Findings and recommendations with regard to communication ACCC/C/2012/71 concerning compliance by the Czech Republic

Adopted by the Compliance Committee on 13 September 2016

I. Introduction

1. On 31 May 2012, Ms. Brigitte Artmann, a member of the public, (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) alleging the failure of the Czech Republic to comply with its obligations under article 3, paragraph 9, and articles 6 and 9 of the Convention. Specifically, the communication alleges that members of the public in Germany did not have the same possibility to participate in the decision-making procedure concerning the Temelin Nuclear Power Plant (Temelin NPP) as members of the public in the Czech Republic.

2. At its thirty-seventh meeting (26-29 June 2012), the Committee determined on a preliminary basis that the communication was admissible.

3. 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 16 August 2012. On the same date, a letter was sent to the communicant. Both were asked to address a number of questions by the Committee.

4. The communicant and the Party concerned responded to the Committee's questions on 28 November 2012 and 14 January 2013, respectively. The communicant commented on the Party's response on 2 February 2013.

5. Additional information was submitted by the communicant and the Party concerned on 4 March and 22 March 2013, respectively.

6. The Committee held a hearing to discuss the communication at its fortieth meeting (25-28 March 2013), with the participation of the communicant and the Party concerned. During the hearing, the Committee confirmed the admissibility of the communication and put questions to both parties, inviting them to respond in writing after the meeting.

7. The communicant and Party concerned submitted their responses on 14 and 20 May 2013 respectively. On 26 May 2013 the communicant sent comments on the Party concerned's response and on 13 June 2013, the Party concerned sent comments on the communicant's comments. The communicant provided its reaction to the Party's comments the same day.

8. The Committee agreed its draft findings at its virtual meeting on 1 June 2016, completing them through its electronic decision-making procedure on 15 June 2016. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded to the parties for comments on 27 June 2016, inviting their comments by 25 July 2016.

9. The communicant and the Party concerned provided comments on 10 July 2016 and 6 September 2016, respectively.

10. The Committee finalized its findings in closed session at its virtual meeting on 13 September 2016, 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 to its fifty-sixth meeting (Geneva, 28 February – 3 March 2017).

II. Summary of facts, evidence and issues[1]

A. Legal framework

International and European Union law

11. Both the Czech Republic and Germany are Parties to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

12. The Czech Republic has signed bilateral cooperation agreements with Germany and Austria regarding nuclear energy and safety. The agreements also cover the exchange of information regarding preparations for construction of the Temelin NPP.

13. NPPs are subject to the European Union environmental impact assessment (EIA) directive.[2]

National law[3]

14. Under Czech law, the first step in decision-making for a project such as the present is an EIA procedure regulated by the Act No. 100/2001 Coll. on EIA (EIA Act). The EIA Act regulates both domestic and transboundary EIA procedures, as well as the related public participation procedures. Section 16(1) and (2) prescribe the contents of the notice to be given to the public regarding the procedure. Section 16(3) and (4) set out the manner in which notice is to be carried out, namely:

> (3) The relevant authority shall ensure that, information and statements referred to in paragraphs 1 and 2 are published:
>
> (a) on the official notice boards of the affected territorial self-governing units
> (b) on the Internet, and
> (c) in at least one of the other ways usual in the affected territory (e.g. in the local press, on the radio, etc.).
>
> (4) The date of publication shall be considered to be the day when the information and statement pursuant to paragraphs 1 and 2 were displayed on the official notice board of the affected region. The affected territorial self-governing units shall be obliged to display the information and statements pursuant to paragraphs 1 and 2 immediately on their official notice board for a period of at least 15 days and inform the relevant authority thereof.

[1] 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.
[2] 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.
[3] This subsection refers to the Party concerned's legislation at the time of the decision-making procedure at issue in this case.

15. For the permitting procedure on the Temelin NPP, the reference to "affected territorial self-governing units" in section 16(4) of the EIA Act was interpreted to include municipalities whose administrative territory includes an internal or external part of the emergency planning zone (approximately the area of a circle with a radius of 13 kilometres centred in the containment area of the first production unit of the Temelín NPP).[4]

16. For projects where, according to the EIA Act "the affected territory can extend beyond the territory of the Czech Republic", the EIA Act envisages transboundary consultations with the affected States.

17. The EIA procedure is completed with the issuance of the EIA statement. Under Czech law at the time of the decision-making procedure in this case, the EIA statement was not a permit itself but constituted an expert basis upon which the next steps in the decision-making for a development consent, such as the zoning, planning permit, or building permit procedure, would be built.

B. Facts

18. Temelin NPP is located near the village of Temelin in the Czech Republic. Construction of four operating units began in 1987 with completion scheduled for 1991. Due to political events, construction of reactors 3 and 4 ceased in the 1990s, while construction of reactors 1 and 2 proceeded slowly. Temelin reactor 1 was eventually commissioned in 2000 and Temelin reactor 2 in 2002.

19. The plan to complete reactors 3 and 4 was revived in 2005. The EIA process was launched in 2008. In 2012, bids were opened for the public contract for completing the Temelin NPP.

20. The Party concerned did not conclude a bilateral agreement with Germany pursuant to the Espoo Convention, but Germany was involved in all stages of the transboundary EIA process in accordance with that Convention. Consultations with Germany within the transboundary EIA process took place in June 2011.

21. The official hearing for the EIA process took place in Ceske Budejovice (Czech Republic) on 22 June 2012 for Czech citizens as well as for interested persons from neighbouring countries. Informal discussions with EIA experts were also organized in Vienna on 30 May 2012 and Passau, Germany on 12 June 2012. The EIA statement was issued on 18 January 2013.

22. The communicant participated in the EIA process from 2010.

C. Domestic remedies and admissibility

23. According to the communicant, since the hearing in Passau was an informal meeting, no remedies are available under German law. Moreover, since the official hearing in Ceske Budejovice and the EIA process itself were conducted under Czech law, any available remedies exist only under Czech law with no opportunity to appeal to a German court. She submits it is difficult for her and other members of the German public to access these remedies because of their unfamiliarity with the Czech legal system and the language barrier.

