account the outcome of the consultations with Romania, as required under art. 6, para. 1;
- (h) did not provide Romania with the text of the final decision authorizing implementation of Phase I, along with the reasons and considerations on which it was based, as required under art. 6, para. 2²¹.

3.3.2 In relation to Phase II of the project

The Implementation Committee found that, by failing to timely and sufficiently notify Romania after the final opinion of the Inquiry Commission, Ukraine was not in compliance with its obligations under art. 3 of the Espoo Convention²². Nevertheless, the fourth session of the Meeting of the Parties stated that Ukraine cannot be considered as being in non-compliance with the Espoo Convention as long as the final decision regarding Phase II is not taken; and as long as all the necessary steps envisaged by the Espoo Convention are followed before the final decision regarding Phase II is taken²³. Later, the fifth session of the Meeting of the Parties stated that “while Ukraine had fulfilled some of its obligations under paragraph

20 Report of the Fourth Meeting of the Parties (ECE/MP.EIA/10), para. 43, see: <http://www.unece.org/fileadmin/DAM/env/documents/2008/eia/ece.mp.eia.10.e.pdf>.

21 *Ibid.*, para. 48.

22 *Ibid.*, para. 65.

23 *Ibid.*, para. 70.

10 of decision IV/2²⁴ with respect to both phases of the Bystroe Canal Project, it had not fulfilled all of these obligations”²⁵.

3.4 Recommendations

The Implementation Committee considered that Ukraine’s national regulatory framework for authorizations of projects and EIA seemed to be extremely complicated. In particular (as was mentioned above), it was difficult to identify which of a number of consecutive decision-making procedures should be considered as the final “decision to authorize a proposed activity” as stipulated in art. 2, para. 3, of the Espoo Convention. Moreover, there seemed to be no clear legal framework for transboundary EIA procedures. Thus, Ukraine did not comply fully with art. 2, para. 2, of the Espoo Convention.

The provision of the Constitution of Ukraine to directly apply international agreements was considered by the Implementation Committee as insufficient for proper implementation of the Espoo Convention without more detailed provisions in the legislation. In particular, the national regulatory framework should clearly indicate:

- (a) Which of the decisions for approving the activities should be considered the final decision for the purpose of satisfying the requirements of the Espoo Convention;
- (b) Where in the decision-making process there is a place for a transboundary EIA procedure and who is responsible for carrying it out and by which means.

In its fourth session, the Meeting of the Parties issued a declaration of non-compliance to the Government of Ukraine and a caution to become effective on 31 October 2008 unless the Government of Ukraine stops the works, repeals the final decision and takes steps to comply with the relevant provisions of the Espoo Convention. It also requested Ukraine to adopt a strategy on implementation of the Espoo Convention into Ukrainian legislation; to adopt new laws that satisfy the Espoo Convention; as well as to negotiate with the neighbouring Parties about cooperation according to the Espoo Convention.

Ukraine met the last requirement. Some measures regarding Phase II (not Phase I!) were also undertaken²⁶. Namely, Ukraine repealed the final decision;

notified Romania and sent the EIA documentation on the project to it; participated at a public consultation meeting in Romania on 9 June 2009; organized a meeting with Romania in Kyiv on 15 and 16 July 2009, where the comments to the project were discussed. However, works regarding the both phases were continued (even though no final decision on Phase II was in force!). Although Ukraine adopted the strategy to implement the Convention, recent changes in the legislation on the development control did not satisfy the strategy. Namely, the Ukrainian law № 3830-VI of 17 February 2011 “On Regulating Urban Planning” introduced changes into the Ukrainian legislation “On Environmental Protection” and “On Ecological Expertise”, which withdrew the IEA of the construction projects. The Chair of the Implementation Committee in his letter to Ukraine (dated 1 February 2011) posed questions regarding the strategy²⁷. As there was no clarifying answer, the Chair of the Implementation Committee addressed his next letter regarding the same issue to the first Deputy Prime Minister (dated 23 June 2011)²⁸. In the reply from the Ministry of Ecology and Natural Resources of Ukraine (Ministry of Natural Resources) to the Implementation Committee regarding the legislative changes the Ministry did not explain the situation, but merely stated that it asked the Ministry of Regional Development, Construction, Housing and Public Utilities of Ukraine about the changes (!)²⁹.

