ÖKOBÜRO
ALLIANCE OF THE ENVIRONMENTAL MOVEMENT

Casebook Nuclear Advocacy

Case-Law on International Regulations in the Nuclear Sector

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OEKOBUERO is the alliance of the Austrian Environmental Movement. It consists of 19 Austrian organizations engaged in environmental, nature, and animal protection like GLOBAL 2000 (Friends of the Earth Austria), FOUR PAWS, BirdLife Austria, and WWF Austria. OEKOBUERO works on the political and legal level for the environmental movement.

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Content

Introduction

Due to their far-reaching impact, nuclear issues consistently raised significant compliance and implementation challenges with regards to two UNECE multilateral agreements, namely the Aarhus Convention and the Espoo Convention as well as EU legislation. Furthermore, while the two Conventions as well as European provisions on EIA and nature protection establish independent and differing obligations on the Parties or member states, the precise interactions and all potentials for synergies have to date not been fully clarified by the bodies set up to assist Parties with compliance, namely the Aarhus Convention Compliance Committee (ACCC) and the Espoo Implementation Committee (Espoo IC). This has resulted in a situation wherein the rules and best policies/courses of action for addressing transboundary environmental problems in this sector are unclear.

In order to gain an overview on the different decisions and approaches regarding assessment procedures and public participation, this casebook includes all relevant international cases related to nuclear activities. It aims to support better compliance and implementation with international provisions in the nuclear sector through an enhanced understanding of the legal and procedural issues involved, and the development of pragmatic solutions.

List of Abbreviations

ACCC ..... *Aarhus Convention Compliance Committee*
EC..... *European Commission*
ECJ ..... *European Court of Justice*
EIA ..... *Environmental Impact Assessment*
EIC ..... *Espoo Implementation Committee*
LTE..... *lifetime extension*
MoP / MOP..... *Meeting of the Parties*
NPP ..... *Nuclear Power Plant*

1. AARHUS CONVENTION

Mochovce NPP – Facing Decades-Old Issues

Body	**ACCC**
Case Number	ACCC/C/2009/41
Party / Member State	Slovakia
Date of Findings	17 December 2010
Relevant Legislation	Aarhus Convention, Article 6(4) and (10)
Communicant / Complainant	GLOBAL 2000/Friends of the Earth Austria

Background

On 1 July 2009 the communicant submitted a communication to the Compliance Committee alleging a failure by Slovakia to comply with its obligations under article 6 (1), (4) and (10) as well as article 9 (2), (3) and (4) of the Convention.

Firstly, the communication alleged that the Party concerned had failed to provide for public participation in the decision-making process regarding the Mochovce NPP (situated in Southern Slovakia, close to the Austrian, Czech and Hungarian borders). To be precise, three specific instances of decision-making by the Slovak Nuclear Regulatory Authority (*Úrad Jadrového Dozoru*; hereinafter, "UJD") were questioned in the light of article 6 (1), (4) and (10) of the Convention:

(a) Decision No. 246/2008 of 14 August 2008 to permit the change of construction of Mochovce NPP Units 3 and 4;
(b) Decision No. 266/2008 of 14 August 2008 to permit the implementation of changes in safety-related equipment during completion of the Mochovce NPP Units 3 and 4; and
(c) Decision No. 267/2008 of 14 August 2008 to permit the implementation of changes in the document "Preliminary Safety Report of NPP Mochovce Units 3 and 4".

The location permit for the project was issued in 1979, and the construction permit for the four reactors was initially issued on 12 November 1986, under the condition that construction be completed in 115 months. Two reactors, Mochovce 1 and 2, were finalized and started operating in 1989, whereas the other two, Mochovce 3 and 4, were only partially constructed. The work on these two reactors was curtailed in the early 1990's due to financial constraints. On 5 May 1997, the period for the completion of construction work under the construction permit was extended several times, at last to 31 December 2011. In 2007, Slovakia decided to complete the Mochovce NPP by finalizing and putting into operation reactors Mochovce 3 and 4. In May 2008 the developer applied for the three permits in question. The applications were approved by above mentioned UJD decisions.

Before the decisions were made, two organizations, Greenpeace Slovakia and Za Matku Zem, had filed their statements with UJD relating to the developer's application for construction changes, as parties to the proceedings in accordance with the general provisions of the Code of Administrative Procedure, and claimed that it was necessary to carry out the EIA and have the EIA final statement before the decision was issued by UJD. Their arguments were rejected on the grounds that these organizations did not fulfil the criteria necessary for organizations to participate in the proceedings. In September 2008, the Slovak Ministry of Environment decided that an EIA would be carried out not for the construction changes to the project, but for its operation, and that such an assessment would be finalized before the initiation of its operation. In the Communicant's eyes this was already too late, as the construction of the new reactors was already under way. The EIA process – which

allegedly was the only process providing for public participation – had only recently started and was scheduled to be finalized just before the new reactors started to operate. It should be noted that, according to Slovak law, the EIA procedure was not a permitting procedure in itself, although the results of the EIA procedure should be considered in subsequent permitting procedures.

Secondly, the communicant also alleged that, since it was not possible to appeal against the different decisions due to restricting standing requirements in Slovak law and by generally not providing for access to justice in environmental matters in its legislation, the Party concerned failed to comply with article 9 (2), (3) and (4) of the Convention.

Decision

Before introducing the findings, the core issues highlighted by the Committee shall be briefly addressed. Firstly, the Committee addressed the relation between the 1986 and 2008 decisions. It noted that while it is undisputed that NPPs are covered by article 6, the applicability of the Convention in the present case still must be clarified, as the Convention had not been applicable in 1986 -- but the UJD decisions were made in 2008 when the Convention clearly was applicable. The Committee then stated that the Party concerned was obliged to ensure public participation before the 2008 UJD decisions, if they amounted to a reconsideration or an update of the operating conditions or if the decisions concerned a change to or extension of the activity in accordance with annex I, paragraph 22, to the Convention. It was clear to the Committee that the UJD decision 246/2008 in itself -- but even more so in combination with decision 266/2008 and decision 267/2008 -- amounted to a reconsideration and update of the operating conditions.

Secondly, the Committee also had to deal with the topic access to justice and use of domestic remedies. Here, the Committee highlighted, that the regional court had not decided to inhibit the construction of the Mochovce NPP while the case was pending before it. In other words, the construction of the plant was being carried out despite the appeal for judicial review and its completion was possible before the court had made its decision. For these reasons, the Committee decided to examine the communication and not to await a possible decision by the national court. The general issues of lacking access to justice on the other hand, as brought up by the Communicant, were not considered by the Committee as it would not be appropriate to examine these claims not awaiting the outcome of the pending case.

Thirdly, the Committee dealt with the alleged failure to provide sufficient early public participation. While there was no opportunity for public participation in the decision-making leading to the three UJD decisions of August 2008, the EIA procedure that provided for public participation was carried out before the permit was given to put the Mochovce NPP into operation. The question was thus whether the opportunity for public participation in the EIA procedure after the construction permit was issued, but before the operation was permitted, was sufficient to meet the requirements of the Convention. Here, the Committee concluded that each party to the Convention has a certain discretion to design the decision-making procedures covered by article 6 (10), however would not allow the Party to entirely exclude public participation. Yet, within such procedures where public participation is required, it should be provided early in the procedure. A mere formal possibility, de jure, to turn down an application at the stage of the operation permit when the installation is constructed, is not enough to meet the criteria. In the present case the Committee was convinced that once the construction was carried out, many decisions could no longer be challenged by the public. For these reasons the Party concerned had failed to comply with article 6 as shown in the findings below.

The Committee found that by failing to provide for early and effective public participation in the decision-making leading to the UJD decisions 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning Mochovce NPP, the Party concerned had **failed to comply with article 6 (4) and (10)** of the Convention.

The Committee further recommended the Meeting of the Parties to advise the Party concerned to review its legal framework to ensure that early and effective public participation is provided for in decision-making when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions, in accordance with the Convention.

In Decision IV/9e, the Meeting of the Parties endorsed on its 4th session that by failing to provide for early and effective public participation in the decision-making leading to the decisions by the Slovak Nuclear Regulatory Authority concerning the Mochovce Nuclear Power Plant, Slovakia failed

to comply with article 6 (4) and (10) of the Convention. It recommended to review the legal framework to ensure that early and effective public participation is provided for in decision-making when old permits are reconsidered or updated, or the activities are changed or extended compared to previous conditions, in accordance with the Convention.

Impact

At the MOP5, the Committee reported that, according to the Party's reporting, there had been legislative amendments concerning permits under the Building Act and the Atomic Act as well as a judgement of the Supreme Court of Slovakia awarding Greenpeace Slovakia the status of a party with all rights in the proceedings relating to the construction of Mochovce reactors 3 and 4. The communicant had reported that Slovak legislation still only provided for public participation in the reconsideration or update of old permits only if an EIA was carried out, whereas no EIA had been carried out for the 2008 decisions. Thus, the Committee was not persuaded that, if similar decisions were taken again under the current legal framework, the public would be entitled to participate.

In a supplementary report, however, the Committee referred to the Party's statement concerning public participation. According to this statement, the Conventions requirements would be met in future new permits (or changes to existing permits) and if no EIA was carried out the public concerned could still participate in a permitting procedure according to the Administrative Procedure Code. The communicant stressed that public participation in a permitting procedure for a change of activity was conditioned on participation in a prior EIA and that authorities would refuse participation on the grounds that if special laws such as the Atomic Act regulate party status to proceedings the general law would not apply. Inter alia because this was not substantiated by practice examples or case-law, the Committee finally concluded that Slovakia had taken sufficient measures to implement Decision IV/9e.

Problematic NPP in Belarus

Body	**ACCC**
Case Number	ACCC/C/2009/44
Party / Member State	Belarus
Date of Findings	28 June 2011
Relevant Legislation	Aarhus Convention, Articles 4 and 6
Communicant / Complainant	European ECO Forum

Background

On 10 December 2009, the European ECO Forum submitted a communication to the ACCC alleging that Belarus had failed to comply with various obligations of the Convention in relation to a project to construct a nuclear power plant (NPP).

The communication concerned the planning and authorizing procedure for the construction of an NPP in Belarus. This communication incorporated, but was not limited to, all facts and allegations previously made in relation to the NPP by an Amicus Curiae Memorandum filed by European ECO Forum Legal Focal Point within communication ACCC/C/2009/37. To sum it up, the major points of allegations were the following:

Generally speaking, the communicant criticized the failure to take necessary legislative and regulatory measures to implement the provisions of article 6 (2), (3), (8) and (9) Aarhus Convention.

Regarding the NPP specifically, the Communicant also added the following: Firstly, the Party Concerned allegedly failed to provide sufficient information regarding the NPP. Between 2007 and 2009, four requests were made by different parties, all addressed to the Ministry of Energy or the Directorate for the Nuclear Power Plant Construction. The requests contained pleas for information about the phase of the project, location, and public participation as well as a request to access to the full EIA Report of the NPP in paper and electronic form. The authorities replied within one month, but the allegations were related to the accuracy of the information and the form in which information was provided.

Secondly, the Communicant alleged the failure to sufficiently involve the public. This included

- Not adequately informing the public about the decision in which the construction of the NPP was authorized: the public notice for commencement of public consultations was published only on the internet and in a local newspaper, and the EIA plan was not published in its entirety online, it was only the preliminary version of the EIA Report.
- Not ensuring early public participation: The Communicant alleged that the public consultations began at a late stage when most options were closed; the public was not given any possibility to discuss the non-NPP alternative, the choice of technology or the choice of location.
- Not providing all information relevant to decision-making: The brief EIA overview, as a basic document for the general public to understand the project, focused on two issues only (the location alternatives and the socio-economic benefits); and the EIA report provided to the public was much shorter (about 135 pages) than the so-called full EIA report (about 1,000 pages) which was never available to the public.
- Not allowing relevant NGOs to submit comments during organized hearings: As stated by the Communicant, there was only one public hearing in a small town organized on a Friday during work hours from 10 a.m. to 12 p.m.; NGOs then also struggled to enter because the room was full; they could not disseminate their copies of the NGO critique of the EIA because they allegedly had gotten confiscated and they were only given three minutes to speak.