[4] Party concerned's response to communication, Annex E1.

24. On 6 August 2012, the communicant submitted a complaint with the European Commission.[5]

25. The Party concerned challenged the communication's admissibility on the grounds that the decision-making on reactors 3 and 4 is still in its initial stages. It submits that the primary objective of the Aarhus Convention is to set standards for the permission phase to which the project of Temelin has not come yet and the communication should therefore be declared inadmissible.

D. Substantive issues

Article 3, paragraph 9

26. The communicant alleges that, by not organizing a formal hearing in Germany, the Party concerned failed to comply with article 3, paragraph 9, because the opportunities for the public in Germany to participate in the EIA procedure were not the same as those for the public in the Party concerned.

27. The communicant contends that at least one formal hearing in Germany was justified by the project's complexity and transboundary dimension and the thousands of comments submitted by German citizens. Instead, only an informal public discussion, outside the formal EIA procedure, was held in Germany. Consequently, German citizens had to travel to the formal hearing in Czech territory, bearing travel and accommodation costs and time off work.

28. The communicant alleges that in April 2012, the German Chancellor, Mrs. Merkel, asked the Czech Government to hold a formal public hearing in Germany, but that request was not accepted.

29. The Party concerned disputes the allegations stating that natural and legal persons in Germany received the same attention as natural and legal persons in the Czech Republic. it submits there is no legal basis under national or international law for a country of origin to organize a public hearing in the territory of the affected country. Moreover, there was no obligation under national or international law to organize an informal discussion in Germany but it voluntarily did so in order to ensure the transparency of the project for the public in Germany.

30. Regarding the official hearing, the Party concerned submits that, in order to ensure broad public participation, the invitation was sent to the public concerned in the Czech Republic and abroad on the same day well in advance. The location was selected for its accessibility by road, parking capacity, venue size (capacity for 2500 people), and proximity to borders with Germany and Austria (approximately 80 and 40 kilometres respectively).

Article 6, paragraph 2

31. The communicant contends that there was a failure to adequately notify the public concerned in Germany. Despite the possible widespread environmental impacts of a nuclear accident, only persons living in German border districts were informed about the possibility to participate in the EIA procedure. Persons living elsewhere in Germany received no official notification at all. Even in the German border districts, there were no public

[5] Reference CHAP 02383 (2012).

notifications in newspapers or other public media. The only information available was on the official websites of the ministries and councils of the border districts and cities.

32. The Party concerned submits that, since the onset of the EIA procedure, it has kept neighbouring countries informed in a timely manner. On 29 June 2010, the EIA documentation, fully translated into German, and including an electronic version on compact disc, was sent by the Czech Ministry of Environment (MoE CR) to the Bavarian State Ministry for Environment and Health and the Saxon State Ministry for the Environment and Agriculture with a copy "for information" to the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety. The covering letter, inter alia, stated:[6]

> "Within the meaning of Section 16, para. 3 of the Act and in accordance with Article 4 para. 2 of the Espoo Convention, we would request that you ensure that information on the documentation and on when and where the documentation can be consulted is published within a reasonable time on the official notice boards of the affected areas and in at least one of the other ways usual in the affected territory (e.g. in the local press, on radio, etc.), along with the information that anyone may send his/her written comments on the documentation within 30 days of the date on which the information on the documentation was posted on the official notice board of the South Bohemia Region. Pursuant to the provisions of Section 16 para. 4 of the Act, the period during which this information is to be displayed is at least 15 days."

The letter also stated that, in accordance with Section 12, paragraph 1 of the Czech EIA Act, the deadline for submission of comments in cases of transboundary assessment might be extended by up to 30 days if the affected State so requested.

33. The Party concerned submits that, once the above information was provided to the German authorities, it could not influence the manner in which the German authorities chose to inform the public.

34. The Party concerned states that the EIA documentation was also posted online in the Czech language on the website of the Czech Environmental Information Agency (CENIA, www.cenia.cz/eia) and on MoE CR's website.

Article 6, paragraph 2(d)(ii)

35. The communicant alleges that there was no proper public notice for the public in Germany about the hearing in Ceske Budejovice and information about the hearing was not easy to access. Though she made several requests to the Party concerned prior to the hearing for information on its format, none was provided. No agenda was made public nor was information given on its proposed duration, whether all participants would be entitled to speak and whether, if needed, it would continue the next day.

36. The Party concerned did not comment on these allegations.

Article 6, paragraph 3

37. The communicant alleges that, given the project's transboundary nature and complexity, the time-frames provided in 2010 and 2012 for the public to comment and the

[6] Party concerned's response to communication, Annex A1.

time allotted for the formal hearing did not enable the public to participate in an adequate, timely and effective manner as required by article 6, paragraph 3.

38. The communicant alleges that the public was given 30 days in August 2010, extended by a further 30 days in September, to comment on 2000 pages of EIA documentation. However, this period coincided with the vacation period (Bavarian summer holidays in 2010 ended on 13 September 2010), leaving effectively only 17 days for the public in Germany to participate. The period to comment on the EIA expert report, from 7 May until 18 June 2012, was similarly inadequate. In Bavaria there were holidays from 26 May until 10 June, leaving 27 days for submitting comments. Moreover, the public in the border districts of Hof and Wunsiedel, where the communicant lives, was first notified through the local newspaper on 29 May, meaning the public in that area had only 18 days to comment. The communicant refers to the Committee's findings on communication ACCC/C/2008/24 (Spain),[7] which considered the timing of opportunities for the public to examine and comment on documentation relating to a proposed activity.

39. The communicant states that a single day for such a large scale hearing was clearly too short. Moreover, the hearing was poorly organized, resulting in frustration for participants. For example, though the hearing opened at 10am, officials' speeches took so long, public participation only started at 3:30pm. Moreover, because public authorities spoke first, few of them stayed through the afternoon, much less the evening and night.

