Findings and recommendations with regard to communication ACCC/C/2016/143 concerning compliance by Czechia

Adopted by the Compliance Committee on 26 July 2021[1]

I. Introduction

1. On 31 October 2016, Austrian environmental non-governmental organizations OEKOBUERO – Alliance of the Austrian Environmental Movement and GLOBAL 2000 (Friends of the Earth Austria), Czech civic associations Jihočeské matky, z. s. and Calla, and the Aarhus Konvention Initiative, a German civil society movement, (the communicants) 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 noncompliance with articles 3(1), 6(1)-(10) and article 9(2) of the Convention regarding the extension of the lifetime of nuclear reactors of the Dukovany nuclear power plant (NPP).

2. At its fifty-fifth meeting (Geneva, 6-9 December 2016), 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 6 February 2017.

4. On 4 July 2017, the Party concerned provided its response to the communication.

5. The Committee held a hearing to discuss the substance of the communication at its sixty-fourth meeting (Geneva, 1-5 July 2019), with the participation of representatives of the communicants and the Party concerned.

6. On 19 September 2019, the communicants sent additional information to the Committee.

7. On 13 November 2020, the communicant OEKUBUERO provided a summary of the Constitutional Court's verdict to the Committee.

8. On 24 December 2020, the secretariat sent a letter enclosing questions from the Committee to the Party concerned.

9. On 20 January 2021, the Party concerned requested an extension to the deadline to respond to the Committee's questions, in particular to provide English translations. On the same day, the secretariat informed the Party concerned that the Chair of the Committee had agreed to extend the deadline until 8 February 2021.

[1] This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

10. On 21 January 2021, the Party concerned submitted a number of documents relating to the Committee's questions. On 8 February 2021, the Party concerned sent further material in reply to the Committee's questions.

11. On 1 March 2021, the communicants send its comments on the Party concerned's reply to the Committee's questions to the Committee.

12. The Committee completed its draft findings through its electronic decision-making procedure on 10 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded on that date for comments to the Party concerned and the communicants. Both were invited to provide comments before 22 July 2021.

13. The communicants and the Party concerned provided comments on the draft findings on 21 and 23 July 2021 respectively.

14. The Committee proceeded to finalize its findings in closed session, taking account of the comments received and adopted its findings through its electronic decision-making procedure on 26 July 2021. The Committee agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

II. Summary of facts, evidence and issues[2]

A. Legal framework

1997 Atomic Act

15. At the time of the permitting procedure to extend the operation of the Dukovany NPP's reactor 1 in 2016, section 9(1)(d) of Act no. 18/1997 Coll. of 24 January 1997 on Peaceful Utilisation of Nuclear Energy and Ionising Radiation (the 1997 Atomic Act) stated that a permit issued by the State Office for Nuclear Safety (SONS) is required for the operation of a nuclear installation.[3]

16. Section 14(1) of the 1997 Atomic Act provided that the applicant shall be the only participant in the proceedings under that Act.[4]

17. The 1997 Atomic Act did not include in any specific provision on the duration of operational licenses of nuclear facilities issued. Rather, its section 15(1)(d) provided that SONS should specify the period for which the licence was issued.[5]

2016 Atomic Act

18. Section 9(1) of Act no. 263/2016 Coll. of July 14, 2016 (the 2016 Atomic Act) sets out an extensive list of activities related to nuclear energy for which a license from SONS is required. This includes, at article 9(1)(f), the operation of a nuclear installation, and at article 9(1)(h), the carrying out of modifications affecting nuclear safety, technical safety and physical protection of a nuclear installation. Article 9(1)(f) of the 2016 Atomic

[2] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.
[3] Communication, annex 4, p. 19.
[4] Communication, para. 9, and annex 4, p. 23.
[5] Communication, para. 4, and annex 4, p. 24.

Act supersedes article 9(1)(d) of the 1997 Atomic Act; article 9(1)(h) appears to supersede article 9(1)(f) of the 1997 Act.[6]

19. Section 19(1) of the 2016 Atomic Act stipulates that the applicant for a permit shall be the only participant in the proceedings for the issuance of the permit.[7]

20. Section 21(2) of the 2016 Atomic Act provides that all operational licenses of nuclear facilities are to be issued for an indefinite period.[8]

Act on Environmental Impact Assessment

21. At the time of the permitting procedure for extending the operation of the Dukovany NPP's reactor 1 in 2016, annex 1, item 3.2 of Act no. 100/2001 Coll. on environmental impact assessment (EIA Act) required that "installations with nuclear reactors (including their dismantling or decommissioning)" be subject to an EIA.[9]

22. Section 9 of the EIA Act provided that public participation and associated standing to bring legal actions must be granted for certain permits that are "subsequent to" an EIA procedure.

23. Following the EIA Act's September 2017 amendment, an exhaustive list of "subsequent procedures" was inserted in section 3(g) of the EIA Act. The list does not include any procedures taken under the 2016 Atomic Act.[10]

Access to justice

24. According to section 94 et seq. of Act No. 500/2004 Coll. (Administrative Procedure Code), the public can submit a request for administrative review to the public authority itself, which shall "review the final decisions when it can reasonably doubt that the decision is in accordance with the law."[11] In this regard, a request for administrative review of a decision by SONS will be conducted by the President of SONS.

25. Section 65(1) of Act No. 150/2002 Coll. (Code of Administrative Justice) provides that "anyone who claims that their rights have been prejudiced directly or due to the violation of their rights in the preceding proceedings by an act of an administrative authority whereby the person's rights or obligations are created, changed, nullified or bindingly determined (hereinafter "decision") may seek the cancellation of such a decision, or the declaration of its nullity, unless otherwise provided for by this Act or by a special law."[12]

26. Section 65(2) of the Code of Administrative Justice provides that "a complaint against a decision of an administrative authority can be made even by a party to the proceedings before the administrative authority who is not entitled to file a complaint under paragraph 1, if the party claims that his or her rights have been prejudiced by the administrative authority's acts in a manner that could have resulted in an illegal decision."[13]

27. According to section 66(3) of the Code of Administrative Justice, "the authorization to make a complaint is also given to a person to whom the authorization is

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[6] Communication, para. 4, annex 3, p. 1, and letter from communicant OEKOBUERO, annex, p. 1.
[7] Communication, para. 9, and annex 3, p. 1.
[8] Communication, para. 4, and annex 3, p. 1.
[9] Communication, para. 8, and annex 3, p. 1.
[10] Party's reply to Committee's questions, 8 February 2021, p. 3.
[11] Communication, para. 26, and annex 3, p. 1.
[12] Communication, para. 27, and annex 5, p. 25.
[13] Communication, para. 27, and annex 5, p. 25.

expressly granted by ... an international agreement which is part of the national law".[14] Section 66(4) of the Code of Administrative Justice provides that "a complaint under paragraphs 1-3 is inadmissible if the legal causes put forward in it have been applied in the same matter in another complaint already rejected by the court.[15]

Relevant case law

28. In its decision no. 2 As 13/2006-110, the Supreme Administrative Court indicated that the Convention may be directly applicable where there is only a single administrative proceeding needed to authorize an activity.[16]