Lastly, the communicant alleged that activists were pressured trying to promote their views on nuclear energy. This involved claimed incidents of defamation (leaflets distributed by unidentified individuals including contact details of two environmental activists), detention and house search of one environmental activist and arrest of a Russian expert when he tried to bring copies of the NGO critique of the EIA to the public hearings in Ostrovets. Allegedly, all cases were related to environmental activists carrying out awareness-raising activities on the potential effects of the NPP.

Decision

Before introducing its final findings, the main remarks of the Committee's consideration and evaluation shall be introduced – beginning with the alleged failure to provide information. As mentioned above, the authorities duly replied in all instances. The Committee further acknowledged that not all information provided was accurate and complete; nevertheless, the information provided might have reflected the current knowledge of the authorities, thus the authorities provided the information that was held by them at that time and Belarus did not fail to comply with the Convention. Regarding the alleged failure to give access to information in the form requested, the Committee recalled that article 4 (1) requires that "copies" of environmental information must be provided. In the Committee's view "copies" does, in fact, require that the whole documentation is available close to the place of residence of the person requesting information, or entirely in electronic form, if the person lives in another town or city. According to the facts presented in this case, access to information was restricted to the site of the Directorate of the NPP in Minsk only and no copies could be made.

Regarding the alleged failures involving public participation the Committee stated the following:

- Publishing the notice on the Internet as well as in the national (*Respublika and Sovietskaya Belorussia*) and local printed media (*Ostrovetskaya Pravda and Grodnenskaya Pravda*) would suffice. However, not giving a hint that the full EIA report, next to the preliminary EIA report, was also online, did not suffice the requirements of 6 (2).
- As for the alleged failure of 6 (4), the Committee has not been provided with any evidence that the public was involved, in forms envisaged by the Convention, in previous decision-making procedures which decided on the need for a nuclear power plant and selected its location. Once the decision to permit the proposed activity in the Ostrovets area had already been taken without public involvement, providing for such involvement at a following stage could under no circumstances be considered as meeting the requirement under article 6 (4) to provide for "early public participation when all options are open". This is the case even if a full EIA procedure is being carried out. This effectively reduced the public's input in many stages of the procedure, which resulted in the finding introduced below.
- The alleged noncompliance with article 6 (6) was also confirmed by the Committee, stating that the EIA report is a crucial document containing important details about a proposed project and the possibility to examine the full report is vital.
- Regarding the alleged noncompliance with article 6 (7) the Committee also confirmed the communicant's allegations stating that by making the developers rather than the relevant public authorities responsible for organizing public participation, including the collection of comments, the Belarusian legal framework was not in line with the Convention. Furthermore, organizers are not entitled to judge whether to allow the public to submit their comments and corroborating documents or not (also found in the findings). Here the Committee also wished to underline that any discussion in closed groups cannot be considered as public participation under the Convention – in order to meet the requirements, such a procedure must in principle be open to all members of the public concerned.

The Committee by itself brought up article 9 (1). It stated that, while there were no specific allegations concerning access to justice, in the light of the information regarding the use of domestic remedies, it observed redress procedures can be of economic nature, and therefore subject to rules for commercial disputes. This may well lead to limiting effective access to justice as required under article 9 (1).

In relation to the general legal framework the ACCC found that

(a) There is considerable uncertainty as to the participatory procedures applicable in case of nuclear activities;

(b) There is lack of clarity as to which decision is considered to be the final decision permitting an activity in terms of article 6 (9).

In relation to the NPP the Committee additionally found that

(a) By restricting access to the full version of the EIA Report to the premises of the Directorate of the NPP in Minsk only and by not allowing any copies to be made, it **failed to comply with articles 6 (6) and 4 (1)(b)**;
(b) By not duly informing the public that, in addition to the publicly available 100-page EIA report, there was a full version of the EIA report (more than 1,000 pages long), it **failed to comply with article 6 (2)(d)(vi)**;
(c) By providing for public participation only at the stage of the EIA for the NPP, with one hearing on 9 October 2009, and effectively reducing the public's input to only commenting on how the environmental impact could be mitigated, and precluding the public from having any input on the decision on whether the NPP installation should be at the selected site in the first place (since the decision had already been taken), it **failed to comply with article 6 (4)**;
(d) By not informing the public in due time of the possibility of examining the full EIA Report, it **failed to comply with article 6 (6)**;
(e) By limiting the possibility for members of the public to submit comments, it **failed to comply with article 6 (7)**.

Furthermore, the ACCC recommended, inter alia, ensuring the compatibility of and coherence between the general framework for public participation in decisions on specific activities (the general EIA legislation) and the framework for public participation in nuclear activities.

Impact

As the ACCC considered it too late for its consideration in 2011, the case was considered at the MoP's 5th session in 2014. By that time, Belarus had reported on different measures, inter alia the establishment of a minimum 30-day period for public discussion after public notice is given as well as the establishment of a working group for preparing proposals for the better implementation of the Convention. An observer informed the Committee that in September 2011, the President of Belarus had confirmed the Ostrovets site for the NPP within an edict and that the Directorate for Nuclear Power Plant Construction had selected the design and reactor type and signed the contract for its construction. These decisions, however, were not discussed with the public and no regard was taken of public opinions or suggestions. It was also reported that, in summer 2012, members of the public, including those involved in communication ACCC/C/2009/44 had been arrested and detained.[1] In 2013, Belarus reported that section 1 of its Regulations on the Conduct of EIA states that these Regulations also set out the EIA procedure, including consideration of transboundary impact, of proposed activities including activities in the field of nuclear energy. The Party also reported on several training on the Aarhus Convention held in 2013 and 2014.

In Decision V/9c, the MoP endorsed the recommendations of the Committee to

(a) Ensure that the amended legal framework clearly designates which decision is considered to be the final decision permitting the activity and that this decision is made public, as required under article 6 (9);
(b) Ensure that the full content of all the comments made by the public is submitted to the responsible authorities for taking the decision;
(c) Make appropriate practical and other provisions for the public to participate during the preparation of plans and programmes relating to the environment.

Although, in 2015, Belarus reported on an Action Plan for the Implementation of the Convention from 2014-2017, the Committee in its 1st Progress Review did not find that the requirements of Decision V/9c had been fulfilled. In 2017, it reported that article 15 (4) of the law "On state ecological experience, strategic environmental assessment and environmental impact assessment" does not make clear which public authority is responsible for making a final decision and that there had not been any information on legislation requiring that the final decision permitting an activity be made public. Regarding the second recommendation, Resolution No. 458 now laid down that the comments

[1] *Note*: This incident was at a later stage subject to Case ACCC/C/2014/102.

from the public are submitted in their entirety to the authorities competent to take decisions. The amended Law on Environmental Protection as well as Resolution No. 458 provided a legal basis for public participation on the preparation of plans and programmes related to the environment. Yet, the Committee emphasized that if Belarus were to deliberately set out to adopt the main programmes within the scope of article 7 just prior to the entry into force of the new provision to avoid giving the public the right to participate, such an approach would run directly counter to the spirit of the Convention.

In Decision VI/8c, the MoP concluded that the requirement of para 7(a) of Decision V/9c was not yet fulfilled. It furthermore concluded that Belarus had fulfilled the requirements of para 7(b) to submit the full content of all comments made by the public regarding the EIA report; however, it had not yet fulfilled these requirements with respect to comments on other information relevant to decisions to permit activities subject to article 6. The requirements of para 7(c) were met according to the Party's reporting.

In October 2021, the MoP adopted Decision VII/8c stating that Belarus has not yet met several public participation requirements of Decision VI/8c. The MoP furthermore expressed its grave concern that the situation for persons exercising their rights in conformity with the Convention in the Party concerned was rapidly deteriorating.

As a matter of urgency, Belarus was requested to take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure, inter alia, that:

- There are clear requirements to inform the public of its opportunities to participate in decision-making processes on activities subject to article 6;
- The content of the public notice required under article 6 (2) of the Convention includes, inter alia, the public authority responsible for making the decision to permit the proposed activity, the public authority from which relevant information other than the EIA report can be obtained and information on whether the activity is subject to a transboundary EIA procedure.

Legislative Gap in the Czech Republic?

Body	**ACCC**
Case Number	ACCC/C/2010/50
Party concerned / Member State	Czech Republic
Date of Findings	29 June 2012
Relevant Legislation	Aarhus Convention, Articles 6 and 9
Communicant / Complainant	Ekologický právní servis (Envnmt. Law Service)

Background

On 14 June 2009 the Communicant submitted a communication to the ACCC alleging a failure by the Czech Republic to comply with its obligations under numerous articles of the Aarhus Convention – even though the convention had been in force from October 4th, 2004 already. Among others the Communicant stated, that the law and practice of the Party concerned provides for a restrictive definition of who may be party in environmental decisions; and that the Party Concerned failed to comply with article 9 of the Convention because some acts and omissions are excluded from the possibility of a court review (see letter of communication, p. 11). This failure allegedly included that the scope of a reviewable act is influenced by the diverse regulation of the parties of the respective decision-making procedures. Regarding some of the procedures (among them the Czech Nuclear Act) the laws would explicitly state that only the applicant (i.e. the investor) has the position of a party. Therefore, only the applicant would have standing and no one else could ask the court to review the legality of decisions.

The Communicant underlined its statements with the example of the permits issued according to the Act No. 18/1997 Coll., "On Peaceful Exploitation of Nuclear Energy (Nuclear Act)". In article 14 para 1, the act would stipulate that only an applicant is party to the administrative procedures exercised according to it. Persons whose rights potentially could have been affected by such activities allegedly had no possibility to influence issuing the permits – nor access to judicial review. Lastly, the Communicant stated, that NGOs were in similar situation: Courts would conclude, that it wasn't necessary for NGOs to participate neither in procedures according to the Nuclear Act nor having access to court reviews of their outcomes.

Decision

The ACCC found, among other things, that:

- Through its restrictive interpretation of "the public concerned" the system of the Czech Republic failed to provide for effective public participation during the whole decision-making process, and thus was not in compliance with article 6 (3);
- The rights of NGOs (meeting the requirements of article 2 (5)) as well as the rights of the members of the public were too limited, to the extent that it resulted in a breach of article 9 (2);

The ACCC further recommended, that members of the public concerned (NGOs included) are allowed to effectively participate and submit comments throughout the decision-making procedure subject to article 6. Furthermore, NGOs fulfilling the requirements of article 2 (5), have the right to access review procedures regarding any procedures subject to the requirements of article 6, and in this regard, they have standing to seek the review of not only the procedural but also the substantive legality of those decisions.

The MoP endorsed the Committee's findings in Decision V/9f at its 5th session.

Impact

In its 1st progress report, the Czech Republic explained that European Commission had instituted an infringement procedure for incorrect transposition of the EIA Directive. The Party thus had prepared a legislative amendment to address both the European Commission's and the ACCC's concerns. The proposed legislative amendment included, inter alia that the term "public concerned" was explicitly defined and would include those natural persons who may be affected by a project. The public concerned would have the opportunity to take part in proceedings on an environmental authorisation and the right to challenge both the substantive and procedural aspects of that authorisation in court. It would further be able to challenge the authorisation in court with no requirement of prior participation (the submission of comments) in proceedings.

The communicant stated that the proposed amendments would not fully meet the recommendation set out in decision V/9f: Tenants would still be explicitly excluded from being parties of the permitting procedures and from standing to challenge the permits at courts. Moreover, the proposed amendments would introduce new requirements for environmental NGOs to participate in administrative procedures with a status of a party and/or challenge decisions in the courts, namely NGOs would either have to prove that they were active in environmental protection for more than 3 years, or gather at least 200 signatures supporting their participation in the administrative procedure or their lawsuit.