40. The communicant alleges that though the organizers were informed she was nominated as a speaker on behalf of the German Greens and others, she was not included in the speakers' list. Only three questions were allowed per speaker per turn. Her first opportunity to speak came at around 17:30pm, and then she had to queue for another turn. Her next turn to raise three questions came at 3am when both the public and organizers were extremely tired. She had 68 further questions but she had no opportunity to raise them. She submitted those questions in writing after the hearing, but has received no response.

41. The communicant contends that Czech citizens present at the hearing were allowed to speak earlier than German citizens; as a result they could go home earlier. As well as breaching article 6, paragraph 3, she submits that this was discrimination under article 3, paragraph 9.

42. She alleges that though the public hearing was organized on a hot summer day, participants had no access to water or to buy food. Only after repeated demands were they allowed to bring water into the venue.

43. The communicant states she travelled 280 kilometres and nearly 5 hours to take part in the hearing but was not able to participate effectively. Many German citizens had to leave the hearing at 8pm to catch buses home, and were left disappointed and frustrated at being unable to participate properly.

44. The Party concerned refutes these allegations, submitting that German citizens had ample opportunity to participate. The EIA documentation was translated into German and disseminated to the public in Germany and Austria. Moreover, the EIA Act provides longer commenting periods for the public outside the Party concerned's territory. The public in Germany had 60 days in 2010 to provide comments on the EIA documentation, and 43 days

[7] ECE/MP.PP/C.1/2009/8/Add.1.

in 2012 to submit comments on the EIA expert report. The Party concerned states that around 70,000 comments were received, the majority from Germany and Austria.

45. The Party concerned submits that the hearing in Ceske Budejovice started on 22 June 2012 at 10am and concluded 17 hours later, when all questions were exhausted. Interpretation was provided in German and Polish. There were only 250 participants and everybody could participate. The hearing finished only when no more questions were raised. The Party did not comment on the allegation that the hearing's lengthy duration impacted the communicant's ability to participate effectively.

46. Regarding speaking order, the Party concerned explains that the order ensured the public was aware of authorities and municipalities' views, particularly since it was primarily municipalities who were presenting the affected public's opinions. After their presentations, full attention (and the majority of time) was given to the public's questions, which were often directly related to the municipalities and authorities' presentations. Such is the normal procedure for public hearings in the Czech Republic.

47. The Party concerned did not comment on the public hearing's organization.

Article 6, paragraphs 4, 6 and 7 – use of "envelope" or "black box" method

48. The communicant states that it was never made clear what type of reactor would be chosen for the Temelin NPP. Although four technologies were apparently under consideration at the time of the public participation procedure, no decision had been made and the technology was presented using the so-called "envelope" or "black box" method. The choice of technology was not disclosed at the time of the public hearing on 22 June 2012, rather the decision was due to be taken without public oversight on 2 July 2012. No technological details were given for the designs considered, nor were their differences highlighted or assessed in the EIA documentation. This meant that the public was not able to verify whether the potential environmental effects of each design fell within the legally set criteria for safety, severe accidents and potential emissions or assess their potential environmental impacts.

49. The communicant also submits that the German translation of the final EIA statement was published with a big delay - initially only a 40 page summary was translated. Thus, it was not possible for the public to properly assess the EIA statement.

50. She submits that through its failure to provide access to all technical and scientific information relevant to the decision-making, the Party concerned breached article 6, paragraph 6, and particularly sub-paragraphs (a) and (c). Moreover, due to being denied access to that information, the public was unable to comment on the design alternatives while they were under consideration, and was therefore unable to participate when all options were open, as required by article 6, paragraph 4, or to submit its own analyses of the potential risks or impacts of those designs, pursuant to article 6, paragraph 7.

51. The Party concerned refutes the allegations concerning article 6, paragraphs 4, 6, and 7. It states that, given that no supplier for the reactor had yet been selected, the "envelope" method was used for the EIA procedure. The assessment of impacts proceeded with the potential maximum impacts of the individual types of reactors in the "envelope", represented by the solution with the worst possible environmental impact and also taking into consideration the concurrent effect of existing power plant operations and the existing background. It submits that this approach is consistent with other countries' practice and article 6, paragraph 4 of the EIA Directive. A technical description of all reactor types

under consideration was provided in Chapter B.I.6 of the EIA documentation "Description of the technical and technological solution for the project". The description was divided into a general part, defining the project with generation III+ PWR type power units, and a specific part, describing the technical aspects of the power units. The input and output parameters of the project were conservatively estimated on the basis of this information and this knowledge made it possible to make a qualitative and quantitative evaluation of environmental impact in accordance with article 3 of the EIA Directive. It submits that the approach secured the timely and effective participation of the public concerned when all options were open.

Article 6, paragraph 7 – questions at the hearing

52. The communicant alleges that at the hearing she was denied her rights under article 6, paragraph 7 because she was limited to three questions per turn, and was not able to ask the 68 further questions she wished to raise on behalf of the public in Germany that she represented (she later sent these in writing but to date has received no response).

53. The Party concerned did not comment specifically on this allegation but maintained generally that the hearing finished when no further questions had been raised.

Article 6, paragraph 8

54. The communicant alleges that, in breach of article 6, paragraph 8, the MoE CR did not take proper account of the public's input in the final EIA statement. For example, the EIA statement concluded that the NPP would have only a low impact on public health and the radiological effects of operation would not threaten the health of people living nearby. The communicant claims that the MoE CR did not take into account studies submitted by the public on the relationship between childhood leukaemia and distance from nuclear reactors or the health effects of a serious nuclear accident. The EIA statement also concluded there would be no impact on the environment following decommissioning, failing to take into account the problem of long-term radioactive waste, and conversely concluding that the environmental impact after decommissioning would be positive. The MoE CR accepted a compartmentalized "salami" approach to public participation regarding the NPP and radioactive waste storage, although it had been informed by the public that this was in breach of the Convention.

55. The Party concerned refutes the communicant's allegation and states that all comments received, whether they came from within or outside Czech territory, were considered in an identical manner in the finalization of the EIA expert report.