29. In its decision no. 4 As 157/2013-33, the Supreme Administrative Court held that participation in an administrative proceeding or an appeal against a decision cannot be stipulated as a condition for its standing under section 65(1) of the Code of Administrative Justice to bring an action against such a decision in proceedings relating to Act no. 183/2006 Coll. on Town Planning and the Building Code.[17]

30. In its decision no. As 90/2011-154, the Supreme Administrative Court found that a procedure extending operation of a nuclear reactor licensed an existing state and, unlike the launch of an NPP into operation, could not constitute an interference with the environment. It further found that the authorisation of the extension was not the only procedure for the activity in which civic associations have the right to engage. Accordingly, the Convention was not directly applicable and a civil society organization had no right to participate in the administrative procedure to authorize extended operations.[18]

31. This case was brought to the Supreme Administrative Court by one of the communicants, Jihočeské matky. It was appealing the Municipal Court in Prague's dismissal of an appeal to a decision by SONS (and a review by the President of SONS) that Jihočeské matky could not participate in the procedure to authorize a 10-year extension of the operating permit for nuclear reactor 3 of Dukovany NPP. SONS had rejected Jihočeské matky's initial application in resolution 32699/2007, 29299/2007/OHJZ/44 on the basis that it was not the only procedure for the relevant operation since it was an extension of the operation of an existing facility.[19] This was affirmed by the President of SONS in decision SONS/PRO/5156/2008.[20]

32. The Municipal Court in Prague dismissed Jihočeské matky's appeal in its judgment 9 Ca 182/2008-96 of 25 November 2010, asserting that it could not review the President of SONS' decision. Jihočeské matky had argued that participation in the procedure was appropriate because the Dukovany NPP had not been subject to an EIA procedure and because the Atomic Act procedure was the only procedure under which the extended operations would be authorized. Jihočeské matky argued that the Convention should therefore be directly applicable, citing the Supreme Administrative Court's 2006 ruling that the Convention could be directly applicable where there is only a single administrative proceeding (see para. 28 above).[21]

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[14] Communication, para. 28, and annex 5, p. 25.
[15] Communication, para. 28, and annex 5, p. 25.
[16] Communication, para. 11, and annex 3, pp. 2 and 4.
[17] Party's reply to Committee's questions, 8 February 2021, pp. 3-4 and annex 4, para. 23.
[18] Communication, para. 11, and annex 3, pp. 2 and 4.
[19] Communication, para. 10, and annex, pp. 1-2.
[20] Communication, para. 10, and annex 3, p. 2.
[21] Communication, para. 10, and annex 3, pp. 2-3.

33. Jihočeské matky brought the case to the Constitutional Court. In judgment US 463/12, decided on 20 June 2012, the Constitutional Court ruled that the constitutional complaint was manifestly unfounded, stating the complainant did not add any new circumstances that would indicate that the process of administrative courts, or the decision of the Supreme Administrative Court, constituted interference in its fundamental rights.[22]

B. Facts

34. The Dukovany Nuclear Power Plant (NPP) has four pressurized-water reactors, all VVER 440/213 units of Soviet design.[23] Reactor 1 was first commissioned in 1985 and has been in operation since then, making it the oldest reactor in Czechia. Reactors 2 and 3 went into operation in 1986. Reactor 4 went into operation in 1987.[24]

35. Until March 2016 SONS had issued permits for ten-year periods.[25]

36. The Dukovany NPP is located 30 km southeast of Třebíč, Czechia, about 40 km from the Austrian border and 175 km from the German border.[26]

Extending operations of the Dukovany NPP's reactors beyond 30 years

37. The reactors' original expected lifetime was 30 years.[27] Reactor 1's original expected lifetime expired in 2015. The original expected lifetime of reactors 2 and 3 expired in 2016, and that of reactor 4 in 2017.[28]

38. In 1996, the project promoter (CEZ) began preparations to extend the four reactors beyond their original expected 30-year lifetimes. SONS required CEZ to meet the basic requirements for normal operational licenses and to take additional measures on the NPP's ageing effects. These measures to address the ageing effects included a long term-strategy based on documents of the International Atomic Energy Agency and internationally accepted practice, and a "Programme for Assurance of NPP Dukovany LTO" to be based on a periodically updated feasibility study.[29]

39. In order to meet these requirements, CEZ: (i) submitted to SONS a Quality Assurance programme "Preparation of the NPP Dukovany LTO" in December 2006; (ii) submitted the document "CEZ, a.s. approach to preparation of NPP long-term operation" in January 2008; and (iii) approved the "Strategy of LTO Dukovany", "Programme for Assurance of NPP Dukovany LTO" and "LTO Dukovany Preparation Project" in January 2009, which were submitted to SONS in February 2009.[30] CEZ also performed works to modernize the NPP for operation beyond the designed lifetimes, including reinforcement of reactor facilities, construction on ventilation towers and an increase in the number of auxiliary diesel generators.[31]

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[22] Communication, para. 12, and annex 3, pp. 4-5.
[23] Communication, para. 1.
[24] Communication, para. 1.
[25] Communication, para. 4.
[26] Communication, para. 1.
[27] Communication, para. 1, and Party's response to the communication, p. 2.
[28] Communication, para. 1.
[29] Communication, para. 2.
[30] Communication, para. 3.
[31] Communication, para. 3.

40. CEZ was unable to submit in a timely fashion the documents required for the lifetime extension of reactor 1. SONS therefore granted a 3-month extension.[32]

41. Subsequently, on 30 March 2016, SONS granted the permission to extend the operation of reactor 1 indefinitely.[33] According to the terms of the permit, CEZ continues to be subject to Periodic Safety Reviews (PSR) every ten years.[34]

42. Similar indefinite operation permits were later issued for reactor 2 on 28 June 2017 and for reactors 3 and 4 on 19 December 2017.[35]

Participation in the procedures authorizing the extensions

43. Only the applicant CEZ could participate in the permitting procedure authorizing the extension of reactor 1 beyond its original 30-year lifetime.[36]

44. On 5 January 2017, communicant Jihočeské matky filed an application to participate in the permitting procedure for the extension of the lifetime of the Dukovany NPP's reactor 2.[37] This application was denied by SONS, basing its decision on settled case law on the interpretation of the Atomic Act and other domestic laws.[38]

Technical problems at the Dukovany NPP

45. Technical problems occurred at the Dukovany NPP in the second half of 2015, according to the 2016 Czech Republic Report on Nuclear Safety under the Convention on Nuclear Safety (2016 Nuclear Safety Report).[39] These problems included the poor condition of some of the welds on emergency steam generation feedwater piping and problems in radiograph quality.[40] Physical defects and systemic problems with in-service inspections caused extraordinary shut-downs of reactors 2 and 3 during 2015 and also a significant extension of reactor 1's outage.[41]

46. In the 2016 Nuclear Safety Report, SONS stated: "uncertainties as to the condition of welds resulted in the absence of information regarding the actual state of nuclear installation as a whole thereby constituting a breach of the requirement to be aware of the actual state of installation throughout the operation of nuclear installation and to have nuclear installation under control." [42]

47. On 14 July 2016 the 1997 Atomic Act was replaced by the 2016 Atomic Act.[43]

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[32] Communication, para. 4.
[33] Communication, para. 4, and annex 8.
[34] Communication, para. 4.
[35] Communicant (Oekobuero), updated chronology, 28 June 2019; Party's reply to Committee's questions, 8 February 2021, pp. 2, 6-7 and annexes 9(e), 9(f) and 9(g).
[36] Communication, para. 7.
[37] Letter from communicant OEKOBUERO, 27 February 2017, p. 1, and annex, p. 1.
[38] Letter from communicant OEKOBUERO, 27 February 2017, p. 2, and annex, p. 4-5.
[39] Communication, para. 14.
[40] Communication, para. 14.
[41] Communication, para. 15.
[42] Communication, para. 14.
[43] Communication, para. 4, and Party's response to the communication, p. 3.

