III.A.2 The Aarhus Compliance Committee and the Danube River Case

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1. *Background*

In 2003, a project to dig a deep-water navigation channel through the Ukrainian section of the Danube Delta Bilateral Biosphere Reserve was approved by the Ukranian Government. A few months later, this decision was challenged by Ecopravo-Lviv (Hereinafter, EPL), a Ukrainian NGO devoted to the protection of the environment, on both environmental and procedural grounds.

In the first stage, the EPL filed the complaint before a number of national courts. In late 2003 and early 2004, however, the NGO's strategy shifted, and it began filing the same complaint before international bodies. First, an official complaint was filed with the Compliance Committee of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, AC). Subsequently, the Romanian government also filed a complaint with the Compliance Committee of the AC. EPL filed a second complaint with the Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter, the ESPOO Convention). The Implementation Committee, however, refused to consider the complaint (Romania also subsequently filed its complaint before this body). Third, a letter of emergency notification was filed with the Executive Secretary of the Convention on the Conservation of Migratory Species. Fourth, an Emergency Complaint was filed with the Permanent Secretariat of the International Commission for the Protection of the Danube River. Fifth, a letter of notification was filed with the Secretariat of the African-Eurasian Waterbird Agreement (hereinafter, AEWA). Finally, EPL also raised the issue under the Ramsar Convention and the UNESCO Man and Biosphere Programme.

2. *Materials and Sources*

- UNITED NATIONS ENVIRONMENTAL PROGRAM – DIVISION OF ENVIRONMENTAL LAW AND CONVENTIONS, "Manual on Compliance with

and Enforcement of Multilateral Environmental Agreements, Strategic Use of International and Domestic Dispute Resolution Mechanisms in the Danube Delta Case" (http://www.unep.org/dec/onlinemanual/Compliance/NegotiatingMEAs/DisputeSettlementProvisions/Resource/tabid/663/Default.aspx);

- UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Compliance Committee of the Aarhus convention – Report of the Seventh Meeting (http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf);
- Participate.org, Vlora Bay: Energy vs. Environment, n. 25/2009 (http://www.participate.org/documents/participate25-web.pdf);
- Environment People Law, Danube-Black Sea Canal (http://epl.org.ua/en/lawnbspnbspnbsp/access-to-justice/cases/danube-black-sea-canal/).

3. *Analysis*

The Danube River case is concerned with the Ukrainian Government's approval process in relation to a proposal for the construction of a deepwater navigation canal on the Danube River Delta, intended to facilitate navigation in the Ukrainian section of the Danube Delta.

Following the publication of the construction proposal, in April 2003 EPL wrote to the Ukrainian Ministry of Environment, asking for additional information on the environmental impact of the project. Several requests for information regarding the proposal followed, each of which was denied. On July 2003 the Ministry of Environment approved the conclusions of the so called "*expertiza*", the official environmental impact assessment. The *expertiza* cited technical reasons in explanation of why the government could not give the claimant access to the whole document. At that point, EPL filed a suit against the Ministry of Environment of Ukraine challenging the *expertiza*. Initially, the Kyiv Commercial Court ruled in favour of the NGO and declared the environmental *expertiza* invalid because of the lack of participation opportunities for the interested parties. This decision, however, was dismissed on appeal by the Kyiv Appeal Commercial Court. On the basis of the cassation, filed by EPL, Supreme Commercial Court of Ukraine left in force the Appeal Court decision. New cassation of EPL on Supreme Commercial Court's decision to the Supreme Court was dismissed.

At the international level, EPL submitted two different claims. The first was filed in 2003 with the Secretariat and the Implementation Committee of the

ESPOO Convention. The complaint (the first ever submitted to the Implementation Committee) was rejected. On January 23, 2007, Romania addressed a second complaint on the same issue to the Implementation Committee. During the Meeting of the Parties of the ESPOO Convention, held in Bucharest on May 2008, the parties issued a cautionary decision towards the Government of Ukraine, asking to fulfil three conditions. To begin with, it had to suspend all works on the canal; additionally, it had to repeal the final decision on Phase II of the project; finally, it had to adhere to the provisions of the ESPOO Convention during the future assessment and implementation phases of the project.