Article 9

56. The communicant submits that there are no opportunities for physical persons (either Czech or German citizens) to challenge decisions, acts or omissions regarding the EIA procedure. Moreover, not all of the potentially affected public is entitled to participate in the subsequent procedures. Lastly, a German citizen seeking to appeal to Czech courts will be faced with high costs. She alleges that the Party concerned thus fails to comply with article 9, paragraphs 2 and 4.

57. The Party concerned states that the EIA procedure is concluded by the issuing of the EIA statement, which is not a decision to construct the project, but a professional basis for subsequent procedures in which it will be taken into account. The EIA statement will thus be subject to judicial action only when it is taken into account in subsequent procedures.

The public has a right to bring an action during the subsequent procedures on condition they meet the statutory requirements, e.g., they are affected owners of neighbouring plots. The Party concerned stresses that the courts interpret the term "neighbouring" extremely widely; all owners of property, even distant, which might be affected can be participants to the subsequent procedures. The Party concerned did not comment on the cost issue.

III. Consideration and evaluation by the Committee

58. The Czech Republic deposited its instrument of accession on 6 July 2004. The Convention entered into force for the Czech Republic on 4 October 2004.

59. Neither party disputes that the Temelin NPP is an activity referred to in paragraph 1 of annex 1 to the Convention and is therefore subject to the requirements of article 6 and article 9, paragraph 2.

60. With respect to the Party concerned's submissions on admissibility (para. 25 above), the Committee notes that the Party concerned has not denied that article 6 must be applied in the context of a multi-stage decision-making process such as the present.[8] The Committee reiterates that since the EIA procedure is normally linked closely to decisions that determine whether or not a proposed activity may proceed, it should thus be regarded as part of the decision-making process regardless of the fact that in the Czech legal framework the EIA statement is not a permitting decision per se. Furthermore, according to the evidence before the Committee, the EIA procedure is the principal procedure in the Party concerned's legal framework to address environmental concerns and to allow broad public participation. Moreover, the EIA procedure is the stage of the decision-making which is specifically designated to address transboundary issues, including by allowing the participation of the foreign public. While the entire decision-making procedure on the Temelin NPP may not yet have been concluded, the EIA stage has been completed and therefore can be assessed against the Convention's requirements. Thus, the Committee finds the Party concerned's objection to the admissibility of the communication to be not sustainable.

61. The Committee will first examine the communicants' allegations regarding article 6 and then article 3, paragraph 9, since without assessing the extent to which the public in Germany had the possibility to effectively participate in the decision-making, it is not possible to properly assess whether discrimination has occurred or not.

62. The Committee decides not to examine the allegations regarding article 6, paragraph 8, because the communicant has not provided sufficient evidence to show that the Party concerned failed to take due account of the outcome of the public participation in the EIA statement, and thus, on the evidence before it, the Committee does not find this allegation to be sufficiently substantiated.

63. The Committee also will not deal with the allegations regarding article 9. The communicant has not submitted case-law or any other evidence to substantiate her allegations concerning that article, for instance on costs or standing of German citizens to challenge the EIA statement before the Party concerned's courts.

[8] See further Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (ECE/MP.PP/2014/2/Add.2), para. 17.

64. Finally, the Committee decides not to deal with the allegation that German citizens were made to speak last at the hearing as the communicant has not provided evidence to substantiate that German citizens were indeed not permitted to speak until after all Czech citizens had spoken. The Committee will however examine other allegations regarding article 3, paragraph 9 below.

Article 2, paragraph 5 – the public concerned

65. As a preliminary point, the Committee notes that the Party concerned has not disputed that the communicant, and other members of the public in Germany, are among the public concerned in relation to the Temelin NPP.

Article 6 in the transboundary context

66. Concerning the application of article 6 in the transboundary context, the Committee welcomes the recommendations on how to ensure more effective participation of the public concerned from affected countries contained in the 2014 Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations).[9]

67. It is clear from article 6's wording that the obligations imposed by that article are not dependent on obligations stemming from other international instruments. An international treaty between two or more States may envisage that the Party of origin and affected Party share joint responsibility for ensuring public participation in the affected Party's territory (as under the Espoo Convention) or even as the affected Party's sole responsibility. However, the obligation to ensure that the Aarhus Convention's requirements are met always rests with the Party concerned.

68. The situation in such cases is akin to where the domestic legal order delegates administrative tasks for public participation to other domestic bodies. Accordingly, as the Maastricht Recommendations state, if "the legal framework seeks to delegate any administrative tasks related to a public participation procedure to persons or bodies other than the competent public authority, it should be borne in mind that the ultimate responsibility for ensuring the public participation procedure complies with the requirements of the Convention will still rest with the competent authority".[10] The Committee considers this wording applies equally to situations where the responsibility for certain tasks related to public participation in the affected country's territory rests (by virtue of an international instrument or ad hoc agreement) on that country's public authorities.

69. In the light of the above, the Committee stresses that, whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the Convention's requirements lies with the competent authorities of the Party concerned.

Article 6, paragraph 2 - notification

70. With respect to the allegations concerning article 6, paragraph 2, the Committee will focus on two aspects:

[9]Paras. 23-26.
[10]Para. 28.

(a) Notifying the public concerned

71. Regarding notifying the public concerned, the Committee will examines two elements of particular relevance in the present case:

(i) Notification in the transboundary context

72. Though the Convention does not expressly address a Party's responsibilities when organizing a public participation procedure in the transboundary context, it nevertheless makes clear that, for all decision-making subject to article 6, the Party must ensure that the public concerned is informed in an adequate, timely and effective manner. The Committee notes that the MoE CR gave clear instructions to the German authorities on how to notify the public in Germany (see para. 32 above) and that these instructions were consistent with the means of notification envisaged for notifying the public in the Czech Republic. Nevertheless, the Committee is not convinced that these instructions were sufficient to ensure effective notification in the transboundary context. The Committee recalls its findings on communication ACCC/C/2006/16 concerning Lithuania,[11] where it noted that "the requirement for the public to be informed in an "effective manner" means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities". The Committee notes that neither the notification requirements in article 16(3) and (4) of the EIA Act (see para. 14 above) nor MoE CR's above-quoted request to the German authorities include a clear requirement to this effect.