C. Domestic remedies and admissibility

48. The communicants submit that any domestic remedy would obviously not provide an effective or sufficient means of redress within the meaning of paragraph 21 of the annex to decision I/7.[44]

49. The communicants further submit that, being mostly foreign organizations, they would face additional hurdles in terms of navigating the domestic legal system, both linguistically and legally.[45] With respect to their systemic allegations, the communicants claim that these are not amenable to judicial review and are accordingly not subject to domestic remedies considerations.[46]

50. The Party concerned did not comment on the issue of domestic remedies.

D. Substantive issues

51. The communicants allege that they have been denied their right to participate in procedures under article 6 of the Convention and their right to access to justice under article 9(2) of the Convention. They claim that the decision of 30 March 2016 to permit activity at Dukovany NPP reactor 1 for an indefinite period of time falls under article 6(1)(a) of the Convention and subsequently also under article 9(2).[47] The communicants submit that the creation and use of so-called "unlimited permits" should not be used as a strategy to avoid public participation responsibilities.[48]

52. The Party concerned states that the Czech legal system enables the general public to participate in EIA procedures as well as "subsequent procedures" such as zoning permits and building permits which precede operational permits. It submits that the Dukovany NPP had to pass through these procedures in the past where the public could raise its issues and that if there were not any other such opportunities, then it would be obligatory to have allowed public participation in these proceedings.[49]

53. The communicants allege specific instances of violations of the Convention in relation to Dukovany NPP's reactor 1 and ongoing specific noncompliance regarding its other reactors. Additionally, the communicants allege systemic noncompliance and a breach of article 3(1) of the Convention, which arises as a result of the Czech legislative framework.[50]

Applicability of article 6(1)(a)

54. The communicants assert that the SONS decision of 30 March 2016 permits or authorizes the continued operation of Dukovany's first reactor beyond that reactor's original lifetime for an indefinite period of time.[51] The communicants submit that, as acknowledged by SONS and CEZ, the original lifetime of the nuclear reactors was set to expire, and that but for the above-mentioned decision, operations would have ceased.[52]

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[44] Communication, para. 36.
[45] Communication, para. 36.
[46] Communication, para. 36.
[47] Communication, paras. 17-29.
[48] Communication, para. 21.
[49] Party's reply to Committee's questions, 8 February 2021, p. 2.
[50] Communication, para. 17.
[51] Communication, para. 19.
[52] Communication, para. 19.

55. The communicants submit that the decision to extend the operation of reactor 1 covers all the basic parameters and main environmental implications of the proposed activity and that it authorized the continued operation of an ultra-hazardous activity of enormous public concern.[53] The communicants state that the risks of environmental damage are particularly heightened given the ageing equipment, some of which cannot be replaced, and the "grave defects with the welds".[54]

56. The communicants claim that the situation will be the same for any future decision to extend the lifetime of the other reactors at Dukovany or other NPPs in the Party concerned beyond their original design lifetimes.[55] Finally, recalling the Committee's findings on communications ACCC/C/2006/17 (Lithuania) and ACCC/C/2005/11 (Belgium),[56] the communicants submit that article 6(1) is applicable regardless of the label the Czech legislation assigns to these decisions and regardless of whether any actual physical changes have occurred.[57] In any case, they claim that substantial upgrading works have taken place in preparation for the extension of lifetimes.[58]

57. The Party concerned submits that "the manufacturer's original estimate of all four reactors' 30-year lifetimes was based on the current scientific and technological knowledge at the time (the 1980s) and as such quite conservative."[59] It claims that "the current state of the reactor – which is subject to continuous observation of its lifetime – clearly shows that the device can be safely operated beyond the 30-year mark."[60] It submits that "the reactor's lifetime is not affected by the operating permit."[61]

Article 6(1)(a) in conjunction with annex I, para. 1

58. Recalling paragraph 44 of the Committee's findings on ACCC/C/2009/41 (Slovakia),[62] the communicants claim that the extension falls directly under article 6(1)(a) in conjunction with paragraph 1 of annex I, for which public participation should be provided in permit procedures.[63]

59. The communicants argue that article 6(1)(a) in conjunction with paragraph 1 of annex I does not require the activity to be "new", and that the words "new," "construction" and the like appear nowhere in either article 6(1)(a) or annex I, paragraph 1.[64] The communicants note that the express wording of article 6(1)(a) states that the provision covers "decisions on whether to permit *proposed* activities"[65] and that there is nothing to prevent lifetime extensions from qualifying as proposed activities.[66]

60. The communicants further state that even if "proposed activity" is interpreted as having the additional requirement that the activity be somehow new, the extension of a NPP's lifetime is a new activity.[67] The communicants claim that operating an NPP within

[53] Communication, para. 19, citing annex 2 and ACCC/C/2006/17 (ECE/MP.PP/2008/5/Add. 10), para. 43.
[54] Communication, para. 19.
[55] Communication, para. 19.
[56] ECE/MP.PP/2008/5/Add.6, para. 57 and ECE/MP.PP/C.1/2006/4/Add. 2, para. 29, respectively.
[57] Communication, para. 19.
[58] Communication, para. 19.
[59] Party's response to the communication, p. 1.
[60] Party's response to the communication, p. 2.
[61] Party's response to the communication, p. 1.
[62] ECE/MP.PP/2011/Add. 3, para. 44
[63] Communication, paras. 18 and 20.
[64] Communication, para. 20.
[65] Communication, para. 20, emphasis in original.
[66] Communication, para. 20.
[67] Communication, para. 20.

its designed lifetime has its own parameters and poses its own – quite significant – environmental risks. Operating an NPP (potentially indefinitely) beyond that designed lifetime has different parameters and poses a host of new and greater environmental risks.[68]

61. The Party concerned does not dispute that nuclear power plants are listed in paragraph 1 of annex I, but submits that the present case cannot be considered an activity permit subject to article 6(1)(a).[69] The Party concerned submits that the inapplicability of article 6(1)(a) is based on the fact that the word "proposed" indicates that the activity has not yet been permitted or constructed and its operation has not yet commenced.[70] The Party concerned observes that the Dukovany NPP has been in operation for over 30 years and submits therefore that it cannot be considered a proposed activity, as the activity has been continuously performed since the 1980s.[71]