As the Committee had not been provided with the text of the proposed legislative amendments, it is not in a position to make any findings regarding the extent to which they fulfil each of the recommendations set out in decision V/9f. In its report to the MoP in September 2017, however, the ACCC considered that, although certain reservations concerning the rights of tenants and the access to information remained, in contrast to the legal situation at the time of the Committee's findings on communication ACCC/C/2010/50, the legal framework of the Party concerned now permits members of the public "to examine and to comment on elements determining the final building decision throughout the land planning and building processes". Accordingly, the ACCC found that the Party concerned has met the relevant requirements of decision V/9f. At this point, the communicant also agreed that the EIA Act now granted NGOs the possibility to challenge the procedural and substantive legality of decisions subject to article 6 without requiring them to be parties to the proceedings preceding the issuance of the challenged decision, which led to compliance with the second relevant requirement of Decision V/9f.

Restrictive Disclosure of Information regarding a New NPP in Romania

Body	**Aarhus Convention Compliance Committee**
Case Number	ACCC/C/2010/51
Party / Member State	Romania
Date of Findings	28 March 2014
Relevant Legislation	Aarhus Convention, Article 4 and 7
Communicant / Complainant	Greenpeace Central and Eastern Europe and Romanian Centre for Legal Resources

Background

On 2 September 2010 the communication alleged that the Party concerned had failed to comply with several provisions of the Convention. Specifically, the communication alleged non-compliance by the Party concerned with respect to three decisions: the decision to build a new nuclear power plant (NPP); the decision(s) regarding the location, technology, and other matters for the proposed construction of the NPP; and the adoption of Romania's Energy Strategy as a whole.

The first two decisions both addressed problems with a planned new NPP. A brief overview on the facts of the case shall be given: Articles in the press and statements of the Ministry of Economy, Commerce and Business Environment (Ministry of Economy) had informed the public about the exploratory studies commissioned by the Ministry regarding possible locations for a new NPP. Therefore, on 6 February 2009, the Communicant submitted a request to the Ministry of Economy to access information relating to the proposed NPP – mainly requesting the list of locations that were examined for suitability of the NPP, possible and preferred locations and copies of the official decision regarding the preferred locations. The Ministry did not respond to this request and the Communicant submitted a new request on 24 March 2009 – again, no response. In March 2009 the Communicant brought this matter to Court. The Bucharest Court ordered the Ministry to provide the requested information. But the court decision was appealed by the Ministry on grounds that the information was not "public information". Eventually, the Ministry declassified the list of the 102 locations studied at the beginning of the project, but not the rest of the information. In the meantime, in March 2011, the Court of Appeal decided in favor of the Ministry.

In October 2009 another press statement was made announcing four possible locations for the proposed NPP at Somes River. The Communicant reacted to this and submitted a third request for access to information about these possible locations, about the quantity of the water that could be used as a cooling agent and about the capacity that the new NPP could have. The Ministry responded to this third request declaring that the information requested was not public and that no decision had yet been made regarding the NPP. The Ministry stated that data regarding a new NPP in Romania is secret and needs to be supplemented until a decision can be made. In 2009 the communicant also brought this matter to the court. The Bucharest court decided in favour of the communicants request; the Court of Appeal, however, ruled that the requested information was not final.

Regarding the third issue, Romania's Energy Strategy, the communication alleged (among other things) that by not providing information in English, it had discriminated against public not residing in the country and that the remedies available were not adequate and effective.

Decision

The Committee considered and evaluated all the allegations made by the Communicant; before introducing its final findings the most important remarks deserve to be mentioned. Regarding the failure to respond to the first two requests the Committees opinion can quickly be told: the first two requests had been ignored. Authorities have to respond to requests of members of the public to access environmental information within one month after a request to information has been submitted.

Regarding the third request, on the other hand, the Committee stated that the authorities replied -- but refused to grant access. Authorities may refuse only if this exemption is provided under national law and, if national law allows such actions, that these exemptions are to be interpreted restrictively. Additionally, the Convention only allows refusal when the disclosure may adversely affect the confidentiality of proceedings of a public authority. Such proceedings relate to concrete events and do not encompass all the actions of public authorities. While national legislation may provide for the possibility to consider actions as confidential, it cannot treat all the actions undertaken by public authorities in relation to selecting feasible locations for an NPP as confidential. The criteria in legislation for such exceptions should be as clear as possible, so as to reduce the discretionary power of authorities to select which proceedings should be confidential. Taking all these considerations into account, the Committee noted, that neither in this document nor in any other document submitted by the Party concerned the public interest served by the disclosure was mentioned, nor was there any balancing between interests for and against the disclosure. The judgement of the Court of Appeal which overturned the judgement of the Bucharest court also did not include any discussion in this respect except for stating that pre-decisional studies should not be disclosed until authorities decided that it's ready to be disclosed.

Furthermore, the Committee evaluated if review procedures were effective, fair and publicly accessible. Here it has to be stated that most of the allegations made by the communicant were not substantive or the Committee did not see itself in a position to make any findings; therefore the Party concerned did not fail to comply with Art 9 (4).

Regarding the Energy Strategy the Committee stated that the Party concerned mostly acted in line with the Convention. The authorities did not discriminate against foreign members of the public in holding back translations and refusing to grant information in English. Art 3 (9) cannot be interpreted as generally requiring the authorities to provide a translation of the information into any requested language. If, on the other hand, national law provides for translations to different official languages, then Art 3 (9) implies that these translations must be handed out in a non-discriminatory way. In the present case, however, the Party concerned confirmed that at the time the public authorities had not held such a translation and the communicant did not provide evidence on the contrary. Not providing information in English cannot be considered discrimination in this case. But, lastly, the Committee found that participation in closed advisory groups cannot be considered as public participation meeting the requirements of the Convention. The draft 2007 Strategy was published on the Ministry websites, but the general public only had 11 days to get acquainted with the draft and submit comments.

Therefore, following mentioned reasons above, the Committee found that:

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

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

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

To conclude, the Committee recommended that the Party concerned should take the necessary legislative, regulatory and administrative measures to ensure that public officials are under a legal and enforceable duty. Also the Party concerned should provide adequate information and training to public authorities about the above mentioned duties.

Insufficient Public Participation regarding the Temelín NPP

Body	**ACCC**
Case Number	ACCC/C/2012/71
Party / Member State	Czech Republic
Date of Findings	13 September 2016
Relevant Legislation	Aarhus Convention, Article 6
Communicant / Complainant	Ms. Brigitte Artmann

Background

On 31 May 2012, the German communicant alleged that the Czech Republic had failed to comply with articles 3 (9), 6, and 9 of the Aarhus Convention by not granting the members of the affected public in Germany sufficient opportunity to participate in the decision-making procedure regarding the Temelín NPP.

At that time, reactors 1 and 2 at the Temelín site were already operating. The decision-making procedure in question concerned the additional reactors 3 and 4, for which the EIA process was launched in 2008. In accordance with the Espoo Convention, Germany was involved in all stages of the transboundary EIA process.

The Party concerned noted that the decision-making process at the time of the communication was still in its initial phase, whereas the permission phase had not yet been reached.

For the permitting procedure on the Temelín NPP, the reference to the public concerned in Czech Republic ("affected territorial self-governing units") in 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). In Germany, however, the public living in border districts was informed of the possibility to participate in the procedure. The information was available only on the official websites of the ministries and councils of the respective border districts and cities. The Czech Republic explained this by submitting that once the information was provided to the German authorities, it could not influence the manner in which they chose to inform the public.

In June 2012, an official hearing was held in the Czech town of Ceske Budejovice for Czech citizens and interested persons from neighboring countries. Also, informal discussions were organized in Vienna and Passau. The communicant stated that there was no proper notice for the public in Germany on the hearing in Ceske Budejovice. The public was given 30 days in August 2010, extended by a further 30 days in September, to comment on the EIA documentation of around 2,000 pages. The period to comment on the EIA expert report dated from 7 May until 18 June 2012. The official hearing thus was held four days after the period for written comments ended. It lasted from 10 a.m. until 3 a.m. the following morning. Apart from this fact, the communicant complained that the total number of questions per participant was limited. Although she had submitted her remaining questions in writing after the hearing, she never received any answer from Czech side.

Apart from the issues regarding information on the public participation procedure, the Communicant also criticized that the Czech Republic did not take proper account of the public's input in the EIA procedure and had chosen a compartmentalized "salami-slicing" approach regarding the NPP and radioactive waste storage. Regarding article 9, she noted that there were no opportunities for physical persons to challenge decisions, act or omissions regarding the EIA procedure and that the public had no right to bring actions during the subsequent procedures on the condition that they met the statutory requirements, e.g., they were affected owners of neighbouring plots.

Findings

As the entire decision-making procedure regarding the new reactors at Temelín had not been concluded, the Committee noted that it could only assess the already completed EIA procedure. The ACCC also did not consider the allegations regarding article 3 (8) and 9 arguing that the communicant did not provide sufficient evidence or case-law to substantiate these points.

Concerning the general application of article 6, the ACCC first noted that, also in line with the 2014 Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations), the obligation to ensure that the requirements of this provision are met always rests with the Party of origin. It further recalled its finding in Case ACCC/C/20006/16 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". Neither the notification requirements in the Czech EIA Act nor the Ministry's request to the German authorities had included a clear requirement to this effect.

The ACCC also stressed that in the case of decision-making on ultra-hazardous activities like an 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 to ensure that all those who potentially could be concerned have a reasonable chance to learn about the proposed activities and their possibilities to participate. Furthermore, for such an activity, members of the public may be affected or be likely 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 this regard, the ACCC noted the rather inconsistent approach of the Party concerned to defining the public concerned, as, for domestic purposes it was confined to the public living within a radius of 13 kilometres, whereas in Germany it included the public in the districts of Bavaria, more than 100 kilometres away.

Concerning **notifications**, the ACCC considered that, in case of ultra-hazardous activities it might be insufficient to rely on the affected territorial self-governing units using locally specific ways of informing the public. Also, a notice on the Ministry's webpage would not in itself be enough to ensure effective notification, as it is not reasonable to expect members of the public to proactively check that website on a regular basis. It also referred to the Maastricht Recommendations, which provide 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". The ACCC thus concluded that the Czech law did not contain a sufficient guarantee that in the case of decision-making regarding activities having clearly more than local scope 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, which led to **non-compliance with article 6 (2)**.

Regarding the very basic information about the hearing in Ceske Budejovice (only timing and venue), the ACCC found that, in order to adequately and effectively inform the public concerned of its opportunities to participate as required by **article 6 (2)(d)(ii)**, the Czech Republic would be in **non-compliance** with the Convention **if this hearing were to remain the last possibility** for the public concerned in Germany to participate in the permitting procedure.

According to the ACCC, a period of 60 days to comment on the EIA documentation and 43 days to comment on the EIA expert report were **sufficient to meet the requirements of article 6 (3)** and it would be unworkable if the Convention required Parties to entirely avoid organizing public participation procedures during other Parties' holiday periods.

The timing and duration of the hearing the ACCC found that organising a hearing in such a manner was not acceptable as the public cannot be expected to participate effectively if its opportunity to be heard comes only after it has been already sitting in the hearing for more than a full working day. However, this shortcoming could as well be rectified at a later stage of the permitting-procedure and thus **did not lead to non-compliance with article 6 (3)**.

The Committee noted that, according to the Maastricht Recommendations, if a particular tier of the decision-making process has no public participation, 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. 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 not be compatible with the Convention. It thus concluded

that if the permitting procedure were to continue and the public concerned was not provided with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6 (4). Likewise**, if the public authorities were provided with any further information relevant to the decision-making than that made available to the public concerned, that would amount to non-compliance with article 6 (6)**. It noted, however, that the time frame for submitting written comments 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 ACCC considered limiting the number of questions as an acceptable means for organising a hearing as further questions could be submitted in line with article 4. In the present case, however, it was not able to estimate whether the communicant's questions were in form of requesting information.

As the communicant did not make an allegation under article 3 (2), the ACCC did not make a finding regarding this provision and only expressed 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 ACCC recommended the Party concerned to provide a legal framework to ensure that when selecting means of notifying the public under article 6 (2), public authorities are required to select such means and to 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. It also recommended to ensure that, when conducting transboundary procedures in cooperation with the authorities of affected countries, the competent public authorities make the necessary efforts to notify the affected public in an effective manner.