73. As indicated above, ultimately it is for the competent public authorities of the Party of origin to ensure that the public participation procedure complies with the Convention's requirements, also in situations where the foreign public is involved. In cases which are not subject to a transboundary procedure under an international treaty (e.g. Espoo Convention), the requirement to inform the public concerned in the affected countries in an adequate, timely and effective manner will be the sole responsibility of the competent authority of the Party of origin. Ensuring that the notification is effective may include, inter alia, publishing announcements in the popular newspapers and by other means customarily used in the affected countries, as well as by exploring possibilities for using more dynamic forms of communication, e.g. via social media. In cases which are subject to a transboundary procedure under an international treaty, the Party of origin remains responsible under the Aarhus Convention for the adequate, timely and effective notification of the public concerned in the affected country, either by carrying out the notification itself or by making the necessary efforts to ensure that the affected Party has done so effectively.

(ii) Notification regarding ultra-hazardous activities

74. The Committee notes that, for the purposes of the permitting procedure on the Temelin NPP, the reference to "affected territorial self-governing units" in section 16(4) of the EIA Act was interpreted to include municipalities whose administrative territory included an internal or external part of the emergency planning zone (approximately the area of a circle with a radius of 13 kilometres centred in the containment area of the first production unit of the Temelín NPP).[12]

[11] ECE/MP.PP/2008/5/Add.6, para. 67.

[12] Party concerned's response to communication, Annex E1.

75. The Committee is convinced that in the case of decision-making on ultra-hazardous activities[13] like a NPP, being activities invariably of wide public concern, particular attention must be taken at the stage of identifying the public concerned and selecting the means of notification in order to ensure that all those who potentially could be concerned in the decision-making, including the public concerned outside its territory, have a reasonable chance to learn about proposed activities and their possibilities to participate. In this regard, the public may potentially be concerned both because of the possible effects of the normal or routine operation of the NPP and because of the possible effects in case of an accident or other exceptional incident. In both cases, the decision-making may impact on not only factors such as property or health but also issues less measurable, like quality of life. For an ultra-hazardous activity such as an NPP, members of the public may be affected or likely to be affected by, or have an interest in, the environmental decision-making within the scope of the Convention even if the risk of an accident is very small. In determining who is concerned by the environmental decision-making, the Committee also considers the magnitude of the effects if an accident would indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and worries of persons living within the possible range of the adverse effects. It is clear to the Committee that with respect to NPPs, the possible adverse effects in case of an accident can reach way beyond state borders and over vast areas and regions.

76. For the above reasons, the Committee considers that the geographical scope of the potential effects of the Temelin NPP, including in the event of an accident, cannot be confined only to the "municipalities whose administrative territory includes an internal or external part of the emergency planning zone" (i.e. within a radius of 13 kilometres).[14] In this context, the Committee notes the rather inconsistent approach of the Party concerned to defining the public concerned for the purpose of notification of the Temelin NPP EIA procedure. For domestic purposes it was confined to the public living in the "municipalities whose administrative territory includes an internal or external part of the emergency planning zone" (i.e. within a radius of 13 kilometres) whereas in Germany it included the public in the districts of Bavaria bordering the Czech Republic (which are more than 100 kilometres away).

77. More generally, the Committee notes that while a legal framework which chiefly relies on the affected territorial self-governing units using locally specific ways of informing the public may well be adequate for activities whose potential effect on the environment would be confined to that locality, it may be insufficient for ultra-hazardous activities which are invariably of wide public concern (whether specific activities subject to article 6 or in the context of plans and programmes subject to article 7). Moreover, notice on the Ministry's webpage would not in itself be enough in order to ensure effective notification of the public as it is not feasible to expect that members of the public will proactively check the Ministry's website on a regular basis just in case at some point there is a decision-making procedure of concern to them. In this respect the, Committee recalls paragraph 64(c) of the Maastricht Recommendations which provides that public notice should be placed also in "the newspaper(s) corresponding to the geographical scope of the potential effects of the proposed activity and which reaches the majority of the public who may be affected by or interested in the proposed activity".

[13] "An activity with a danger that is rarely expected to materialize but might assume, on that rare occasiion, grave (more than significant, serious or substantial) proportions", International Law Commission Draft Articles on Prevention of Transboundary Harm from Hazardous Activitis with commentaries, 2001, in Yearbook of the International Law Commission (2001-II), Part 2, commentary to article 1, para. 2.

[14] Para. 15 above.

78. In the light of the above, the Committee finds that by requiring that only the public in the Czech Republic living in the "municipalities whose administrative territory includes an internal or external part of the emergency planning zone" (i.e. within a radius of 13 kilometres) be notified, the Party concerned failed to ensure that all the public in the Czech Republic who potentially could be concerned had a reasonable chance to learn about proposed activities. Likewise, although the distance in which the public in Germany was notified was wider, only the public in the districts of Bavaria bordering with the Czech Republic were notified and not in other parts of Germany.[15]

79. Having reviewed article 16 of the EIA Act, the Committee considers that the Party concerned's law does not contain a sufficient guarantee that in the case of decision-making regarding activities having clearly more than local scope (such as is the case of decision-making regarding a NPP) all those who potentially could be concerned, including the public concerned outside its territory, would indeed have a reasonable chance to learn about proposed activities and their possibilities to participate.

80. For the above reasons, the Committee finds that, by not providing a clear requirement in its legal framework to ensure that public authorities, when selecting means of notifying the public, are bound to select such means which, bearing in mind the nature of the proposed activity, would assure that all those who potentially could be concerned, including the public concerned outside its territory, have a reasonable chance to learn about proposed activity, the Party concerned has failed to comply with article 6, paragraph 2 of the Convention with respect to its legal framework.