Article 6(1)(a) in conjunction with annex I, para. 22

62. The communicants alternatively claim that the extensions of lifetime should be considered as "changes or extensions" within the meaning of paragraph 22 of annex I, with the result that the substantive provisions of article 6 must be applied to such extensions.[72]

63. The Party concerned claims that the permit issued in 2016 does not fall under article 6(1)(a) in conjunction with paragraph 22 of annex I either.[73]

64. The Party concerned observes that the Dukovany NPP has been in operation since the 1980s based on previously issued operating permits.[74] It submits that "the operating permit in question has been issued by [SONS] in 2016 and has (from material perspective) the character of a decision on renewal of the previous operating permit issued in 1986."[75]

65. The Party concerned argues that, "even though the permit is formally issued as an independent decision, it is based on previous operating activities and the SONS utilizes information gathered during previous operation and administrative activities".[76] The Party concerned claims that "this renewal of the operating permit is analogous to a periodic safety review performed during the lifetime of an NPP, when no changes and alterations of the NPP are made. All the general conditions for the activity remain unchanged – the installation continues to operate for the same purpose and no changes generating possible environmental impact are involved."[77]

Article 6(10)

66. The communicants also allege that future procedures following the initial extension beyond the original lifetime, such as periodic technical or safety reviews, qualify as a "reconsideration or update" of the NPP's operating conditions within the

[68] Communication, para. 20.
[69] Party's response to the communication, p. 1.
[70] Party's response to the communication, p. 1.
[71] Party's response to the communication, p. 1.
[72] Communication, para. 20, citing ACCC/C/2009/41 (ECE/MP.PP/2011/Add. 3), para. 58.
[73] Party's response to the communication, p. 1.
[74] Party's response to the communication, p. 1.
[75] Party's response to the communication, p. 1.
[76] Party's response to the communication, p. 1.
[77] Party's response to the communication, p. 1.

meaning of article 6(10).[78] The communicants submit that the law of the Party concerned does not provide for public participation with respect to periodic safety reviews.[79]

67. The communicants observe that the Committee has stressed that article 6(10) cannot be understood to give complete discretion to Parties to determine whether it was appropriate to provide for public participation. The term "appropriate" merely introduces "an objective criterion to be seen in the context of the goals of the Convention", and where "an activity of such a nature and magnitude, and being the subject of such public concern" is at issue, public participation is appropriate.[80]

68. The Party concerned responds by arguing that the operating permit itself does not qualify as a reconsideration or update of the operating conditions and so does not fall under article 6(10).[81]

69. The Party concerned claims that "while the decision in question is labelled an operating permit, its nature is closer to a periodic safety review"[82] and that the main purpose of the periodic issuance of the operating permit is for the operator to provide information to SONS. It submits that the "Dukovany NPP has been in full operation since the 1980's based on operating permit issued every ten years. The main purpose of these operating permits is to perform a complex check of the NPP's operation tied to the periodic safety review of the NPP."[83]

70. The Party concerned further submits with respect to the content of the operating permit that "no physical works, reconstructions etc. are included" in the permit.[84] It notes that, were reconstructions or physical works necessary, different permits would be required, such as permits for reconstruction and changes of a nuclear facility in conjunction with permits for changes of the construction as regulated by Act No. 183/2006 Coll., the Building Code.[85] The Party concerned further states that all the general conditions for the activity remain untouched.[86] Thus the installation continues to operate for the same purpose and no changes generating possible environmental impacts are involved.[87]

71. The Party concerned further argues that in any case section 14(2) of the 1997 Atomic Act, its constitutional law and section 2 of the Administrative Procedure Code leave SONS no option other than issuing the permits when all the requirements are met.[88]

72. The Party concerned submits that it follows that the periodic issuance of the operating permit is a largely formal act, which could also be performed via other mechanisms such as PSR, special decisions or the amending/renewal of existing permits.[89]

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[78] Communication, para. 21.
[79] Communicants' comments on Party's reply to Committee's questions, 1 March 2021, p. 3.
[80] Communication, para. 21, citing ACCC/C/2009/41 (ECE/MP.PP/2011/Add. 3), paras. 55-56.
[81] Party's response to the communication, p. 2.
[82] Party's response to the communication, p. 2.
[83] Party's response to the communication, p. 2.
[84] Party's response to the communication, p. 2.
[85] Party's response to the communication, p. 2.
[86] Party's response to the communication, p. 2.
[87] Party's response to the communication, p. 2.
[88] Party's response to the communication, p. 2.
[89] Party's response to the communication, p. 2.

73. The Party concerned concludes that the 2016 operating permit should not be subject to article 6(10) because its "purpose is not to permit changes in the NPP's operation but to maintain the status quo."[90]

74. The Party concerned claims that, "reflecting the relative redundancy of the operating permit as described above, [the 2016 Atomic Act] abandons concept of periodic issuance of operating permits (the operating permits issued under this act shall be issued for an indefinite period) and replaces it with strict requirements on periodic safety reviews, performed every 10 years." [91]

75. The Party concerned submits that the 10-year periodic safety reviews are not "reconsiderations or updates" of the NPP's operating conditions within the meaning of article 6(10) either.[92]

Compliance with article 6(2)-(9)

76. The communicants claim that the public concerned as defined in article 2(5) of the Convention in this case includes persons and NGOs far beyond Czechia's borders since "should an accident occur, the range of adverse effects could extend over huge geographical areas well beyond neighboring countries."[93] The communicants claim that "the concern of persons and NGOs who fear such an accident, particularly in light of the fact that the reactors will be exceeding their lifetimes potentially indefinitely, despite already showing major defects in critical systems, is correspondingly extensive."[94]

77. The communicants submit there was no public participation provided for either the domestic or foreign public concerned during any of the phases of the decision-making process regarding the lifetime extension of the Dukovany NPP's reactor 1.[95] The communicants contend that this means that the Party is in noncompliance with article 6(2)-(9).[96] More specifically, the communicants claim that:

(a) In breach of article 6(2), the public concerned was not informed about the decision-making procedure, and the basic information in CEZ's website concerned only its own application to extend the lifetimes of the reactors.[97] The communicants claim further that requests for notification and other steps pursuant to the Espoo Convention were refused.[98] The communicants argue that the nature of the activity in question means that members of the domestic and foreign public who also expressed their interest should have been notified;[99]

(b) In breach of article 6(4), the Party concerned did not provide "early" participation when "all options are open and effective public participation can take place";[100]

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[90] Party's response to the communication, p. 3.
[91] Party's response to the communication, p. 3.
[92] Party's comments on Committee's draft findings, pp. 3-6.
[93] Communication, para. 22.
[94] Communication, para. 22.
[95] Communication, paras. 7 and 23.
[96] Communication, paras. 7 and 23.
[97] Communication, para. 24, citing ACCC/C/2010/50 (ECE/MP.PP/C.1/2012/11), para. 70.
[98] Communication, para. 24.
[99] Communication, para. 24, citing ACCC/C/2004/3 and ACCC/S/2004/1 (ECE/MP.PP/C.1/2005/2/Add.3), para. 28.
[100] Communication, para. 24.