The MoP endorsed the Committees findings and recommendations on the present case in Decision VI/8e.

Impact and implementation

By the time of the 1st progress review to Decision VI/8e and the ACCC meeting in March 2019, the Czech republic could not report on any measures taken that public authorities are required to select such means of notification to ensure effective notification of the public concerned. On the contrary:

- The duty to publish the information about the EIA procedures also by other means, such as via newspapers and other media, was cancelled in 2015.
- Regarding transboundary notification, the Czech Republic continued to claim that Czech authorities cannot exercise their power on the territory of another Party.
- Regarding public participation in subsequent procedures, the Czech Republic asserted that the conditions needed for NGOs to participate in the subsequent decision-making procedures on the Temelín NPP were the same for both domestic and foreign NGOs, namely that the organization must be "a legal person of private law whose principal activity is not business (or other profit-making activity) and whose activity set in its founding act is protection of the environment or public health." It must also have either been in existence for 3 years or be supported by at least 200 persons by their signatures. There was, however, no sufficient information on opportunities to participate for other members of the public concerned (apart from NGOs), inside and outside the territory of the Czech Republic. Neither did the Czech Republic provide evidence to show at which of the subsequent stages in the multistage decision-making procedure for the NPP the public concerned will be entitled to participate.

In October 2021, the MoP held in decision VII/8e that Czech Republic had not yet met the requirements of decision VI/8e, nor has made any apparent progress in that direction. Czech Republic was thus **repeatedly requested** to

- Demonstrate that it provides a legal framework to ensure that, when selecting means of notifying the public under article 6 (2), public authorities are required to select adequate means to 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;
- The necessary arrangements to ensure that:

- When conducting transboundary procedures in cooperation with the authorities of affected countries, the competent public authorities make the necessary efforts to ensure that the public concerned in the affected countries is in fact notified in an effective manner;
- There will be proper possibilities for the public concerned, including the public outside the territory of the Party concerned, to participate in the subsequent stages of the multistage decision-making procedure regarding Temelín NPP.

In the light of the lack of engagement and concrete action of the Czech Republic during the intersessional period, **the MoP decided to issue a caution to become effective on 1 January 2024, unless the Czech Republic has fully satisfied the conditions** set out in decision VII/8e.

Additional Reactors of the Mochovce NPP

Body	**ACCC**
Case Number	Aarhus Convention Compliance Committee
Party / Member State	ACCC/C/2013/89
Date of Findings	Slovakia
Relevant Legislation	9 June 2017
Communicant / Complainant	Aarhus Convention, Articles 4(4), 6(4), 9(2)

Background

The communication submitted on 10 June 2013 alleged non-compliance with the Convention's provisions on public participation and access to justice, specifically articles 3 (1), 6 and 9 (2)-(4) in the course of the decision-making on the extension of the Mochovce NPP.

On 14 August 2008, three permits were approved by the Nuclear Authority regarding the Mochovce NPP, including decision 246/2008 permitting the change of construction of Mochovce Units 3 and 4. In November 2008, Greenpeace Slovakia sought to appeal this decision on the ground that it was necessary to carry out an EIA, including public participation. The appeal of Greenpeace Slovakia was dismissed by the Nuclear Authority in April 2009 on the ground that Greenpeace Slovakia did not have standing in the proceedings. The Bratislava Regional Court confirmed this dismissal arguing that the permit did not deal with any activity subject to annex I and Greenpeace Slovakia did not have standing. On 27 June 2013, the Supreme Court annulled this second instance (appeal) decision and returned the case to the Nuclear Authority ordering to carry out and EIA and grant Greenpeace SK standing.

In August 2013, the Nuclear Authority restarted the proceeding and granted standing to the communicants. In autumn 2013, a Preliminary Safety Analysis Report and a Basic Design of Mochovce Units 3 and 4 were open for inspection at Mochovce in Kalna nad Hronom municipality. A repeated appeal decision No. 291/2014 was issued in May 2014 as well as a decision excluding suspensive effect of the appeal filed by the communicants in 2008. In October 2014, the Constitutional Court found that the rights of Slovenské elektrárne, a.s., had been violated by the judgment of the Supreme Court issued in favour of Greenpeace, but confirmed rather than cancelled that judgment because the appeal decision had already been issued by the Nuclear Authority.

The Communicant complained that even though the Supreme Court had clarified that the Convention was applicable, "no legislative measures were taken to regulate this in general rules, in particular for cases where old permits are updated and no EIA was required" and that the administrative appeal and court procedures took five years without any injunctive measures to halt the construction process.

Regarding access to information the communicant brought forward that the Slovak Nuclear Act significantly limited public access to nuclear-related information by stipulating that the Nuclear Authority may ban access to information if, in the opinion of that Authority, "its publication is likely to adversely affect public safety". In such cases the information is withheld as "sensitive information". In October and November 2013, the Nuclear Authority blacked out an important amount of the information in the Preliminary Safety Analysis Report and the Basic Design of the new Mochovce Units as sensitive information. Apart from Mochovce as the location for inspection of documents being difficult to reach from Bratislava, the communicant noted that the documentation was voluminous and no electronic version of it was available to the public concerned, despite the fact that the authorities had an electronic copy thereof.[2]

[2] *Note*: The Committee refrained from considering this allegation further, as the communicants did not demonstrate that they actually ever made a clear request for the Party concerned to provide the documentation in an electronic format.

The allegation of non-compliance with article 9 (3) was argued with the fact that if no EIA was conducted, members of the public may derive standing only through the general provisions of the Administrative Code. Slovakia countered that in the present case, standing according to article 9 (3) was denied only for the fact that the decision did not have an impact on the environment. Also, following the *Slovak Brown Bear Case*[3], the Slovak Ministry of Justice would have issued a directive guiding the authorities in granting standing to the public concerned in environmental proceedings, including in proceedings under the Nuclear Act.

Lastly, the communicants alleged that the courts did not necessarily address requests by the public concerned for an injunction to be granted and, moreover, that there would be no clear legal requirement for courts to do so, namely that Nuclear Authority decision No. 761/2013 excluded the suspensive effect of the appeal.[4]

Decision

Regarding article 4 (4) the ACCC noted that the Party concerned had not provided any evidence to show that its legal framework requires that the exemptions on disclosure in the Nuclear Act and accompanying legislation are to be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to emissions into the environment.[5] The Committee stressed that an approach where whole categories of environmental information are unconditionally declared as confidential and for which no release is possible is **incompatible with article 6 (6), in conjunction with article 4 (4)** and thus found Slovakia in non-compliance with the Convention to this regard.

The ACCC also noted that the Nuclear Authority refused access to the electronic version of the information because, among other things, the request filed by electronic mail was not accompanied by a certified electronic signature. The Committee found that requiring a certified electronic signature every time a request is filed by electronic mail would seriously limit access to information under article 4 and if that were the case the Party concerned would be in non-compliance with that provision. However, it did not have any evidence before it to establish whether this requirement is the standard practice of the authorities of the Party concerned when dealing with requests for access to information by electronic mail.

On article 9 (2), the ACCC found that, as the Supreme Court took a decision annulling the contested Nuclear Authority decision, the communicants were granted standing in the proceedings, which did not indicate non-compliance with that provision.

Regarding article 9 (3), the Committee noted that, in January 2015, an amendment to the Nuclear Act came into force whereby the requirement to participate in the EIA procedure in order to have standing was removed from the legislation. As the communicants acknowledged that no NGOs had tried to get standing in proceedings under the Nuclear Act since this amendment, they could not sufficiently substantiate their allegation that the Party concerned was in non-compliance with article 9 (3).

As no case law was provided to substantiate their allegation that courts systematically refuse applications for injunctive relief in cases related to the environment, the ACCC did not find Slovakia in non-compliance with Article 9 (4) in this respect. However, it emphasized that it is implicit from the wording of that provision that in a review procedure within the scope of article 9 the courts are required to consider any application for injunctive relief, bearing in mind the requirement to provide fair and effective remedies.

As the communicants solely referred to the Mochovce NPP case, the ACCC did not see a lack of clear and consistent framework to implement the provisions of the Convention according to article 3 (1).

It therefore concluded that **Slovakia had failed to comply with article 4 (4) and article 6 (6), in conjunction with article 4 (4)**

[3] Case C-240/09, *Lesoochranárske Zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej,* ECLI:EU:C:2011:125.

[4] *Note*: This last allegation was finally not considered by the ACCC on the grounds that introducing a new allegation at the time of the hearing neither gives the Party concerned due time to prepare a considered response nor permits the Committee to explore the allegation fully in the presence of both parties.

[5] It pointed out that the Nuclear Act required public authorities to take into account the public interest in *withholding* the information whereas the Convention requires authorities to do the opposite, i.e., to take into account the public interest in *disclosure*.

- by adopting an approach in the Directive on Sensitive Information whereby **whole categories of nuclear-related environmental information are unconditionally declared as confidential** and for which no release is possible and
- for **failing to require that any grounds for refusal are interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to emissions into the environment**.

The MoP endorsed the ACCC's findings in Decision VI/8i and recommended that Slovakia take the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that when providing access to nuclear-related information, any grounds for refusal under article 4 (4) are interpreted in a restrictive way and taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

Impact and implementation

Based on Slovakia's first progress report of October 2018 the situation remained unchanged. Slovakia provided no evidence that it has taken any legislative, regulatory or administrative measures and practical arrangements to ensure the implementation of Decision VI/8i regarding the findings in the present case.

Even more, in June 2019, the communicants reported on legal amendments which led to an even wider interpretation of "sensitive information" according to the Nuclear Act as well as amendments restricting possibilities to appeal in environmental matters.

In its final progress report regarding decision VI/8i, Slovakia reported that the Nuclear Regulatory Authority was currently drafting a new Nuclear Act which should represent a comprehensive amendment of the legislation applicable to the peaceful use of nuclear energy. To bring the legal framework into compliance with the ACCC's recommendations, certain exceptions from disclosure of information regarding the terms "telecommunication secrets", "postal secrets", "bank secrets", and "tax secrets" were deleted from the text of the proposed new Nuclear Act. The ACCC welcomed the proposed amendments and emphasized that the grounds for refusal set out in article 4 (3) and (4) of the Convention are exhaustive.

Slovakia also informed the ACCC that a **new paragraph had been added to the Directive**, after the definition of "sensitive information". It provides that, "**Each request for information shall be considered individually**. Any restrictions on access to information within the meaning of the above definition shall be interpreted in a restrictive manner, taking into account the public interest served by disclosure of environmental information and whether the information requested relates to emissions into the environment." The Directive now also provided, that "**in case the request for information concerns documentation which cannot be disclosed without restriction, the environmental information shall be made available after the removal of information which cannot be disclosed due to security reasons**."

The Committee welcomed the insertion of these provisions in the Directive on Sensitive Information. The ACCC also generally welcomed the constructive engagement of Slovakia and the quality of its reporting throughout the intersessional period. It found that **the Party concerned has met the requirements of decision VI/8i**.

Transnational Challenges regarding NPP Hinkley Point C

Body	**Aarhus Convention Compliance Committee**
Case Number	ACCC/C/2013/91
Party / Member State	UK
Date of Findings	19 June 2017
Relevant Legislation	Aarhus Convention, Article 6(2)
Communicant / Complainant	German citizen Sylvia Kotting Uhl

Background

On 12th June 2013 the communicant submitted a communication to the ACCC. She alleged that UK of Great Britain and Northern Ireland not only had failed to comply with article 6 (2), (5) and (7) of the Convention but also the Convention's requirements of non-discrimination. The reasoning behind this allegation was, that, according to the communicant, the Party concerned "did not provide the German public with opportunities to participate in a transboundary environmental impact assessment (EIA) procedure concerning the proposed construction of two third-generation nuclear reactors at Hinkley Point, known as Hinkley Point C."