(b) Appropriate and adequate information regarding the public hearing

81. The Committee notes that only very basic information about the hearing, namely its timing and venue, was provided in advance. While that might meet the requirements of article 6, paragraph 2(d)(iii), the Committee considers that it does not meet the requirement in article 6, paragraph 2(d)(ii) to adequately and effectively inform the public concerned of its opportunities to participate. If a hearing is to be held, the public concerned should be notified of its opportunities to participate in that hearing, e.g., the format of the hearing, the format in which the public may make interventions, and any time limits on those interventions. This is particularly important in the case of a foreign public concerned, who may be entirely unfamiliar with how hearings are conducted in the Party of origin, though it should not be presumed that all members of the public concerned from the Party of origin will necessarily know this either. Moreover, the Party concerned has not disputed that it failed to respond to the communicant's request to the MoE CR on 26 May 2012 for further information regarding the format of the upcoming hearing.[16]

82. In the light of the above, the Committee considers that the Party concerned did not provide adequate and effective notification of the opportunities for the public to participate in the public hearing on 22 June 2012 in accordance with article 6, paragraph 2 (d)(ii). The Committee is thus convinced that if the hearing on 22 June 2012 were to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelin NPP and in particular to provide its input on the issues under consideration at the hearing on 22 June 2012, the Party concerned would have failed to comply with article 6, paragraph 2 (d)(ii). However, since the shortcomings identified above could be rectified at a future stage of the multi-stage permitting procedure not even initiated yet, provided that all options under consideration at

[15] Paras. 31 and 32 above.
[16] Communication, annex 3.

the time of the hearing on 22 June 2012 would then still be open, the Committee does not make a finding of non-compliance on this point. The Committee stresses, however, that if the permitting procedure were to continue and the shortcomings identified above not be rectified, the Party concerned would be in non-compliance with article 6, paragraph 2 (d)(ii).

Article 6, paragraph 3

83. Article 6, paragraph 3 requires that the public participation procedures include reasonable time-frames for the different phases allowing sufficient time, inter alia, for the public to prepare and participate effectively. The Committee considers two aspects of the communicant's allegations regarding this provision, namely the time-frames for submitting written comments and the public hearing on 22 June 2012:

(a) Timing and duration for submitting written comments

84. The Czech authorities gave two opportunities to German citizens to submit written comments: first, 60 calendar days on the EIA documentation (2 August–30 September 2010), and second, 43 calendar days on the EIA expert report (7 May–18 June 2012).

85. As the communicant observed, in its findings on communication ACCC/C/2008/24, the Committee considered the timing of the commenting period (as opposed to its duration).[17] In those findings, the Committee stated "In particular, the Committee notes that while the month of August is indeed a traditional summer holiday season month in many countries, the given time frame began on August 25 2005 and included most of the month of September, which is considered a "regular" working month. Under these circumstances, the Committee does not consider the given time frame as amounting to non-compliance with the Convention."[18] The Committee considers that finding to be equally relevant to the present case.

86. Moreover, holiday periods in countries of the UNECE region differ, especially during summer. The Committee considers it would be unworkable if the Convention required Parties to entirely avoid organizing public participation procedures during other Parties' holiday periods. Thus, on the issue of the timing of the two commenting periods, the Committee does not find the Party concerned to be in non-compliance with article 6, paragraph 3.

87. Regarding duration, the Committee considers a period of 60 days for the German public to comment on the EIA documentation and 43 days to comment on the EIA expert report, were likewise sufficient to meet the requirements of article 6, paragraph 3.

(b) Timing and duration of public hearing

88. Regarding the timing of the hearing, which was held four days after the period for written comments ended, the Committee does not consider this inherently problematic. Article 6, paragraph 7, does not require the hearing to be a vehicle through which public authorities must demonstrate how they have already taken due account of the public's written comments. Rather, the hearing is an opportunity for the public to be heard and also

[17] Findings on communication ACCC/C/2008/24, para. 90.
[18] Ibid, para. 93.

offers the opportunity for the applicant to present the project and respond to questions and comments.[19]

89. Concerning the hearing's duration, neither party disputes that the hearing lasted from 10am until 3am the next morning (i.e. 17 hours). Given a transboundary project of such a contentious nature as a NPP, the Committee considers that the competent authorities should have foreseen that the hearing might require longer than one working day and should therefore have planned and organized accordingly. As it was, the Committee considers that organizing the hearing in such a manner was not acceptable. Article 6, paragraph 3 requires that the time-frame for each phase of the public participation procedure must be reasonable and enable the public to participate effectively. The public cannot be expected to participate effectively if their opportunity to be heard comes only after they have been already sitting in the hearing for more than a full working day. Nor does it ensure that the public authorities present are in a fit state to take due account of that participation.

90. Bearing the above in mind, the Committee considers that the time-frame for the hearing on 22 June 2012 was neither reasonable nor could ensure that the public participating therein could do so effectively in accordance with article 6, paragraph 3. The Committee is convinced that if that hearing was to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelin NPP the Party concerned would fail to comply with article 6, paragraph 3. However, since this shortcoming could be rectified at a future stage of the multi-stage permitting procedure not even initiated yet, provided that all options under consideration at the time of the hearing on 22 June 2012 would then still be open, the Committee does not make a finding of non-compliance on this point. The Committee stresses, however, that if the permitting procedure were to continue and the shortcoming identified above not be rectified, the Party concerned would be in non-compliance with article 6, paragraph 3 of the Convention.

Article 6, paragraphs 4, 6 and 7 - the use of the "envelope" or "black box" method

91. Neither party disputes that the Party concerned used the "envelope" or "black box" method to assess the technological specifications and related safety aspects of the proposed reactor during the EIA procedure for the Temelin NPP. An evaluation of the "envelope" or "black box" method per se is outside the remit of the Committee's examination. Rather the Committee may only examine the extent to which the approach meets the requirements of the Convention, and in this regard, the communicant's allegations that the approach fails to comply with article 6, paragraph 4, 6 and 7.