The Meeting of the Parties, in its fifth session, acknowledged that Ukraine had fulfilled some of its obligations according to decision IV/2 with respect to both phases of the Bystroe Canal Project, but not all of them³⁰. Thus, the caution to the Government of Ukraine remained effective. The Meeting of the Parties also requested Ukraine to report each year on steps taken to bring into full compliance the Bystroe

24 The Fourth Meeting of the Parties “decided to issue a caution to the Government of Ukraine to become effective on 31 October 2008 unless the Government of Ukraine stopped the works, repealed the final decision and took steps to comply with the relevant provisions of the Convention.

25 Report by the Meeting of the Parties at its fifth session (ECE/MP.EIA/15), the decision V/4, see: <http://www.unece.org/fileadmin/DAM/env/documents/2011/eia/decision.V.4.e.pdf>.

26 Letter to Mr Nemyrya, Deputy Prime Minister of Ukraine, from Mr Kubis, Executive Secretary of UNECE, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Letter_by_Mr_Kubis_to_Mr_Nemyrya_20_Mar_09.pdf.

27 The letter is available at the Convention’s website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Letter_to_Ukraine_inquiry_re_new_laws_1_Feb_2011_re_.pdf.

28 The letter is available at the Convention’s website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Ukraine_DPM_-_23_June_2011.pdf.

29 The letter dated 10.06.2011 (Received on 19.07.2011) is available at the Convention’s website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Reply_by_Ukraine__19.07.11_-_Unofficial_Translation.pdf.

It should be also mentioned that this letter was dated 10.06.2011 and received only on 19.07.2011. Taking into account that the letter of Chair of the Committee was dated 23.06.2011, as well as that even bigger gap between “writing” the letter and its receiving (dated 01.08.2013 but received by the secretariat on 14.11.2013 (!) it can be supposed that not only it is not true, but also Ukrainian officials do not care about the fact that it is obvious. The latter information is available at the Aarhus Convention’s website, see: <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envppf/wg/envppcc/implementation/fourth-meeting-of-the-parties-2011/ukraine-decision-iv9h.html>.

30 Report by the Meeting of the Parties at its fifth session..., para. 17.

Canal Project with the Convention; and on the implementation of the strategy, in particular on concrete legislative measures adopted to this effect.

In the next letter to Ukraine (dated 7 September 2011) Chair of the Implementation Committee asked for further clarifications³¹. In subsequent responses Ukraine tried to provide the Implementation Committee with some information on the posed questions as well as with progress reports as requested by the Meeting of the Parties at its fifth session (decision V/4 para. 24)³²; however, as mentioned at the Espoo Convention's website, no appropriate steps to implement the Convention were taken.

The latest (sixth) session of the Meeting of the Parties to the Espoo Convention was held from 2 to 5 June 2014. In the Draft decision on the review of compliance of the Convention, it was stated that the respective legislative measures for the implementation of the Convention were not adopted; the Bystroe Canal Project was not brought into full compliance with the Espoo Convention. Ukrainian Government was requested to adopt the relevant draft legislation and to bring the Bystroe Canal Project into full compliance with the Convention by the end of 2015 as well as to report by the end of each year to the Committee on these measures³³.

4 General analysis of the situation and its supposed causes

It is clear that by promising compliance with the Espoo Convention and pretending that it is doing so (repealing decision while continuing the implementation of works; not giving the direct responses to questions posed by the Implementation Committee in order to avoid the disclosure of facts of non-compliance; surreptitious adopting legislature contradicting to the Espoo Convention, etc.) Ukraine is just trying to pre-

tend that it follows the respective provisions of the Convention and the recommendations of the Meetings of the Parties, whereas it does not comply with them. Unfortunately, frequent infringement of Ukraine's international obligations by Ukrainian governmental bodies noticed by a number of scholars shows the low importance attached to these obligations³⁴. What are the causes of such a situation?