On 18 July 2011, the Party concerned had adopted its National Policy Statement for Nuclear Power Generation. This Statement forms the Government's policy regarding nuclear new built and identified relevant sites. Within this Statement indicated Hinkley Point, a coastal headland in Somerset, south-west England, as a suitable location for new nuclear power plants.

On 2 December 2011, a registration period for the public to make presentations was announced. This period lasted 52 days. Altogether 1,197 persons registered as interested parties. On 18 September 2012, Austria requested to participate in the environmental impact assessment procedure of the Party concerned, invoking Article 3 (7) of the Espoo convention. Austria stated that, "(...) there is no convincing evidence that severe accidents with major releases of radionuclides can be excluded with certainty (...) Consequently, in case of certain beyond-design-based accidents Austria may be significantly affected by impacts of the NPP".

The communicant argued that article 6 of the Convention does not distinguish between participations for persons that live in the issuing country and persons of another country. Furthermore, she argued that if it was possible for Austria as party to the Aarhus Convention to request participation, members of the public concerned should have the same rights. If this was not granted, their rights would be dependent on the initiative of the government which would be incompatible with the concept of the Aarhus Convention interpreting the right to participate as an unconditional one.

At its forty-second meeting in Geneva September 2013, the Committee found that the communication was admissible. It was forwarded to the Party concerned which responded a few months after. One year later, in September 2014, the Committee held a hearing in its forty-sixth meeting with participation of both parties. After a multitude of questions and proceedings the Committee completed its draft findings and forwarded them to both Parties and the Committee before finalizing its findings on 19 June 2017.

Decision

The Committee found that:

(a) The UK failed to comply with Art 6 (2) of the Convention regarding the decision-making regarding Hinkley Point C by not ensuring that the public concerned in Germany had a

reasonable chance to learn about the proposed activity and the opportunities for the public to participate.

(b) Furthermore, the UK failed to provide a clear requirement in its legal framework to ensure that public authorities are bound to select such means which ensure that all those who potentially could be concerned have a reasonable chance to learn about the proposed activity.

The Committee recommended the Party concerned to put in place a legal framework to ensure the effective notification of the public concerned – inside and outside the Party's territory – always keeping in mind the nature of the proposed activity and the potential effects in case of an accident. When identifying the public concerned by the environmental decision-making on ultra-hazardous activities, such as NPPs, the precautionary principle must be applied.

The MoP endorsed the findings of the Committee in Decision VI/8k at its 6th session. It recommended the UK to ensure that, when selecting the means for notifying the public under article 6 (2), public authorities are required to select such means that will ensure effective notification of the public concerned in the territory outside of the Party concerned, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts. When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as nuclear power plants, the UK should ensure that public authorities apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

Impact

In its first progress report 2018, the Party reported that a "Planning Advice Note 12" had been introduced to ensure that "all Espoo and Aarhus states" would be informed of applications for nuclear power stations. This procedure had already been applied regarding the planned Wylfa Newydd NPP. The Committee asked the UK to report if public authorities are legally required to comply with this Advice Note and whether the failure to do so could be challenged. The ACCC further noted that the requirements of Article 6 apply to all activities that have potential for transboundary impacts, not limited to "Espoo and Aarhus States".

The Committee also stressed that is not sufficient to grant public access depending on the question whether the government on the state where a member of the public lives exercises its rights under the Convention. The Committee asked the Party to report on further steps that were taken to ensure that the public concerned was informed in an adequate and effective manner. In this respect it also noted that this includes not only the mediums through which the notice is to be conveyed, but also the language(s) in which this is done.

The UK reported that the relevant procedure was set out in "Planning Advice Note 12" (PAN 12), which applies to all Nationally Significant Infrastructure Projects, including NPPs. However, the ACCC concluded from its deliberations that this note did not represent a clear legal requirement. The ACCC further clarified that effective notification requires the notification of any members of the public "affected *or likely to be affected* by, or having an interest in, the environmental decision-making". Thus, it is not sufficient to restrict notification only to the public in other States in which a significant impact on the environment has been identified. The Committee also pointed out that ensuring adequate and effective notice in the transboundary context requires that all the information under article 6 (2) of the Convention is provided to the public concerned in the affected States, in their national languages.

In October 2021, the MoP reaffirmed decision VI/8k and requested the UK to, as a matter of urgency, take the necessary legislative, regulatory, administrative, and practical measures to put in place a clear requirement to ensure that:

- When selecting the means for notifying the public under article 6 (2), public authorities are required to select such means as to ensure effective notification of the public concerned in the territory outside of the Party concerned, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts;
- When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as NPPs, public authorities will apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small.

Transboundary EIA on NPP Hinkley Point C in Germany

Body	**ACCC**
Case Number	ACCC/C/2013/92
Party / Member State	Germany
Date of Findings	18 January 2017
Relevant Legislation	Aarhus Convention, Articles 3, 4, 6
Communicant / Complainant	Ms. Brigitte Artmann

Background

The communicant alleged in her communication of 24 June 2013 that Germany had failed to comply with the Aarhus Convention by not providing the public in Germany the opportunity to participate on the transboundary environmental impact assessment procedure regarding the construction of two new nuclear reactors at Hinkley Point C, UK. The communicant alleged inter alia that Germany failed to identify the public in Germany as being among the public concerned.

Regarding article 3 (1), the communicant alleged that Germany was in breach of the Convention by failing to take the "necessary measures" and "proper enforcement measures" required by that provision. For failing to "facilitate participation" as required in article 3 (2) the communicant brought up another argument for non-compliance with the Convention. The communicant also alleged that the public in Germany was not identified by the relevant authorities of the United Kingdom and the Party concerned as being among the public concerned in the case of a "beyond design base accident" and was therefore discriminated against.

In February 2013, the communicant had sent an email to the German Federal Minister for Environment, Nature Conservation, Building and Nuclear Safety requesting that the public of the Party concerned be given the opportunity to participate in an environmental impact assessment on Hinkley Point C. In March 2013, Germany informed the EIC on a lack of transboundary notification regarding the planned construction of NPP Hinkley Point C by the United Kingdom.[6] In December 2019, following the recommendations of the EIC, the UK wrote to Germany to ask whether the notification was still useful at the current stage of the development of Hinkley Point C. By letter of 9 March 2017, Germany replied, noting the interest of the German public in nuclear plants in the vicinity of Germany and stating that it considered that notification under the Espoo Convention would still be useful in order to provide an opportunity for the authorities and the public of other Parties to comment on the project.

Germany, inter alia, argued that there could be no violation of the Aarhus Convention by failure to demand a transboundary EIA process, if neither the Party of origin nor the potentially affected Party deem that a specific case requires the implementation of a transboundary EIA. Rather, the communicant's claims were governed by the Espoo Convention and that therefore the Espoo Convention would take precedence over the Aarhus Convention.

[6] See Case EIA/IC/CI/5.

Findings

Regarding non-compliance with article 6, the ACCC recalled its findings on communication ACCC/C/2012/71 (*Czechia*) in which it stressed that "whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the requirements of article 6 lies with the competent authorities of the Party of origin". As the decision on Hinkley Point C was to be taken by the UK and there was no transboundary procedure under the Espoo Convention or EIA Directive within which the German authorities were required to carry out tasks under a joint responsibility. The Committee thus found that Germany did not fail to comply with article 6.

Regarding a failure by Germany to comply with article 3 (1), the Committee found that the communicant had not provided sufficient evidence that Germany had failed to take the "necessary measures" and "proper enforcement measures" required.

The ACCC did not find that the fact that the public concerned in Austria was entitled to participate in a decision-making procedure carried out by the UK amounted to discrimination by Germany.

Regarding article 3 (2) the Committee first noted that there is nothing in the wording of the Convention to imply that the obligation to "endeavour to ensure that officials assist and provide guidance to the public … in facilitating participation in decision-making" applies only with respect to the authorities competent to take a decision under articles 6, 7 or 8 of the Convention. Likewise, there is nothing in its wording to imply that the obligation applies only with respect to decision-making procedures inside the Party concerned. Yet, the provision, according to the ACCC, "should not be interpreted as requiring a Party to necessarily always use all of the rights and competences that it has under international or national law with respect to a decision-making procedure in another country". However, the Convention requires a level of effort appropriate to the actions open to it in the particular context.

The Committee considered that, in the case of a formal notification from another country, when deciding whether to enter into a transboundary procedure under applicable international or EU regimes, a Party to the Aarhus Convention must take into account a strong interest of its own public in the outcome of the decision-making subject to the EIA procedure – even without a clear request from its public, when deciding whether to enter into the transboundary procedure. However, in the present case, Germany was not notified by the UK about the decision-making prior to the grant of development consent. Moreover, it was requested by the communicant to initiate a transboundary procedure only at the very end of February 2013. However, the ACCC noted that refusal by Germany of the communicant's request should have clearly demonstrated that due account had been taken of her concerns and not only of the views of the authorities. Also, at a minimum, it should have provided the links to where the relevant information and contact details concerning the national public participation procedure could be found on the UK website.

Finally, the ACCC referred to the obligation in article 3 (2) is to "endeavour to ensure" rather than "to ensure" and considered in particular the awareness of Germany that the decision on the Hinkley Point C NPP was required to be taken in less than three weeks after the communicant had addressed the Party concerned via e-mail. The Committee also noted that Germany had subsequently informed the UK that it wished to be notified for the purposes of a transboundary EIA procedure under the Espoo Convention.

The Committee therefore did **not find the Party concerned to be in non-compliance with the Convention**.

Note: In its findings the ACCC had revised his draft findings of 18 November 2016, according to which "by not undertaking any efforts to facilitate the participation of the German public in the decision-making procedure regarding Hinkley Point C in the face of a clear request from its public to do so, the Party concerned failed to comply with article 3, paragraph 2 of the Convention".

Inter alia it had argued that the right to participate in decision-making would be granted without discrimination as to citizenship, nationality or domicile and is related to environmental impacts of activities subject to the Convention. Such impact may occur across national borders. Thus, the obligation to "assist and provide guidance to the public...in facilitating participation in decision-making" would also apply to decision-making procedures outside Germany where German authorities are not competent to take decisions. The ACCC had stressed that, in the case of decision-making on

ultra-hazardous activities like a NPP, the obligation to take efforts to facilitate the public's participation in decision-making must be given particular weight.

The Committee had found that some efforts should have been undertaken by Germany to at least inquire with the UK what could be done to facilitate the participation of the German public. "If, as a result of those efforts, it ultimately became clear that nothing further to facilitate the participation of the German public could be done, the Party concerned's refusal of Ms. Artmann's request should have been well reasoned and clearly demonstrated that due account had been taken of her concerns and not only of the views of the authorities."

For its draft findings, the ACCC had also argued that the interest of the German public in decision-making regarding construction of NPPs had been well-known to the German authorities.

Harassment of Nuclear Activists in Belarus

Body	**ACCC**
Case Number	ACCC/C/2014/102
Party / Member State	Belarus
Date of Findings	18 June 2017
Relevant Legislation	Aarhus Convention, article 3(8)
Communicant / Complainant	Ecohome

Background

In its communication of 24 April 2014, Ecohome alleged Belarus' failure to comply with its obligations under article 3 (8) of the Convention. The allegations referred to different incidents involving Mr. Ozharovskiy, a Russian anti-nuclear activist, Ms. Novikova, a well-known anti-nuclear activist in Belarus, Ms. Sukhiy, the chair of the board of the communicant, Mr. Matskevich, a well-known human rights activist in Belarus as well as XX, another environmental activist to remain anonymous.

The reported incidents of 2009 involved search and seizure, detention, or arrest of Mr. Ozharovskiy. Regarding these incidents, the Committee noted that they were already brought before the Committee in the context of communication ACCC/C/2009/44. In its findings on that communication, the Committee had held that, based on the information provided, it could not assess with sufficient certainty what happened exactly and therefore refrained from making a finding on this issue. Therefore, it chose not to re-examine the same allegation again.