Article 6, paragraph 4

92. With respect to article 6, paragraph 4, the Committee cites with approval the Maastricht Recommendations, which state that "while the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage where public participation is required, it should occur when all the options to be considered at that stage are still open and effective public participation can take place. If a particular tier of the decision-making process has no public participation,

[19] Aarhus Convention Implementation Guide, page 154.

then the next stage that does have public participation should provide the opportunity for the public to also participate on the options decided at that earlier tier".[20]

93. The Committee considers that the discretion as to the range of options to be addressed at consecutive stages of the decision-making is closely related to the opportunities for public participation on those options. A multi-stage decision-making procedure in which certain options are considered at a stage without public participation and where no subsequent stage provides an "opportunity for the public to also participate on the options decided at that earlier tier"[21] would be incompatible with the Convention. Similarly, a multi-stage decision-making procedure that provides for public participation on certain options at an early stage but leaves other options to be considered at a later stage without public participation would likewise not be compatible with the Convention.

94. The Committee understands that no decision on the technological design of the reactor has yet been made (see para. 51 above). In this light, the Committee finds that, so long as the public concerned, including the public concerned in Germany, will be provided with the opportunity to participate effectively in the stage of the decision-making at which the exact designs or technical specifications (including the risk factors and potential environmental impacts of each) are under consideration, the use of "envelope" or "black box" approach at the EIA stage does not, in itself, constitute non-compliance with the requirement in article 6, paragraph 4 of the Convention to provide for early public participation when all options are open. The Committee stresses, however, that if the permitting procedure was to continue and the public concerned not be provided with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6, paragraph 4 of the Convention.

Article 6, paragraph 6

95. Since the permitting of the Temelin NPP is a "multi-stage" decision-making procedure, the obligations in article 6, paragraph 6, must be seen in that context. In this regard, while the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage at which public participation is required, all information relevant to the decision-making at that given stage that is available to the public authorities should be made available to the public concerned (excepting information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4).

96. Information regarding the specific technology to be used is clearly of relevance for the decision-making on whether to permit the Temelin NPP and is therefore subject to the requirements of article 6, paragraph 6.

97. In this light, if the public authorities were in fact provided with any further information relevant to the decision-making than that made available to the public concerned (excepting information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4), that would amount to non-compliance with article 6, paragraph 6.

98. However, having reviewed the evidence before it, the Committee understands that the "envelope" approach was also used to provide information to the competent authorities

[20] Para. 18.
[21] Ibid.

and the Committee has been provided with no evidence to indicate that the competent authorities were provided with any further information at the EIA stage than was provided to the public concerned. In light of the above, the Committee finds the allegation that the use of the "envelope" approach in this case resulted in non-compliance with article 6, paragraph 6 to be unsubstantiated.

Article 6, paragraph 7

99. The communicant alleges that the use of the "envelope" approach was also in non-compliance with article 6, paragraph 7, because the public concerned was not able to submit any comments, information, analyses or opinions that it considered relevant to the proposed activity. In keeping with its finding in paragraph 94 above, the Committee finds that so long as at the stage of the decision-making at which the exact designs or technical specifications (including risk factors and potential environmental impacts) are to be considered by the competent authorities, the public concerned, including the public concerned in Germany, will be allowed to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity while all options are still open and having been provided with all information relevant to the decision-making, the use of the "envelope" or "black box" approach at the EIA stage does not, in itself, constitute non-compliance with article 6, paragraph 7.

Article 6, paragraph 7 – limit on number of questions and questions not answered

100. Concerning the allegation that the communicant was denied her rights under article 6, paragraph 7 at the hearing because she was limited to three questions per turn, the Committee notes that the Convention leaves considerable discretion to Parties as to how public hearings should be conducted. However, as the Implementation Guide correctly states, while the Convention does not establish particular standards for public hearings, rules for their conduct should be made in accordance with the Convention's provisions, in particular article 3, paragraphs 1 and 2.[22]

101. Parties may choose to codify the rules for public hearings in detail in their legislation or by way of established administrative practice. Alternatively, the rules for public hearings may be set case-by-case by the authorities responsible for each hearing. Whichever approach is taken, Parties must ensure that the rules to be applied are clear, transparent and consistent, as required by article 3, paragraph 1 and non-discriminatory, as required by article 3, paragraph 9. Furthermore, in accordance with article 3, paragraph 2, Parties should endeavor to ensure that officials provide guidance to the public in order that it knows and understands the rules to be applied during the hearing in advance. As mentioned above, this is of particular importance in the case of the foreign public concerned, who may be entirely unfamiliar with how hearings are conducted in the Party of origin.

102. The discretion granted to Parties as to how hearings should be conducted includes the relative speaking orders of experts, officials and others presenting the activity and representatives of affected local communities. It also includes the hearing structure itself, e.g. separate sessions for questions and comments/discussion. In this light, the Committee considers that limiting the number of questions or comments to three questions or comments per turn is a legitimate way to structure a hearing.

[22] Aarhus Implementation Guide, second edition, page 154.

103. Even limiting the total number of questions or comments to be raised during the hearing may be acceptable in certain cases, provided there are legitimate reasons for doing so and the public is adequately informed of the limitation in advance of the hearing. In such cases, the public should be invited to submit any remaining questions or comments in writing within a reasonable stated timeframe. Questions submitted in this manner would then be subject to article 4, with the time-frames under article 4 adjusted to fit within the time-frames for submitting comments under the public participation procedure, or alternatively, the time-frames for submitting comments extended to take into account the time-frames under article 4. Likewise, comments submitted in this manner would be subject to the legal regime of article 6, and in particular paragraphs 3, 7, 8 and 9.

104. In the light of the above observations, the Committee does not find the limit of three questions or comments per turn to amount to non-compliance with article 6, paragraph 7.

105. Regarding the communicant's allegation that she had a large number of unanswered questions at the end of the hearing, the Committee notes the parties' differing factual accounts on this point, since the Party concerned asserts that the hearing only finished "when no further questions had been raised by the general public".[23] Irrespective of which version of events is correct, the Committee does not find that the fact the public concerned may have had a large number of remaining questions at the end of the hearing to, in itself, amount to non-compliance with article 6, paragraph 7. Rather, at the end of the hearing and regardless of whether any participants had indicated their wish to submit additional questions or comments, the competent authorities should have informed the public concerned of its opportunity to put any further questions or comments in writing and to have informed the public concerned of the timeframes for it to do so.