(c) In breach of article 6(5), the Party concerned did not encourage the applicant (CEZ) to identify the public concerned, enter discussions, and provide information regarding the objectives before applying for a permit.[101] The communicants claim that requests were made by "domestic and Austrian- and German-based individuals and NGOs (in addition to governmental entities in Austria and Germany)" demanding information, yet these efforts were rebuffed.[102]

(d) In breach of article 6(9), the public concerned was not informed of the decision to extend reactor 1's lifetime, "and it cannot expect to be informed of any future decision-making."[103]

78. The Party concerned submits that, because article 6 is not applicable to the operating permit in question, the provisions of article 6(2)-(9) of the Convention are not applicable.[104]

Article 9(2)

79. The communicants submit that the Party concerned fails to comply with article 9(2), because there is no access for the public concerned to have access to justice to defend its rights and interests with respect to the procedures in question.[105] The communicants outline four ways in which their access to a review mechanism is blocked or ineffective.[106]

80. Firstly, they complain that the remedy under the Administrative Procedure Code, according to which the public concerned can appeal to the superior administrative authority, namely the President of SONS, (see para. 24 above) is hopeless. The communicants observe that the SONS President is not a neutral entity and that it rejected the same arguments at issue in the communication, namely the necessity of public participation, in its decision of 2008 (see para. 31 above).[107]

81. The communicants submit secondly that the stipulation that only the applicant is a party to the permitting procedure found in both section 14(1) of the 1997 Atomic Act and section 19(1) of the 2016 Atomic Act prevents the existence of a remedy under section 65(2) of the Code of Administrative Justice since that provision only grants a right to appeal to parties to the procedure (see paras. 16, 19 and 26 above).[108]

82. The communicants thirdly claim that the remedy under section 65(1) of the Code of Administrative Justice is also unavailable as evidenced by both the Municipal Court in Prague and the Supreme Administrative Court rejecting these arguments (see paras. 30 - 32 above). The courts held that article 6 of the Convention was not directly applicable and accordingly determined there was no corresponding violation of the association's rights. The communicants note that the Constitutional Court found the ensuing constitutional complaint manifestly unreasonable (see para. 33 above). The communicants submit that there are no facts or legal circumstances which would permit a contrary result in the context of the present case.[109]

[101] Communication, para. 24.
[102] Communication, para. 24.
[103] Communication, para. 24.
[104] Party's response to the communication, p. 3.
[105] Communication, para. 25, citing ACCC/C/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2), para. 26.
[106] Communication, paras. 26-28.
[107] Communication, para. 26.
[108] Communication, para. 27.
[109] Communication, para. 27.

83. Finally, the communicants claim that a special complaint to protect the public interest under article 66(3) of the Code of Administrative Justice (see para. 27 above) is also not possible. The communicants contend that, due to the case law cited above, there are no plausible arguments under domestic law that the public concerned should be deemed to have been expressly granted authorization to appeal decisions to extend the lifetime of reactors.[110]

84. The communicants submit there are no other possible legal avenues to challenge the procedural and substantive failings regarding public participation and the extensions of the reactors' lifetimes.[111]

85. The Party concerned submits that article 6 of the Convention is not applicable to the operating permit in question, and therefore concludes that article 9(2) is not applicable either.[112]

86. The Party concerned further states that the 2014 judgment of the Supreme Administrative Court (see para. 29 above) found that participation in an administrative proceeding or an appeal against a decision cannot be stipulated as a condition for standing to bring an action against such a decision. As such, it contends that it was possible for the communicants to challenge the legality of the decisions in question.[113]

Article 3(1)

87. The communicants allege that the legislation of the Party concerned, taken together with judicial interpretation and practice, results in systemic noncompliance with the Convention.[114] The communicants allege that, in breach of article 3(1), the Party concerned has failed to "take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework" to implement articles 6 and 9(2) in relation to the extensions of lifetimes of nuclear reactors.[115]

88. The communicants submit that the legislation of the Party concerned fails to provide for public participation during the procedures taken to authorize the extension of the lifetime of the reactors. It recalls that both the 1997 and 2016 Atomic Acts stipulate that only the applicant may be a party to these procedures (see paras. 16 and 19 above).[116]

89. The communicants submit that domestic case law has specifically approved this legislative gap, finding that no public participation is required, even where this is the only procedure applicable and the result is no public participation of any kind takes place (see paras. 30-33 above). The communicants submit that the decision of 30 March 2016, which extended the operation of reactor 1 indefinitely, and the 2016 Atomic Act's provision that future licenses shall be unlimited in time, seem likely to compound these deficiencies.[117]

90. Moreover, the communicants state that the legal framework of the Party concerned does not provide access to justice relating to reactors' lifetime extensions.[118] The communicants claim again that the lack of access to justice under section 65(2) of the

[110] Communication, para. 28.
[111] Communication, para. 29.
[112] Party's response to the communication, p. 3.
[113] Party's reply to Committee's questions, 8 February 2021, pp. 3-4.
[114] Communication, para. 30.
[115] Communication, para. 30, citing ACCC/C/2004/1 (ECE/MP.PP/C.1/2005/2/Add.1), para. 23.
[116] Communication, para. 31.
[117] Communication, para. 31.
[118] Communication, para. 31.

Code of Administrative Justice is attributable to the fact that the Party concerned has no party status in Atomic Act procedures.[119] Secondly, the communicants submit that the domestic courts have established that there is no way that the public concerned can demonstrate that its rights have been changed, nullified or reduced in a manner recognized under section 65(1) of the Code of Administrative Justice given that there are no participatory rights under Atomic Act procedures (at least those that only licence the continuance of activities).[120] The communicants claim that, by virtue of these rulings by domestic courts, "domestic law rejects that the Convention authorizes the public concerned to bring such appeals."[121]

91. The communicants argue that it is uncertain as to whether Atomic Act procedures could qualify as "subsequent procedures" under the EIA Act, and that "SONS tried to have such procedures expressly excluded during the course of amendments to the Czech EIA legislation, and there is a provision which could suggest such an exclusion."[122] They submit that, if the Party concerned were required to find that lifetime extensions must in fact be subject to an EIA, "it could still insulate itself here against public involvement in the future" what "could perpetuate the systemic failure to establish the legislative and other measures needed to implement article 6 and article 9, para. 2."[123]

92. The Party concerned submits that article 6 of the Convention is not applicable to the operating permit in question, and therefore concludes that article 3(1) is not applicable either.[124]

III. Consideration and evaluation by the Committee

93. Czechia deposited its instrument of accession on 6 July 2004. The Convention entered into force on 4 October 2004.

Admissibility

94. The communicants claim that the Party concerned does not provide for access to either administrative or judicial review procedures to challenge the lack of public participation in the decision-making on the Dukovany NPP (see paras. 79-84 above). To substantiate their claim, the communicants have provided examples of the unsuccessful attempts by Jihočeské matky, one of the communicants, to challenge an earlier 10-year extension to the operating permit for reactor 3 of Dukovany NPP granted in 2007.

95. The Party concerned has not contested the admissibility of the communication.

96. In the light of the outcomes of the various review procedures used by Jihočeské matky to challenge the 2007 extension and noting the Party concerned has not pointed the Committee to any other review procedures through which the communicants could clearly have challenged the indefinite operating permit at issue in this case, the Committee finds the communication to be admissible.