The Committee also chose not to evaluate the incidents referring to the anonymous "XX" involving, inter alia, search and detention in the year 2009 as well as search, seizure, and penalties in 2012. While not ruling out that there may be cases of alleged non-compliance with article 3 (8), where a Party concerned would be able to adequately respond to the allegations concerning its compliance without knowing the identity of the person concerned, it considered that this is not so in the present case.

One of the two remaining incidents evaluated by the Committee took place in July 2012: Mr. Ozharovkskiy and Ms. Novikova were arrested in Minsk, for committing a "public order violation by using obscene language on the street". Mr. Ozharovskiy was held in detention for 10 days and given a 10-year ban from entering Belarus. Ms. Novikova was held in detention for five days despite poor health after a serious illness and was allegedly denied access to her essential post-cancer medication during some of the period of her detention. Ms. Sukhiy and Mr. Matskevich were also arrested for committing a "public order violation by using obscene language on the street". Mr. Matskevich was held in detention for five days. Ms. Sukhiy was fined Rbl 1.5 million (approximately EUR 75). Mr. Ozharovkskiy and Ms. Novikova denied that they were using obscene language and stated that they were instead on their way to the Russian Embassy to present a petition concerning the proposed construction of the Ostrovets nuclear power plant. Likewise, Ms. Sukhiy and Mr. Matskevich denied that they were using obscene language on the street. Ms. Sukhiy stated that, after learning of the arrests of Mr. Ozharovskiy and Ms. Novikova forty minutes earlier, she was on her way to the Russian Embassy to present the petition in their place. Mr. Matskevich stated that he was on his way to provide legal assistance to Mr. Ozharovskiy and Ms. Novikova following their arrest.

The second chain of incidents occurred in relation to the annual Chernobyl Way, conducted on the anniversary of the Chernobyl nuclear accident in 2013: Ms. Sukhiy was stopped for a "documents check" on the street outside her apartment shortly before the start of the Chernobyl Way 2013 street action and detained until it was over. She was responsible for bringing posters and flags, etc., for the event. Ms. Novikova was blocked in Ms. Sukhiy's apartment due to the presence of police outside the apartment building for several hours until the Chernobyl Way 2013 street action was over. She was one of official organizers named in the application for the permit for the action.

Decision

The Committee first set out that to demonstrate a breach of article 3 (8), the following four elements must be established,

- One or more members of the public have exercised their rights in conformity with the provisions of the Convention;
- The member of the public or those members of the public have been penalized, persecuted or harassed;
- The penalization, persecution or harassment was related to the member(s) of the public's exercise of their rights under the Convention (*Note*: The Committee explained that the communicant must first establish a prima facie case that members of the public were penalized, persecuted or harassed because they sought to exercise their rights under the Convention. The burden of proof then moves to the Party concerned to show, on the balance of probabilities, that the penalization, persecution or harassment was entirely unrelated to the fact that those persons sought to exercise their rights under the Convention.);
- The Party concerned has not taken the necessary measures to fully redress any penalization, persecution or harassment that did occur.

Regarding the arrests for "using obscene language in the street" the Committee noted that a petition against a proposed activity that may have a significant environmental impact, such as a nuclear power plant, is a legitimate exercise of the public's right to participate in decision-making as recognized in the Convention. Likewise, a member of the public who provides legal assistance to persons seeking to exercise their rights in conformity with the provisions of the Convention is thereby taking part in these persons' exercise of their rights and is consequently entitled to protection according to article 3 (8). Given that Belarus did not dispute that the activists were seeking to deliver the petition to the Russian Embassy, the Committee considered it implausible that all four persons would risk the successful delivery of the petition by, within 40 minutes of each other, using "obscene language on the street". As the Party concerned stated that it "regards this as a politicized issue, since handing over a petition is a political act", the Committee concluded that it failed to demonstrate that the above arrests for "using brutal language on the street" were unrelated to the delivery of the petition. The ACCC therefore concluded that the described incidents led to a non-compliance of Belarus with article 3 (8).

Likewise, regarding the events during the Chernobyl Way 2013, the Committee pointed out that an authorized street action concerning an activity covered by the Convention, such as nuclear energy, constitutes a means through which the public can raise the awareness of public authorities and the wider public regarding their concerns about the potential environmental impacts of nuclear energy. Due to a lack of evidence to establish that Ms. Novikova was definitely present in Ms. Sukhiy's apartment at the relevant time, the Committee considered not to have sufficient evidence before it to make a finding with respect to this allegation. However, it did consider the allegations regarding the document check of Ms. Sukhiy: Although, the Party concerned stated that it had received reports of a group of 15 people consuming alcohol and engaging in disorderly conduct in the vicinity of Ms. Sukhiy's apartment and, during the check of the information received, Ms. Sukhiy and three other persons were subject to a documents check, it did not provide any explanation as to why the documents check needed to last for almost three hours, i.e., until just before the scheduled end of the Chernobyl Way 2013 event. Therefore the Committee concluded that the prolonged documents check of Ms. Sukhiy on 26 April 2013, which prevented her participation in the Chernobyl Way 2013 street action, constituted harassment, penalization and persecution in non-compliance with article 3 (8).

The Committee recommended the Party to

(a) Take the necessary legislative, regulatory, administrative, institutional, practical or other measures to **ensure that members of the public exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed for their involvement**;
(b) **Disseminate the Committee's findings and recommendations to senior officials in the police, security forces, judiciary and to other relevant authorities, for their information and action**, together with a request for them to disseminate the findings to all relevant officials in order to raise awareness of their obligation to ensure compliance with article 3 (8);
(c) Deliver **appropriate training and information programmes on human rights law relevant to article 3 (8) for police, security forces and the judiciary** to ensure that

members of the police and security forces do not exercise their powers in a manner, and identity checks and arrests for alleged public order violations are not utilized in a way, that would restrict members of the public from legitimately exercising their rights to participate in decision-making;

(d) Report to the Committee on an annual basis on all measures taken to fulfil the measures above.

In Decision VI/8c, the MoP at its 6th session welcomed the willingness of Belarus to accepts these recommendations and requested the Party to report on the measures taken to implement them.

In its first progress review on the implementation of Decision VI/8c, the Committee noted that the entry ban on Mr. Ozharovskiy and the court decisions convicting Ms. Novikova, Ms. Sukhiy and Mr. Matskevich of administrative offences have not been revoked, which lead to ongoing penalization, prosecution and harassment within the meaning of article 3 (8). The recommendations on communication ACCC/C/2014/102 and decision VI/8c had been disseminated to the ministries and relevant institutions. However, the Committee stressed the requirement to disseminate the Committee's findings and recommendations to "senior officials in the police, security forces, judiciary and to other relevant authorities" not merely for their information, but also for their action. Accordingly, dissemination of the findings and recommendations alone, without a request for further action, would not meet the requirements of Decision VI/8b. While training programmes and training materials for law enforcement officials had been elaborated, they were not yet actually delivered in practice to law enforcement officials (police) nor to security forces or the judiciary.

In its progress review, the Committee furthermore expressed it concerns that of thirty-five requests to hold public meetings, pickets and a demonstration received by the Brest City Executive Committee during 2018, only one application to hold a public meeting was approved.

On 31 August 2021, the environmental NGO Ecohome was liquidated in Belarus. In Decision VII/8c the MoP held in October 2021 that this constitutes a further incident of persecution, penalization and harassment under article 3 (8) of the Convention and that the silencing of a communicant actively engaged in the Committee's follow-up procedure is a particularly flagrant case of non-compliance with article 3 (8).

In this respect, Belarus was requested to

- Take the necessary legislative, regulatory, administrative, institutional, practical or other measures to **ensure that members of the public exercising their rights in conformity with the provisions of the Convention are not penalized, persecuted or harassed for their involvement** and
- Disseminate the Committee's findings and recommendations on communication ACCC/C/2014/1025 to senior officials in the police, security forces, judiciary and to other relevant authorities, for their information and action, together with a request for them to disseminate the findings to all relevant officials in order to **raise awareness of their obligation to ensure compliance with article 3 (8) of the Convention**.

In the light of the gravity of the situation, the MoP decided to suspend the special rights and privileges accorded to Belarus under the Aarhus Convention. This suspension shall become effective on 1 February 2022, unless the Party concerned has cancelled the liquidation of Ecohome and reinstated Ecohome's registration as a public association under the Act on Public Associations and has notified the secretariat of this fact.

In a letter of 8 November 2021 Belarus stated that the issue of Ecohome's liquidation was not sufficiently studied and that the Party thus found the ACCC's recommendation to be unreasonable. The ex-executive director of Ecohome objected these statements in her comments on the letter. In another letter, Belarus considered its withdrawal from the Convention unless the Committee would cancel Decision VII/8c.

Extension of Operating Time at Borssele

Body	**ACCC**
Case Number	ACCC/C/2014/104
Party / Member State	Netherlands
Date of Findings	21 January 2019
Relevant Legislation	Aarhus Convention, article 6
Communicant / Complainant	Stichting Greenpeace Netherlands

Background

The communicant alleged in its communication of 6 May 2014 a failure by the Netherlands to comply with article 6 of the Convention with regard to extending the operating time for the NPP Borssele. The original operating license issued in 1973 for the power plant had included a safety report based on a design lifetime of 40 years. In 1997, a restriction of the operational period until 2004 was entered into the operating license according to an agreement of 1994 between the Party concerned and the electricity producers' cooperative. As a reaction to court proceedings, the government announced in 2002 that the plant would close in 2013 instead.

In 2006, the government concluded an agreement with the operator to continue the operating period of the NPP Borssele until 31 December 2033 at the maximum followed by an amendment of the Nuclear Energy Act in 2010 according to which the licenses for the NPP would be revoked with effect from 31 December 2033. Since 1973, the operating license for Borssele had been amended several times, each time with an EIA and public participation. Conducted safety reviews involved public participation. In 2012, the Minister of Economic Affairs announced the preliminary decision to grant the extension of the design lifetime stating that no EIA would be necessary, because the extension did not concern an extension or modification of the design. Relevant documents were available for inspection for a period of six weeks and an evening information session was held in a town near Borssele. In 2013, the decision on the extension of the operating period was available for public perusal and interested parties could lodge an appeal. According to the communicant, the public consultation was limited to the issue of technical safety, excluding issues relating to the potential impact on the environment and that neither the agreement of 2006 nor the amendment of the Nuclear Energy Act in 2010 were subject to public participation procedures.

The Netherlands requested the ACCC to differ its consideration in the light of the ongoing parallel investigation of the EIC.

Decision

First, the ACCC stated that the present case concerned claims under the Aarhus Convention which are independent of whether a transboundary EIA was required under the Espoo Convention.

On the case itself, the ACCC first noted that neither the communicant nor the Party concerned excluded the possibility that article 6 (10) could potentially apply to the Borssele license amendment. It disagreed with the position of the Netherlands that the fact that the 1973 license was for an "indefinite" period means that the 2013 license amendment extending the design lifetime until 2033 was not a change in the plant's operating conditions and stated that the permitted duration of an activity is clearly an operating condition. Therefore, the ACCC did not find it necessary to consider the applicability of article 6 (1)(a).

The ACCC explained that the applicability of article 6 (10) led to the requirement to apply the provisions of article 6 (2)-(9) *mutatis mutandis*, i.e. "with the necessary changes", and *where appropriate*. This, however, does not mean that a Party has complete discretion to determine whether or not it is appropriate to provide for public participation. Plus, the discretion as to the

"appropriateness" of the application of the provisions of article 6 are even more limited if the update in the operating conditions might itself have a significant effect on the environment. The ACCC thus considered 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. The Committee accordingly concluded that it was required to apply the provisions of article 6 (2)-(9).

Regarding the applicability of article 6 (4), the ACCC recalled its findings in case ACCC/C/2007/22 (*France*) that this implies that, when public participation is provided for, the authority must be neither formally nor informally prevented from fully turning down an application on substantive or procedural grounds. The agreement of 2006, however, created an enforceable contractual obligation on the public authorities not to interfere with the plant's operation until 2033. Even if no compensation would be payable if the plant was closed before 2033 for not complying with the applicable safety requirements, the possibility for the competent authorities to refuse to grant the 2013 licence amendment solely on the grounds of nuclear safety does not equate to all options being open and the duration of the NPP until 2033 was already set prior to the 2012 public participation procedure. The ACCC thus concluded that, by not having at any stage provided for public participation, meeting the requirements of article 6, where all options were open, with regard to setting the end date for the operation of Borssele NPP, the Netherlands had **failed to comply with article 6 (4), in conjunction with article 6 (10)**.