106. Bearing the above in mind, on the basis of the chronology presented to the Committee, it appears that the period for written comments on the EIA expert statement ended on 18 June 2012, i.e. before the hearing. This means that there was no opportunity for the public concerned to submit written comments in the light of what it learned at the hearing itself. The Committee notes that preferably the timeframe for submitting written comments in a public participation procedure should extend for a reasonable time beyond the date of any public hearing in order that the public concerned has the possibility to submit comments in the light of what it learns at the hearing. The Committee recalls the communicant's assertion that the Party concerned has to date not responded to the questions she sent to the MoE CR in written form after the hearing. Having not been provided with a copy of the communicant's questions, the Committee is not in a position to assess whether they were in the form of questions requesting information (i.e. amounting to a request for information under article 4), comments to be taken into account in the decision-making procedure under article 6, paragraph 7, or otherwise. The Committee does not therefore make a separate finding on this point.

Article 3, paragraph 2 – assistance to the public

107. The communicant did not make an allegation under article 3, paragraph 2 so the Committee does not make a finding regarding this provision. However, it expresses its concern that the Party concerned did not appear to take steps to make sure that the rules to be applied during the hearing were known and understood by the public concerned in advance. The Committee reminds the Party concerned of its obligation under article 3,

[23] Party concerned's response to communication, page 4.

paragraph 2 to endeavor to ensure its officials assist and provide guidance to the public in, inter alia, seeking access to information and public participation in decision-making.

Article 3, paragraph 9

108. In deciding whether the Party concerned has complied with article 3, paragraph 9, the Committee considers the general test to be whether the public concerned in Germany was given any less favourable treatment than the public concerned in the Czech Republic with regard to its opportunities to participate in the procedure. The Committee considers the following three aspects:

(i) Distances travelled to the hearing by the public concerned in Germany and Czech Republic

109. The Committee considers that by organizing the public hearing in a town close to the German/Czech border, the Party concerned made an effort to ensure that the public in Germany was able to participate in the same way that the public in the Czech Republic were, and thus the Committee does not find there to have been discrimination within the meaning of article 3, paragraph 9 in this respect.

(ii) Information about the hearing made available to the public in Germany and the Czech Republic

110. On the basis of the information before it, there is nothing to indicate that the public in the Czech Republic was provided with any additional information about the format of the hearing and its opportunities to participate, and thus, the Committee does not find there to have been discrimination within the meaning of article 3, paragraph 9, in this respect. The Committee notes, however, that in public participation procedures involving the public in countries other than the country of origin, the competent public authorities should be mindful of the need to give clear and full explanations of the relevant procedures, as the foreign public cannot be presumed to be familiar with how such procedures work in the Party of origin. Having said that, it should not be assumed that all members of the public concerned from the country of origin are familiar with such procedures either.

(iii) No formal hearing in Germany

111. The Committee notes that neither Czech nor international law require that the country of origin organize a formal hearing in the territory of the affected country. Moreover, article 6, paragraph 7, does not require a hearing to be conducted in all cases, but rather as appropriate, bearing in mind the need to ensure effective public participation in the decision-making. While there is no express requirement under national or international law, including the Convention itself, to conduct a hearing in the affected country, neither is there anything to prevent that. The Committee finds however that there is no legal basis to conclude that in this case the Party concerned's failure to organize an official hearing in Germany constituted a breach of article 3, paragraph 9.

112. In the light of its findings in paragraphs 109-111 above, the Committee does not find the Party concerned to have failed to comply with article 3, paragraph 9.

IV. Conclusions and recommendations

113. 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

114. The Committee finds that by not providing a clear requirement in its legal framework to ensure that public authorities when selecting means of notifying the public are bound to select such means which, bearing in mind the nature of the proposed activity, would assure that all those who potentially could be concerned, including the public concerned outside the territory of the Party concerned, have a reasonable chance to learn about the proposed activity, the Party concerned has failed to comply with article 6, paragraph 2 of the Convention with respect to its legal framework.

115. Regarding the decision-making on the Temelin NPP, the Committee is convinced that if the public participation procedure on the EIA stage was to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelin NPP the Party concerned would fail to comply with article 6, paragraphs 2(d)(ii), 3, 4, 6 and 7 of the Convention.

116. However, since the shortcomings identified in paragraphs 82 and 90 above could be rectified at a future stage of the multi-stage permitting procedure not even initiated yet, provided that all options under consideration at the time of the EIA procedure would then still be open, the Committee does not make findings of non-compliance with respect to these points. The Committee stresses, however, that if the permitting procedure were to continue and these shortcomings not be rectified, the Party concerned would be in non-compliance with article 6, paragraphs 2(d)(ii) and 3 of the Convention.

117. Likewise, the Committee finds that, so long as the public concerned, including the public concerned in Germany, will be provided with the opportunity to participate effectively in the stage of the decision-making at which the exact designs or technical specifications (including risk factors and potential environmental impacts) are under consideration, the use of the "envelope" or "black box" approach at the EIA stage did not, in itself, constitute non-compliance with article 6, paragraphs 4, 6 and 7. The Committee stresses, however, that if the permitting procedure was to continue and the public concerned not be provided with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6, paragraphs 4, 6 and 7 of the Convention.

B. Recommendations

118. The Committee pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures request in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned provides:

(a) A legal framework to ensure that when selecting means of notifying the public under article 6, paragraph 2, public authorities are required to select such means as will ensure effective notification of the public concerned bearing in mind the nature of the proposed activity and including, in the case of proposed activities with potential transboundary impacts, the public concerned outside the territory of the Party concerned;

(b) The necessary arrangements to ensure that:

(i) When conducting transboundary procedures in co-operation with the authorities of affected countries, the competent public authorities make the necessary efforts to ensure that the public concerned in the affected countries was in fact notified in an effective manner;

(ii) There will be proper possibilities for the public concerned, including the public outside the territory of the Party concerned, to participate at the subsequent stages of the multi-stage decision-making procedure regarding the Temelin NPP;

(c) A report to the Committee at the latest nine months in advance of the sixth session of the Meeting of the Parties on the measures taken and the results achieved in implementing the above recommendations.

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