[119] Communication, para. 31.
[120] Communication, para. 32.
[121] Communication, para. 32.
[122] Communication, para. 34.
[123] Communication, para. 34.
[124] Party's response to the communication, p. 3.

Scope of consideration

97. The Committee notes that at the time of the submission of the communication, a permit for indefinite operation had been granted only to Dukovany reactor 1. The Committee recognizes that permits for the indefinite operation of reactors 2, 3 and 4 have been issued in the meantime. Since the public was also denied to participate in the decision-making on those permits, the Committee's conclusions in the present findings equally apply to reactors 2, 3, and 4. For ease of reference, however, the Committee focuses its examination in the present findings on reactor 1.

SONS' permit of 30 March 2016 granting indefinite operation of Dukovany reactor 1

Applicability of article 6

98. It is common ground between the parties that a nuclear power station is an activity listed in paragraph 1 of Annex I to the Convention.

99. It is also common ground that Dukovany reactor 1 was put into operation in 1985 and subject to 10-year operating permits. The last of these was due to expire on 31 December 2015. Following a three-month extension granted by SONS, that permit ceased to have effect on 31 March 2016. On 30 March 2016, SONS granted the NPP operator an indefinite period of operation to commence from 1 April 2016.

100. In its findings on communication ACCC/C/2014/104 (Netherlands), the Committee examined a licence amendment extending the operation of an NPP by a period of twenty years. In those findings, the Committee held:

> 65. ... It is also clear from the documentation that, without the 18 March 2013 decision, the plant was not permitted to operate beyond 2014. The Committee considers that the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity, be it a reduction or an extension, is a reconsideration or update of that activity's operating conditions. It follows that any decision permitting the nuclear power plant to operate beyond 2014 amounted to an update of the operating conditions.
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> 66. Based on the above, the Committee considers that the decision of 18 March 2013, by amending the licence to extend the design lifetime of the nuclear power plant until 31 December 2033, updated the operating conditions of the plant. Accordingly, under article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, mutatis mutandis, and where appropriate to that decision. In the present case, permission was granted to continue operating reactor 1 not merely for a further twenty years, but indefinitely. By definition, it follows from the above findings that the grant of an indefinite operating licence for an NPP requires the provisions of article 6(2)-(9) to be applied to that decision-making procedure.[125]

101. In the present case, the Party concerned does not dispute that the Dukovany NPP is an activity listed in paragraph 1 of annex I to the Convention and thus subject to article 6(1)(a) of the Convention. Likewise, it does not dispute that, without the operating permit granted by SONS on 30 March 2016, the first reactor of Dukovany NPP would have had to cease operations on 31 March 2016.

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[125] ECE/MP.PP/C.1/2019/3, paras. 65-66.

102. In line with its findings on communication ACCC/C/2014/104 (Netherlands), the Committee reiterates that the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity is a reconsideration or update of that activity's operating conditions. It follows that any decision permitting the first reactor of Dukovany NPP to operate beyond 31 March 2016 amounted to an update of the NPP's operating conditions.

103. Based on the foregoing, the indefinite operating permit granted by SONS on 30 March 2016 clearly updated the operating conditions for the first reactor of Dukovany NPP, an activity subject to article 6(1)(a) of the Convention. Accordingly, under article 6(10) of the Convention, the Party concerned was obliged to ensure that the provisions of article 6(2)-(9) were applied, mutatis mutandis, and where appropriate to that permit.

Mutatis mutandis

104. As the Committee has already clarified in previous findings,[126] in this context "*mutatis mutandis*" simply means "with the necessary changes". In other words, when applying the provisions of paragraphs (2)-(9) of article 6 to a reconsideration or an update of the operating conditions for an article 6 activity, the public authority must apply those paragraphs with the necessary changes.[127]

Where appropriate

105. The Committee has previously found that the clause "where appropriate" in article 6(10) does not imply complete discretion for a Party to determine whether or not to provide for public participation. In its findings on communication ACCC/C/2014/121 (European Union), the Committee held:

> Rather, this term introduces an objective criterion to be applied in line with the goals of the Convention, recognizing that "access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns", and "aiming thereby to further the accountability of and transparency in decision-making and strengthen public support for decisions on the environment".[128]

106. In its findings on communication ACCC/C/2014/104 (Netherlands), the Committee considered whether it was "appropriate", and thus required, to apply the provisions of article 6(2)-(9) on the decision-making to grant the licence amendment extending the NPP's operation by twenty years. In that case, the Committee held:

> The Committee considers that, except in cases where a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment, it is appropriate for extensions of duration to be subject to the provisions of article 6. In this regard, the Committee considers it inconceivable that the operation of a nuclear power plant could be extended from 40 years to 60 years without the potential for significant environmental effects. The Committee accordingly concludes that it was appropriate, and thus required, to apply the

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[126] E.g. ECE/MP.PP/C.1/2019/3, para 70.
[127] ECE/MP.PP/C.1/2019/3, para 70.
[128] Ibid.

provisions of article 6, paragraphs 2–9, to the 2013 decision amending the licence for the Borssele plant to extend its design lifetime until 2033.[129]

107. In the present case, the operating permit granted by SONS on 30 March 2016 did not merely permit the continued operation of the first reactor of Dukovany for a further twenty years, but in fact indefinitely. In accordance with its findings on communication ACCC/C/2014/104 (Netherlands), the Committee considers that it was "appropriate" and thus required, for the Party concerned to apply the provisions of article 6(2)-(9) to the decision-making on the 30 March 2016 operating permit.

108. Having found that the Party concerned was required under article 6 (10) to apply the provisions of article 6(2)-(9) to SONS' 30 March 2016 permit, the Committee considers that it is not necessary in the present case to examine whether article 6(1)(a) of the Convention would also apply to the March 2016 permit for reactor 1, either in conjunction with paragraph 1 or paragraph 20 of annex I to the Convention.[130]

109. The Party concerned does not dispute that there was no opportunity for the public to participate in the decision-making by SONS to grant the 30 March 2016 indefinite operating permit.

110. Based on the foregoing, the Committee finds that, by not providing for public participation meeting the requirements of article 6(2)-(9) in the decision-making to grant the first reactor of Dukovany NPP an indefinite operating permit, the Party concerned failed to comply with article 6(10) of the Convention.

Periodic safety reviews

111. According to the terms of its 30 March 2016 indefinite operating permit, the first reactor of Dukovany NPP is subject to ten yearly periodic safety reviews (PSR).[131] The legal framework of the Party concerned does not provide for public participation in the PSRs.

112. The communicants submit that the PSRs qualify as "reconsiderations or update of operating conditions" within the meaning of article 6(10) of the Convention.[132] The Party concerned disagrees with the communicant's position.

113. The Committee first determines whether a PSR should be considered as a "reconsideration or update of the operating conditions" within the meaning of article 6(10).