Obviously, law in general (as well as international law in particular) can be enforced by imposing sanctions on non-abiding subjects. Regarding the case in question, the Meeting of the Parties to the Espoo Convention has already issued a caution to the Government of Ukraine. Issuing a caution is a sanction that works through the reputation effect ("name and shame"). However, recalling Maslow's hierarchy of needs, which can be used in trying to understand human behavior on the state level as well, apparently, the "physiological or safety needs" (in our case renovation of the canal) will take precedency of "the reputation" (a caution). In other words, it is a question of cost-benefit analysis. If the costs are too high and the added value is not attractive enough, is it possible to enforce anybody to do what should be done?

In the considered case the costs are "to take due account of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the outcome of the consultations with the Affected Party and the comments submitted by its citizens" in the final decision on the proposed activity. The benefits are "to have a caution no effective", to remain "a full member of the Espoo Convention", etc. Even though some authors tend to believe that membership of the Espoo Convention brings a real advantage for Ukraine³⁵, it is not easy to see the rationale behind their suggestion. Regrettably, the inherently soft character and rather political nature of the recommendations of the bodies established by international agreements are the conditions of signing these agreements by the parties³⁶.

However, it should be admitted that it is Ukraine that is one of the most resistant violators of the obligations envisaged in the Espoo Convention while the Convention may be more effective in case of other countries.

31 The letter to Ukraine, dated 7 September 2011, is available at the Convention's website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Letter_to_Ukraine_7.9.11.pdf.

32 Curiously, in this letter (received 7 September 2011) the Ministry of ecology and natural resources of Ukraine thanked the Implementation Committee of the Espoo Convention "for the fruitful cooperation". Taking into account that covering a lot of paper with ineffective writing cannot be considered as "an important fruit" in terms of environmental protection, what fruits it meant remains a mystery.

This letter from Ukraine is available at the Convention's website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Unofficial_translation.pdf.

Progress report by Ukraine of 29 December 2011 is available at the Convention's website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Report_Ukraine_2011_eng_correctAppendix2.pdf.

Progress report by Ukraine of 31 December 2012 is available at the Convention's website, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.s/eia.ic.s.1/Report_by_Ukraine__31.12.2012_ENG.pdf.

33 Draft decision on the review of compliance with the Convention, 2-5 June 2014, is available at the Convention's website, see: http://www.unece.org/fileadmin/DAM/env/documents/2014/EIA/MOP/cece.mp.eia.2014.L.3_e.pdf.

34 The Aarhus Convention and Innovations in Compliance..., p. 46. Andriy Andrusyevych. Ukraine's Compliance with its Obligations under the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters. (in) *Environment People Law Journal* №1 (31), p. 9-14, see: <http://epl.org.ua/uploads/media/V31.pdf>.

35 Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment. Simon Marsden, Timo Koivurova, Routledge, 2013, p. 287.

36 Angel V. Horna, Procedural Aspects Concerning Jurisdiction and Admissibility in Cases of Maritime Delimitation Before the ICJ. *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*. Edit.: Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, Chiara Ragni. Springer, 15 March 2013 - 990, pp. 176-177; Yelyzaveta Alekseyeva. Once again about the Aarhus Convention...

Some possible reasons for the geographical distribution of cases submitted to the Compliance Committee (Aarhus Convention) analyzed by S. Kravcenko can be used to explain non-compliance with the international agreements in general, and the Espoo Convention in particular. Among these reasons there can be mentioned the rate of economic growth and the level of democracy.