Regarding article 6 (6), the ACCC noted that although an analysis on the consequences of ending or continuing the operation of the Borssele plant after 2013 would be highly relevant to any decision-making to grant a lifetime extension of that plant beyond 2013 it is not necessary to give the public concerned access to all available information relevant to a decision-making procedure carried out. Regarding article 6 (8), the ACCC commended the format used in the 2013 decision to summarize, group, and respond to the comments received from the public and considered that it may serve as a useful example on how to deal with comments received from the public in the text of a decision subject to article 6.

In its decision VII/8m the MoP endorsed the ACCC findings that, by not having at any stage provided for public participation meeting the requirements of article 6 when all options were open, in regard to setting the end date of 31 December 2033 for the operation of Borssele NPP, the Netherlands failed to comply with article 6 (4) in conjunction with article 6 (10) of the Convention with respect to the licence amendment of 18 March 2013. The MoP recommended to take the necessary legislative, regulatory and administrative measures to ensure that, when a public authority reconsiders or updates the duration of any nuclear-related activity within the scope of article 6 of the Convention, the provisions of article 6 (2) to (9) are applied.

Public Interest in Assessment Analysis of Paks II

Body	**ACCC**
Case Number	ACCC/C/2014/105
Party concerned / Member State	Hungary
Date of Findings	6 October 2021
Relevant Legislation	Aarhus Convention, articles 4, 5 (7)(a), 7
Communicant / Complainant	Greenpeace Association and Energiaklub

Background

The NGOs Hungarian Greenpeace Association and Energiaklub submitted a communication to the ACCC on 11 June 2014, alleging the failure of Hungary to comply with articles 3 (1), 4 (2) and (3) (c), 5 (7) and 7 of the Convention because of Hungary's plans to build new units at Paks NPP.

In 2006, Hungary issued its Energy Strategy 2030, which also contained the possibility of building additional units at Paks NPP before 2030. The parliament then gave its consent to start preparatory works for new NPP blocks in a resolution in 2009. The Parliament's decision was based on the Teller project, in which the MVM Hungarian Electricity Ltd. (MVM) examined the feasibility of a new nuclear power plant. Following the decision, the program ran under the name of Lévai project. In the same year, Energiaklub raised a complaint to the Constitutional Court, claiming that it was not clear enough, whether the resolution referred to preparatory works of the decision to permit these units or to the construction itself. The complaint failed. In 2011, the Parliamentary Ombudsman unsuccessfully required the government to publish the results of the EIA and to include the public in the preparatory work of the new units. Energiaklub also requested information on the Teller project and its continuation, the Lévai project. After several court procedures, it was granted by court decision to receive parts of the requested information.

In its communication, the communicant argues that Paks Ltd. and MVM were performing public tasks and were therefore obliged to provide information to the public, as they are public authorities according to article 2 (2) of the Convention. The communicant alleged a breach of article 4 (2) of the Convention, claiming that a delay of three years in providing information on the Teller project made some of the information superfluous. By the delay, participation in the decision-making was made impossible. Also, only parts of the information requested by the communicants were actually received. Regarding article 4 (3)(c), the communicants claim that authorities wrongfully applied the exception for materials in the course of completion since the refusal was based on the completion of the entire decision-making process. Referring to article 3 (1), the communicants submit that there are structural problems in their access to information that conflict with the Convention. They further state that there is a lack of institutional and procedural guarantees in the access to information and in tools to effectively implement decisions.

The communicants claim that the Party concerned did not act according to article 5 (7)(a) of the Convention by failing to publish, and denying access to, information on Teller and Lévai projects. They further submit that the concerned public was not granted participation in connection with the Resolutions 40/2008 (on the 2008-2020 Energy Policy), 25/2009 (consent to start preparatory activities) and 77/2011 (modification of Resolution 40/2008). In the case of Resolution 40/2008, public participation was limited to the draft energy policy paper but the studies, analyses, and materials the paper was based on were not published. Also, the actual resolution was not discussed with the public concerned. According to the communicants, it was furthermore not clear, whether and how any comments were considered. Finally, they claimed that the environmental assessment was not provided to the public.

Referring to Resolution 25/2009, the communicants claim that the proposal of the resolution was published only shortly before its adoption and its accompanying justification was too shallow. Only after the adoption it became clear that it was based on documents produced in the framework of the Teller project, which made any effective participation in the process of the preparation of the Resolution impossible.

Finally, the communicants claim that also the public participation on Resolution 77/2011 was flawed. The ACCC, however, did not include the last resolution into its scope, arguing that the communicants did not allege breaches with respect to this resolution (77/2011), but only in their subsequent correspondence to the Committee.

Decision

The ACCC first examined the applicability of article 2 (2) of the Convention. As Paks NPP plays a significant role in electricity production, both Paks Ltd. and MVM perform public responsibilities. Since NPPs fall under the scope of the Convention, the provided public service is considered "in relation to the environment". Both MVM and Paks Ltd. are indisputably under the control of a body falling within article 2 (2)(a) of the Convention. Accordingly, the ACCC found that Paks Ltd. and MVM are public authorities within the scope of article 2 (2)(c) and are therefore subject to the requirements of article 4 Aarhus Convention. Also, the ACCC found it clear that at least some of the information requested by the communicants was environmental information under article 2 (3)(b).

The ACCC thus concluded that the refusal to provide the requested information was a breach of article 4 (1) in conjunction with article 2 (2) of the Convention.

The ACCC made clear the "materials in the course of completion" in article 4 (3)(c) relates to the process of preparation of information or a document and not to an entire decision-making process. It thus considered the MVM's refusal to provide information merely because the Lévai Project was ongoing at the time a breach of article 4 (1) in conjunction with 4 (3)(c) of the Convention. The Party concerned referred to article 4 (4)(d) of the Convention, saying that the publishment of the requested information would disclose information that is confidential commercial and industrial information. The ACCC stated that this exemption must be applied restrictively considering the public interest in disclosure. Moreover, information on emissions that is relevant for the protection of the environment must be disclosed.

Concerning the delay in providing the requested information, the ACCC stated that this is an issue of adequate and effective remedies under article 9 (4) of the Convention rather than the time frame for responding to information requests under article 4 (2). As there were overlapping requests, the Committee was not in the position to determine the time frames in which the full set of information stemming from the original requests were actually provided. It therefore did not consider the delayed submission of information by the concerned Party a breach of articles 4 (2) and (7) or 9 (4) of the Convention.

Regarding article 5 (7)(a), the Committee stated that the concerned Party is not obliged to disclose all studies, analyses and materials that fed into the decision-making, but only information that "frames" the proposal. As the communicants requested too vaguely to publish "studies, analysis and material" resulting from the Teller project, the Committee found **the allegation regarding article 5 (7)(a) unsubstantiated**.

The Committee considered **Resolution 40/2008 a policy relating to the environment which is therefore within the scope of article 7** of the Convention. **Resolution 25/2009** has a different character, though, since it **concerns a specific project and does not provide a general framework**. It may fall, having the nature of a decision, under article 6 of the Convention. But as the communicators did not raise any concerns relating to article 6, the Committee did not make any finding in this regard.

The obligation to provide for public participation regarding policies is less strict than regarding plans or programs, but certain minimum obligations are imposed also on policies. In the concrete case, the draft energy policy and the "assessment analysis" were sent to the National Environmental Council (NEC) in accordance with article 44 (2)(a) of the Environmental Code. NGOs that participated in NEC had an opportunity to comment. This is, as the Committee stated, not a sufficient public participation as required by the Convention. The draft energy policy was then also published on the parliament website and the public was allowed to comment and take part in the discussion. The "assessment analysis", though, was not published. **Regarding the draft energy policy, the Committee found**

the requirements of Conventions met. But because of lack of public participation regarding the "assessment analysis", the Committee found a breach of article 7, final sentence, in conjunction with article 5 (7)(a) of the Convention.

The allegation of a breach of article 3 (1) of the Convention was found unsubstantiated.

Following the ACCC's findings, the MoP considered in its seventh session that **Hungary failed to comply with article 7, final sentence, in conjunction with article 5 (7)(a) of the Convention by not publishing the "assessment analysis" of the draft 2007-2020 energy policy** prepared under articles 43 (1) and 44 (2) of the Environmental Code. It therefore recommended Hungary to take the necessary measures to make the "assessment analysis" available to the public to effectively exercise participation possibilities according to article 7 of the Convention.

Lack of Participation and Access to Justice at Temelín?

Body	**ACCC**
Case Number	ACCC/C/2013/106
Party / Member State	Czech Republic
Date of Findings	1 November 2019
Relevant Legislation	Aarhus Convention, articles 6, 9
Communicant / Complainant	V havarijni zone jaderne elektrarny Temelín

Background

The communication submitted on 26 November 2013 alleged the failure by the Czech Republic to comply with its obligations under articles 6 (3) and (8), and 9 (2)-(4).

The communication inter alia referred to the Czech EIA Act, which was amended in 2015. Prior to this amendment, EIA procedures ended with a non-binding EIA opinion. Since then, EIA procedures end with the adoption of a binding EIA statement. The 2015 EIA Act also regulates "subsequent procedures" as procedures in which, pursuant to special regulation, a decision is to be issued which permits the location and implementation of a project under consideration by the 2015 EIA Act. Annexes 5 and 6 of the 2015 EIA Act state that the EIA statement must include a "settlement" of the comments received on the notification and on the expert report.

In 2008, the Communicant had participated in the planning permitting procedure for the construction of a spent nuclear storage facility, submitting a number of comments and objections. On 14 April 2008, the competent authority granted the planning permit for the facility. The communicant sought administrative review but its administrative appeal was dismissed on 18 July 2008. The Communicant challenged this dismissal in court and requested suspensive effect which was refused. On 27 October 2010, the Municipal Court in Prague agreed that the communicant's objections had not been dealt with by the appellate authority and remitted the case for another decision. At that time however, the building permit had already been issued on and development of the facility had commenced.

The Communicant had also brought a legal challenge demanding that its comments be taken into consideration in the subsequent building permit procedure which was rejected by the Municipal Court of Prague on 11 May 2010 as well as Supreme Administrative Court on 14 January 2013 on the grounds that the planning permit procedure is the only procedure under the Building Act in which the association had standing to participate.

The Communicant challenged the EIA opinion of the Ministry of Environment with respect to the construction of blocks 3 and 4 of the Temelín NPP. Its challenge was rejected by the Municipal Court of Prague the grounds that the opinion did not affect the communicant's legal interests. This ruling was upheld by the Supreme Administrative Court on 4 June 2013.

In a judgment of 19 August 2014, the Supreme Administrative Court held that unincorporated associations whose main role was to protect nature and landscapes were entitled to participate in building permit procedures.

Under the 2015 EIA Act, planning, building and change in construction procedures will involve decisions issued on the basis of a binding EIA statement and are hence subsequent procedures governed by that Act. The Communicant argued that the 2015 EIA Act did not give a definite answer on the question of whether procedures under the 1997 Atomic Act were considered as a subsequent procedure. The Party concerned stated that, in the context of the present communication, the relevant subsequent procedures were the planning and building procedures under the Building Act, the procedure for the placement of a nuclear plant, the procedure on the construction of a nuclear plant and the procedure for granting the nuclear power plant operating permits pursuant to the 1997 Atomic Act. It asserted that all of these procedures meet the definition of subsequent procedures as

defined in the 2015 EIA Act and accordingly the 2015 EIA Act's provisions on public participation apply to all of them. By email of 21 October 2016, however, observer OEKOBUERO stated that a pending amendment of the 2015 EIA Act would exhaustively list subsequent procedures and that procedures under the 1997 Atomic Act were not on the list.