114. The Committee notes that the *IAEA Safety Standards for protecting the environment* explains the purpose of a PSR as follows:

> The objective of PSR is to determine by means of a comprehensive assessment:
>
> — The adequacy and effectiveness of the arrangements and the structures, systems and components (equipment) that are in place to ensure plant safety until the next PSR or, where appropriate, until the end of planned operation (that is, if the nuclear power plant will cease operation before the next PSR is due);

[129] ECE/MP.PP/C.1/2019/3, para. 71.
[130] See ECE/MP.PP/C.1/2019/3, para. 67.
[131] Communication, para. 4.
[132] Communication, para. 21.

— The extent to which the plant conforms to current national and/or international safety standards and operating practices;

— Safety improvements and timescales for their implementation;

— The extent to which the safety documentation, including the licensing basis, remains valid. [133]

115. The Party concerned submits that its PSR requirements reflect the IAEA standards. It cites, in particular, the IAEA's Specific Safety Guide, No. SSG25, Periodic Safety Review for Nuclear Power Plants 2012, and refers specifically to point 2.18 thereof, according to which a PSR consists of the following stages:[134]

— Preparation of the PSR project

— Conduct of the PSR

— Regulatory review

— Finalization of the integrated implementation plan

116. As to the regulatory review, point 2.18 states:

> The regulatory body should review the PSR report prepared by the operating organization and the proposed safety improvements, should identify any issues it wishes to raise (for example, whether further safety improvements need to be considered), should review the proposed integrated implementation plan and should determine whether the licensing basis for the nuclear power plant remains valid.[135]

117. It is plain from this statement, particularly the final limb, that the PSR procedure necessarily entails a determination by the regulatory body as to whether, in the light of its review of the PSR report, the NPP concerned should be permitted to continue to operate. This amounts to a decision, tacit or otherwise, under article 6. Accordingly, the requirements of article 6 (10) apply to that determination.

118. Indeed, referring to point 2.18, the Party concerned acknowledges that "a PSR report must go through a regulatory review by a regulatory body and the regulatory body determines whether the licensing basis and operating conditions for the nuclear power plant remains valid or unchanged".[136]

119. The Committee notes that article 6(10) of the Convention covers any type of reconsideration or update of a permit's operating conditions. Accordingly, any reconsideration or update of the conditions of the operating permit for Dukovany NPP is within the scope of article 6(10) of the Convention. While the duration of a NPP's operating permit is of a very different nature to its safety requirements, they are both operating conditions within the meaning of article 6(10).

120. Based on the foregoing, the Committee considers that, because of the "regulatory review" stage, a PSR is a "reconsideration" of the NPP's operating conditions within the meaning of article 6(10) of the Convention. Moreover, should the regulatory body's

[133] IAEA Safety Standards for protecting people and the environment. Periodic Safety Review for Nuclear Power Plants (2013), p.4, 5.
[134] IAEA's Specific Safety Guide, No. SSG25, Periodic Safety Review for Nuclear Power Plants, 2012, para. 2.18.
[135] Ibid.
[136] Party's comments on Committee's draft findings, p. 4.

review of the PSR report find that certain measures should be applied, those measures will constitute an "update" of the NPP's operating conditions within the meaning of article 6(10) of the Convention too. Accordingly, the Party concerned is required by article 6 (10) to determine whether or not it is "appropriate" and thus required, to carry out public participation under article 6(2)-(9) of the Convention on the 10-year PSRs for the Dukovany NPP.

Mutatis mutandis

121. As the Committee has already clarified in paragraph 104 above, "mutatis mutandis" simply means that when applying the provisions of paragraphs (2) – (9) of article 6 to a reconsideration or an update of the operating conditions for an article 6 activity, the public authority must apply those paragraphs with the necessary changes.[137]

Where appropriate

122. In its findings on communication ACCC/C/2014/121 (European Union), the Committee provided guidance on how the words "as appropriate" in article 6(10) should be applied in practice.

123. The Committee found that, "except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6(2)–(9) is 'appropriate' and thus required."[138]

124. In those findings, the Committee considered whether public participation was "appropriate", and thus required, during the reconsideration of a permit's conditions for operational safety requirements. The Committee held:

> …operational safety requirements are understood as intended to ensure the safe operation of an installation and serve to prevent impacts on humans and the surrounding environment. Accordingly, at least some of a facility's operational safety requirements will concern the facility's potential for having impacts on the environment, human health and safety.
>
> Based on the above, the Committee considers that where a public authority reconsiders and, where necessary, updates the operating conditions of an activity subject to article 6 of the Convention in order to meet operational safety requirements, except in cases where the reconsideration or update is not capable of significantly changing the basic parameters of the activity and will not address significant environmental aspects of the activity, public participation meeting the requirements of article 6 (2)–(9) is "appropriate", and thus required.[139]

125. In the present case, according to the IAEA, the periodic safety review should entail a "comprehensive assessment" of, among other things, the adequacy and effectiveness of the arrangements and systems in place to ensure the NPP's safety and its compliance with international and national safety standards. The IAEA also notes that the review of the PSR report by the regulatory body may result in certain further safety measures being applied as a condition for the NPP's continued operation.

126. The regulatory review stage of a PSR is accordingly "capable of changing the basic parameters" of the NPP, including determining whether the licensing basis and

[137] ECE/MP.PP/C.1/2019/3, para 70.
[138] ECE/MP.PP/C.1/2020/8, para. 108.
[139] ECE/MP.PP/C.1/2020/8, paras. 110-111.

operating conditions for the NPP remain valid or should be changed. The Committee therefore considers it is "appropriate" and thus required, for the Party concerned to apply the provisions of article 6(2)-(9) when carrying out the regulatory review of each 10-year periodic safety review.

127. In the light of the above, the Committee finds that, by establishing a legal framework that does not provide for public participation meeting the requirements of article 6(2)-(9) in each of the 10-year periodic safety reviews for the Dukovany NPP, the Party concerned fails to comply with article 6(10) of the Convention.

Article 9(2) – access to a review procedure to challenge decisions subject to article 6

Applicability of article 9(2)

128. Since the permit for indefinite operation for the first reactor of the Dukovany NPP and the 10-year periodic safety reviews are each subject to the requirements of article 6, it follows that the Party concerned is required to provide access to a review procedure to challenge the substantive or procedural legality of those decisions in accordance with article 9(2) of the Convention.

129. Pursuant to the first subparagraph of article 9(2), the review procedure may be a court of law or another independent and impartial body established by law, or both. The Committee examines below the extent to which the legal framework of the Party concerned ensures that members of the public concerned have access to either form of review procedure to challenge such decisions.

Access to a review procedure before an independent and impartial body established by law

130. Section 94 et seq of Act No. 500/2004 Coll. (Administrative Procedure Code) provides that members of the public may request administrative review of a decision by applying to the public authority concerned (see para. 24 above).

131. The Committee notes that in 2007 Jihočeské matky, one of the communicants, had sought administrative review of a SONS decision that had decided that Jihočeské matky was not entitled to participate in the administrative procedure under the 1997 Atomic Act to grant a 10-year extension to the operating permit for Dukovany reactor 3 (see para. 30 above). The review of the decision was taken by the President of SONS, the body responsible for taking the decision to grant the 10-year extension.

132. Review under article 9 (2) need not be before a court of law. However, in that case, there must be access to a review procedure before "an independent and impartial body established by law". The President of the SONS is clearly not independent and impartial from SONS itself, even if the President of the SONS is required by law not to have taken part in the decision-making on the decision subject to review.