In terms of economic factors S. Kravcenko mentioned one study concerning compliance with five international environmental agreements concluded that the probability of compliance is greater in countries with a larger gross domestic product (GDP), with a higher per capita GDP, and with a higher rate of economic growth³⁷. That is, richer countries are more likely to comply with treaties than poor countries. Ukraine's economy is in transition from past socialist economies to some forms of capitalism. Economic growth is rather slow, and it is certainly not rich. Ukraine has economic problems and lacks financial resources to comply with treaties, as it emphasizes at international meetings.

What is more, democracy is still young in Ukraine, as it became independent only with the collapse of the Soviet Union in 1991. Reforms are under way, but transparency of governmental decision-making is not established. Environmental rights are stated in the Constitution of Ukraine and in Ukrainian laws, but lack of institutional capacity and enforcement makes achieving these rights more difficult. Ukraine does not have long traditions and cultures of participatory democracy. The court system is not always independent and public officials may have no habit of dealing with issues related to the implementation of the Espoo Convention. In short, the ideals of transparent and participatory government are not yet part of the normal expectations of civil servants, leading to a greater likelihood of non-compliance than in countries with such expectations³⁸.

5 Conclusion

While the Espoo Convention is the important international document that stipulates transboundary environmental impact assessment, Ukraine fails to implement its provisions in an adequate way. This can be seen with the example of the Bystroe Canal Project, the designing of which began more than 10 years ago and which as yet has not been adjusted in accordance with the Espoo Convention. Even though the Meeting of the Parties to the Espoo Convention issued a caution to become effective to the Government of Ukraine in order to urge it to comply with the relevant provisions of the Espoo Convention, Ukraine did not

fulfil its obligations under the Convention. Namely, works regarding the Bystroe Canal Project authorized with the violations of the Espoo Convention were continued. In response to the request of the Meeting of the Parties to the Espoo Convention Ukraine adopted a strategy on implementation of the Espoo Convention into Ukrainian legislation. However, recent changes in the legislation on the development control did not satisfy the strategy. Thus, Ukrainian government was just imitating compliance with the Espoo Convention in order to try to avoid imposing sanctions. Unfortunately, even though the persistent noncompliance was quite obvious, due to the inherently soft character and rather political nature of the recommendations of the Meeting of the Parties to the Espoo Convention it is almost impossible to compel the party of the Convention to follow its provisions. Furthermore, an insufficient level of democracy and economic problems faced by Ukraine complicate the situation even more. However, in this uneasy transitional situation efforts made by Ukrainian civil society as well as by the international community in order to bring Ukraine into compliance with universally recognized norms and standards are even more valuable.

37 Edith Brown Weiss, Harold K. Jacobson A framework for Analysis. Engaging Countries: strengthening Compliance with International Accords. Edit.: Edith Brown Weiss & Harold K. Jacobso, 1998, p. 1-11.

38 The Aarhus Convention and Innovations..., pp. 46-47.

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Editors in charge of the current issue:
Gerhard Roller and Julian Schenten

Editor in charge of the forthcoming issue:
Martin Führ (fuehr@sofia-darmstadt.de)

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Authors of this issue

Victoria Rachynska, PhD student at the Institute of Legislative Foresight and Legal Expertise (Kyiv); intern at Faculty of Law and Administration, Opole University (Poland)
vikarachinskaya@gmail.com.

Christian Schaible, Lawyer specialised in environmental law, is EU Senior Policy Officer for Industrial Production at the European Environmental Bureau (EEB) in Brussels, Belgium
christian.schaible@eeb.org.

Hendrik Schoukens is PhD Assistant at the Department of Public International Law of the Ghent University
hendrik.schoukens@UGent.be.

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Contact

Freiburg Head Office:

P.O. Box 17 71
D-79017 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:

Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:

Schicklerstraße 5-7
D-10179 Berlin
Phone +49(0)30-40 50 85-0
Fax +49(0)30-40 50 85-388

www.oeko.de

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Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

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Contact

Darmstadt Office:

Prof. Dr. Martin Führ - sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de

www.h-da.de

Göttingen Office:

Prof. Dr. Kilian Bizer - sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

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elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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elni, c/o Institute for Environmental Studies and Applied Research
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