The second process was instituted by the filing of a complaint in May 2004 with the AC's Compliance Committee. The complaint claimed that the government of Ukraine had breached Article 6 of the AC, firstly by failing to allow public participation in the Environmental Impact Assessment process; and, secondly, by not granting sufficient access to relevant documents involved in the approval process. Romania also raised similar issues.

The AC's Compliance Committee eventually agreed with both claims. It determined that, by failing to provide the relevant documents upon request, and by failing to involve the public, the Ukrainian government had failed to comply with the provisions of the AC. The matter was then referred to the Ukrainian Parliament with two requests. The first was for Ukraine to bring its legislation and practices into compliance with the AC's provisions. The second request was that Ukraine should submit a strategy, by the end of 2005, for transposing the provisions of the Convention into national law.

4. *Issues: Judicial Strategies and the Overlapping of Supranational Legal Regimes*

The Danube River cases are interesting for three different reasons. The first is related to the complaint strategy pursued by the Ukrainian NGO. The EPL sought relief through multiple domestic courts as well as through international dispute resolution mechanisms. This judicial strategy is not new to non-state actors operating at the international level. It does, however, indicate the growing number of compliance procedures available within the framework of international environmental agreements. Multiple complaints are helpful in two ways. Increased media coverage means greater awareness in public opinion more generally – and both of these may even be favourable to the environmental cause. In the Danube River case, for instance, the Romanian government's decision to file a complaint followed that of the EPL. Moreover, the strategy is interesting in that it tries to exploit the connections and overlaps between different legal

regimes (both national and supranational) tin order to bring a dispute to a satisfactory conclusion.

This strategy can, however, be resource intensive. Also, should be recalled that non-state actors that seek recourse by means of an international procedure may well (although not necessarily) be required to exhaust domestic remedies first. The requirement to exhaust local remedies depends on the terms of the particular multilateral environmental agreement or institution, and there often are exceptions for specific instances (e.g. emergency or futility).

A interesting element of the dispute more generally is the challenge of European Union law under a different international treaty. In this specific case, in fact, the challenge was made by a environmental NGO in relation to the access to justice's pillar. The challenge addressed the failure of the European Court of Justice to grant standing to individuals and NGOs. Thus, the complaint filed with another international institution is aimed at bypassing these limits and get relief.

The element of interest relates to the proactive stance adopted by the global judiciary. In its final report to the Meeting of the Parties on this issue, the Compliance Committee not only recommended that Ukraine submit a strategy containing a time schedule for the Convention's transposition within the national law, but also explicitly requested Ukraine to set up a number of capacity-building activities directed toward the judiciary, and public officials more generally, involved in environmental decision-making processes.

5. *Further Reading*

a. M. BENEDETTI, "Global Judicial Review: A Remedy against Fragmentation?", Paper presented during the 4th Viterbo Global Administrative Law Seminar, held in Viterbo (Italy) on June 13-14, 2008 (http://www.irpa.eu/wp-content/uploads/2011/06/41.pdf);
b. L. MALONE, S. PASTERNACK, *Civil Society Strategies to Enforce International Environmental Law*, Martinus Njhoff, New York (2005);
c. S. MARSDEN, *Strategic Environmental Assessment in International & European Law: A Practitioner's Guide*, Earthscan, London (2008);
d. F. MARSHALL, "Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006", 8 *International Community Law Review* 123 (2006);
e. B. TOTH, "Public Participation and Democracy in Practice – Aarhus convention Principles as Democratic Institution Building in the Developing World", 30 *Utah Environmental Law Review* 295 (2010).