133. Accordingly, since the review by the President of SONS is not independent or impartial from SONS, this procedure does not meet the requirement in article 9(2) to provide access to a review procedure before an independent and impartial body established by law.

134. Since the Party concerned has not pointed the Committee to any other independent and impartial body established by law through which members of the public concerned can challenge decisions under the 1997 and 2016 Atomic Acts subject to article 6 of the Convention, the Committee examines below the possibility for the public concerned to challenge the indefinite operating permit for Dukovany reactor 1 and the 10-year periodic safety reviews before a court of law.

Access to a review procedure before a court of law

135. The Committee notes that the combined effect of section 65(2) of the Code of Administrative Justice and section 19(1) of the 2016 Atomic Act (and equivalently previously section 14(1) of the 1997 Atomic Act) is that only the applicant, but no members of the public concerned, can challenge decisions, acts or omissions in licensing procedures under section 9 of the 1997 or 2016 Atomic Acts. This includes the operation of a nuclear installation and the carrying out of modifications affecting nuclear safety, technical safety and physical protection of a nuclear installation (see paras. 15 and 18 above).

136. In its findings on communication ACCC/C/2008/31 (Germany) the Committee found that, when there is a clear contradiction between the provisions of national law and the requirements of the Convention it is for the Party concerned to bring evidence to show that its courts interpret those provisions in conformity with the Convention.[140]

137. In the present case, the Party concerned cites decision no. 4 As 157/2013-33 of the Supreme Administrative Court as evidence that members of the public have standing under section 65(1) of the Code of Administrative Justice to challenge procedures under the 1997 and 2016 Atomic Acts even though they are not a party to those procedures.

138. In its decision no. 4 As 157/2013-33, the Supreme Administrative Court held that participation in an administrative proceeding under the Building Code cannot be stipulated as a condition for the applicant's standing under section 65(1) of the Code of Administrative Justice to bring an action against the decision resulting from that administrative proceeding. In its judgment, the Court asked itself "whether there can be any cases in which there would be a decision of an administrative authority that would infringe on the rights of someone who is not a party to the administrative proceeding".[141] The Court held that "although such a situation is extremely undesirable, it cannot be ruled out a priori that it may exceptionally occur".[142] It went on to hold that "it is therefore not decisive whether the entity concerned was treated as a party to the administrative proceedings or not, but whether the decision issued affected his legal sphere in the sense described above".[143]

139. The Committee understands that, based on the judgment of the Supreme Administrative Court, if a claimant can show that the decision affected its "legal sphere" then although "extremely undesirable" it may be "exceptionally" entitled to standing to challenge the decision even though it was not a party to the administrative proceeding. The Committee makes clear that providing standing to challenge decisions subject to article 6 as an exceptional occurrence falls far short of meeting the requirements of article 9 (2).

140. Moreover, as the Court itself states, the administrative proceeding under the Building Code in that case was subject to the public participation provisions of article 6 of the Convention.[144] That means that the requirements of article 9 (2) applied to that case, including that any NGO meeting the requirement of article 2 (5) should be deemed to have a sufficient interest and/or rights capable of being impaired and thus to have standing.

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[140] ECE/MP.PP/C.1/2014/8, para 79.
[141] Party's reply to Committee's questions, 8 February 2021, annex 4, para. 29.
[142] Ibid.
[143] Ibid.
[144] Ibid., para. 37.

141. The Supreme Administrative Court remitted the above case to the Municipal Court for its further consideration and the Committee has not been provided with the later judgment to know whether the Municipal Court indeed found that "legal sphere" of the NGO claimant was affected in that case. However, nothing turns on that point here, since that case was decided under the Building Code and it was acknowledged by the Court that the provisions of article 6 (and therefore article 9 (2)) applied.

142. In contrast, the core of the Party concerned's position that article 6 does not apply to the extension of the Dukovany NPP's operating permit or to the 10-year PSRs, and thus that article 9 (2), including its deeming provision granting standing to NGOs, does not apply either.[145] Furthermore, the Party concerned has provided no legislative provisions or case law to show to the Committee that the "legal sphere" of environmental NGOs can be affected by the extension of the Dukovany NPP's operating permit or the 10-year PSRs.

143. In the light of the foregoing, the Party concerned cannot therefore rely solely on decision no. 4 As 157/2013-33 of the Supreme Administrative Court as evidence that environmental NGOs have access under section 65(1) of the Code of Administrative Justice to challenge procedures under the 1997 or 2016 Atomic Acts.

144. Based on the above, the Committee finds that, by failing to provide environmental NGOs with access to a review procedure to challenge the substantive or procedural legality of decisions, acts and omissions under the 1997 or 2016 Atomic Act subject to article 6 of the Convention, the Party concerned fails to comply with article 9(2) of the Convention.

Article 3(1) – necessary legislative, regulatory and other measures

145. Article 3(1) requires each Party to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. While in paragraphs above, the Committee has found that the Party concerned fails to meet the requirements of article 6(10) and article 9(2) of the Convention, noncompliance with those provisions does not automatically result in noncompliance with article 3(1) of the Convention also. Rather, the communicants would need to show that the legal framework to implement these provisions was not clear, transparent or consistent. Since no evidence has been provided to the Committee that the Party concerned's legal framework is deficient in this respect, the Committee finds the allegation that the Party concerned fails to comply with article 3(1) of the Convention to be unsubstantiated.

IV. Conclusions and recommendations

146. 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

147. The Committee finds that:

(a) By not providing for public participation meeting the requirements of article 6(2)-(9) in the decision-making to grant the first reactor of Dukovany NPP an

[145] Party's response to the communication, p. 3.

indefinite operating permit, the Party concerned failed to comply with article 6(10) of the Convention;

(b) By establishing a legal framework that does not provide for public participation meeting the requirements of article 6(2)-(9) in each of the 10-year periodic safety reviews for the first reactor of the Dukovany NPP, the Party concerned fails to comply with article 6(10) of the Convention.

(c) By failing to provide environmental NGOs with access to a review procedure to challenge the substantive or procedural legality of decisions, acts and omissions under the 1997 and 2016 Atomic Act subject to article 6 of the Convention, the Party concerned fails to comply with article 9(2) of the Convention.

B. Recommendations

148. 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 requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned take the necessary legislative, regulatory, administrative or other procedures to ensure that:

(a) When the operating conditions of a permit issued under the 1997 or 2016 Atomic Act, or any legislation that supersedes the 2016 Atomic Act, are reconsidered within the meaning of article 6(10) of the Convention, the provisions of article 6(2)-(9) will be applied mutatis mutandis and where appropriate, bearing in mind the objectives of the Convention. This includes, but is not limited to, the reconsideration of the duration of the permit or the 10-year periodic safety reviews.

(b) Members of the public concerned meeting the requirements of article 9(2), including environmental NGOs, have access to a review procedure to challenge the substantive or procedural legality of decisions, acts and omissions under the 1997 or 2016 Atomic Act, or any subsequent legislation, that are subject to the provisions of article 6 of the Convention.