The Communicant claimed that the Czech Republic was in breach of article 6 (8) by failing to ensure that in decision-making on NPPs due account is taken of the outcome of the public participation. It contended that the public concerned is excluded from participation in the building permit procedure and thus could not exercise its rights. The communicant also submitted that, while anyone could participate during the EIA procedure, no final decision was issued by the assessing authority which reflected the comments or suggestions of the public.

Regarding article 9 (2), the communicant submitted that under the Code of Administrative Justice, for a person to have legal standing to file a challenge, the person must either have a claim that its rights have been curtailed by an administrative authority's decision establishing, altering or abolishing rights or obligations, or a claim that its rights have been curtailed by an administrative authority's actions to such an extent that it could result in the adoption of an unlawful decision. In practice, access to justice, in most cases, would be restricted to persons that have already participated in the previous related administrative procedure in the matter. The Czech Republic countered inter alia, that article 9 (2) would not be "directly executable", arguing that Parties would have an obligation to ensure "a judicial or other independent and impartial review of substantive or procedural legality" and that standing requirements had to be determined in accordance with national law and with the objective of wide access to justice.

The communicant also claimed that the Czech Republic systematically and consistently prevented members of the public concerned from access to court review of the most significant administrative procedures through which decisions are adopted on crucial issues of approval for the commissioning of nuclear facilities or the construction of storage of spent nuclear fuel. The Czech Republic submitted that, for the same reasons as article 9 (2), article 9 (3) would not be "directly executable".

The communicant further submitted that the law of the Party concerned is in conflict with article 9 (4) because court proceedings take a long time, frequently lasting for more than 1 or 2 years before a court would even order a trial and because there were no statutory deadlines within which courts must decide a case. Furthermore, filing an action against a decision adopted by the administrative authorities would not have suspensive effect under the Administrative Procedure Code.

Decision

The Committee found that a number of the Communicant's allegations are not substantively different from those examined regarding communication ACCC/2010/50. It thus stated that it will accordingly examine any further information received from the communicant regarding those points in the context of its follow-up on Decision VI/8e. In line with its practice, the Committee did not examine the compliance of legislative drafts not yet adopted, such as the draft amendments to the Building Act or to the 2015 EIA Act.

The Committee noted the statement of the Party concerned that the regulation in the 2015 EIA Act of public participation in subsequent procedures takes precedence over the regulation of public participation in the legislation under which these procedures are conducted. As it is already examining the issue of whether procedures under the Atomic Act are treated as subsequent procedures for the purposes of the 2015 EIA Act in the context of its review of Decision VI/8e, the ACCC did not examine OEKOBUERO' claim concerning the pending amendment of the 2015 EIA Act.

The Communicant had presented cases to prove the restriction pf public participation in practise. But as these all referred to the legal situation before the adoption of the 2015 EIA Act, the ACCC found that the allegations regarding article 6 (1) and (3) were not substantiated.

According to the ACCC, the Communicant did not provide any evidence that comments would continue to be rejected for formal reasons despite the 2015 EIA Act, the Committee could not conclude in the abstract that the system instituted through the 2015 EIA Act would lead to such a result. Also regarding other allegations concerning article 6 (8), the Committee found that the communicant did not substantiate its allegations sufficiently.

As the Czech Republic had stated that, while it is not immediately possible to challenge the binding EIA statement itself, the EIA statement are fully reviewable within an appeal against any subsequent decision , the Committee considered that there is nothing in the Convention to prevent Parties from

establishing such a system as long as all relevant claims can still be brought when challenging the subsequent decision and that adequate, effective and timely remedies are available.

Since the Communicant had not provided any examples of court decisions (issued after the entry into force of the 2015 EIA Act) in which the public concerned have been denied the possibility to challenge a substantive defect in a permitting procedure within the scope of article 6, the Committee found the allegation to this regard as well to be unsubstantiated.

Regarding article 9 (3), the ACCC concluded that the Communicant had not identified any provisions of national law relating to the environment which it claims were contravened but could not be challenged through administrative or judicial procedures.

Regarding article 9 (4), the ACCC noted that the Convention does not necessarily require Parties to set out in law specific timeframes within which the courts must decide cases. Thus, the Committee does not find the Party concerned to be in non-compliance with article 9 (4) for failing to set statutory deadlines within which the courts must decide a case. It further noted it does not consider automatic suspensive effect to be necessarily required – "although it can be a very useful mechanism through which to prevent environmental damage". Neither had the communicant provided evidence that the courts of the Party concerned are applying the provisions of the 2015 EIA Act in a manner that denies injunctive relief in cases where the execution of the challenged planning permit may cause environmental damage or that it often takes 1-2 years before a court schedules a hearing in an administrative proceeding.

Hence, the Committee did not find the Czech Republic to be in non-compliance with article 6 or 9 in the circumstances of the present case.

Challenging state aid for Hinkley Point C

Body	**ACCC**
Case Number	ACCC/C/2015/128
Party / Member State	European Union
Date of draft Decision	17 March 2021
Relevant Legislation	Aarhus Convention, article 9
Communicant / Complainant	ÖKOBÜRO, GLOBAL 2000

Background

On 9 March 2015, the Austrian NGOs GLOBAL 2000 and ÖKOBÜRO submitted a communication alleging the failure of the European Union to comply with its obligations under the Convention for a failure to provide access to justice against a decision on state aid for the British nuclear reactors Hinkley Point C.

In 2013, the UK had notified the EU Commission of three aid measures to support the Hinkley Point C NPP. The EC decided to initiate a formal investigation procedure on the aid measures. On 8 October 2014, the EC adopted the decision stating that the aid measures constituted state aid within the meaning of article 107 (1) Treaty on the Functioning of the European Union (TFEU). The EC further examined those measures and declared them to be compatible with the internal market pursuant to article 107 (3)(c) TFEU, authorizing their implementation. On 6 July 2015, the Republic of Austria lodged an action for annulment of that decision. In its judgement in case C-594/18, the ECJ, inter alia, made remarks on the principle of protection of the environment, the precautionary principle, the "polluter pays" principle and the principle of sustainability.[7]

Regulation (EC) No 1367/2006 (Aarhus Regulation) is intended to implement the mandates of the Aarhus Convention within the EU. Its article 10 (1) provides that NGOs meeting certain criteria are "entitled to request an internal review to the EU institution or body that has adopted a certain administrative act under environmental law or, in the case of an alleged administrative omission, that should have adopted such an act." This provision is meant to implement the specific obligations under article 9 (3) Aarhus Convention. However, the Aarhus Regulation's article 2 (2)(a) expressly excludes state aid determinations from its definition of challengeable acts. Therefore, NGOs did not have a possibility to challenge the EC's decision on state aid for Hinkley Point C.

Decision

Tthe ACCC found this situation to be in non-compliance with Article 9 (3) and (4) of the Convention. The Committee held, inter alia, that the European Commission, as an institution of the EU, is a "public authority" under article 2 (2) Aarhus Convention. Therefore, the provision of article 9 (3) is also applicable to its decisions. It referred to the recent judgement on state aid for Hinkley Point C in case C-594/18 P (*Austria v Commission*). In this ruling, the Court of Justice of the European Union (CJEU) noted that state aid decisions need to respect the general principles of environmental protection embedded in articles 11 and 194 (1) TFEU. The ACCC thus concluded, "that a decision on state aid measures by the Commission may contravene EU environmental law, and that this is the case regardless of the justification given for the aid provided by the member State."

The Committee also clarified that a right to ask the Commission to carry out an investigative procedure cannot be regarded as a right to challenge a decision as stipulated in article 9 (3) of the Convention. It recalled its findings in case ACCC/C/2008/32 (*European Union*), according to which neither the system of preliminary ruling nor the possibilities for members of the public to bring an

[7] See case sheet below, on p. 65.

annulment procedure under article 263 (4) TFEU, as currently interpreted by the ECJ, can meet the requirements of article 9.

As the draft amendment to the EU Aarhus Regulation published in the end of 2020 did also not provide for access to justice on state aid decisions, the ACCC recommended the EU to "take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on state aid measures taken by the European Commission under article 108 (2) TFEU which contravene EU law relating to the environment, in accordance with article 9 (3) and (4) of the Convention."

At the MoP in October 2021, the EU acknowledged the concerns expressed in the findings adopted by the Committee in case ACCC/C/2015/128. According to the EU, this should be understood as an expression of the need for the EU to fully assess and understand the implications of the findings, assess the options available and to determine the appropriate course of action. Before having concluded this work, the EU would not be able to accept a decision on the endorsement of these findings. In the spirit of reaching consensus, the MoP thus exceptionally decided to postpone the decision-making on the Committee's findings and recommendations on communication ACCC/C/2015/128 to the next ordinary session of the Meeting of the Parties to be held in 2025. The MoP also requested the ACCC to review any developments that have taken place regarding the matter, and to report to the MoP accordingly.

Lifetime Extension of the NPP Dukovany

Body	**ACCC**
Case Number	ACCC/C/2016/143
Party / Member State	Czech Republic
Date of draft Findings	26 July 2021
Relevant Legislation	Aarhus Convention, articles 6, 9
Communicant / Complainant	ÖKOBÜRO, GLOBAL 2000, et al

Background

On 31 October 2016, Austrian environmental NGOs ÖKOBÜRO 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, submitted a communication to the ACCC alleging non-compliance with articles 3 (1), 6 (1) to (10) and 9 (2) of the Convention regarding the extension of the lifetime of nuclear reactors of Dukovany NPP.

Dukovany NPP has four pressurized-water reactors, all VVER 440/213 units are of Soviet design. Reactor 1 was first commissioned in 1985 and has been in operation since then, making it the oldest reactor in the Czech Republic. Reactors 2 and 3 went into operation in 1986. Reactor 4 went into operation in 1987. Until March 2016, he State Office for Nuclear Safety (SONS) had issued permits for 10-year periods. Dukovany NPP is located 30 km south-east of Třebíč, Czechia, about 40 km from the Austrian border and 175 km from the German border.

The reactors' original expected lifetime was 30 years. This original expected lifetime for the different reactors expired in 2015 and 2016, and 2017, respectively. In 1996, the project promoter (CEZ) had begun preparations to extend the four reactors beyond their original expected 30-year lifetimes. SONS required CEZ to meet the basic requirements for normal operational licences and to take additional measures on the NPP's ageing effects. These measures to address the ageing effects included a strategy for long-term operation (LTO) 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. In order to meet these requirements, CEZ submitted to SONS a Quality Assurance programme as well as different strategies. 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.

On 30 March 2016, SONS granted permission to extend the operation of reactor 1 indefinitely. According to the terms of the permit, CEZ continues to be subject to Periodic Safety Reviews (PSR) every ten years. Similar permits for indefinite operation were later issued for the other three reactors. Only the applicant CEZ could participate in the permitting procedure authorizing the extension of reactor 1 beyond its original 30-year lifetime. The communicants submitted that no public participation was provided for either the domestic or foreign public concerned during any of the phases of the decision-making process regarding the lifetime extension of Dukovany NPP reactor 1. Furthermore, there was no access to justice for the public concerned to defend its rights and interests with respect to the procedures in question.

The communicants claimed 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. They further stated that even if "proposed activity" is interpreted as having the additional requirement that the activity be somehow new, the extension of an NPP's lifetime is a new activity. They claimed that operating an NPP within its designed lifetime has its own parameters and poses its own – quite significant – environmental risks. Operating a NPP (potentially indefinitely) beyond that designed lifetime has different parameters and poses a host of new and greater environmental risks. The Czech Republic submitted that the word "proposed" in article 6 (1)(a) indicates that the activity has not yet

been permitted or constructed and its operation has not yet commenced. Since the Dukovany NPP had been in operation for over 30 years, according to the Czech Republic, it could not be considered to be a proposed activity, as the activity has been continuously performed since the 1980s.

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. Other than regarding procedures according to the Atomic Act, the administrative proceeding under the Building Code in that case was subject to the public participation provisions of article 6 of the Convention.

Decision

At the time of the submission of the communication, a permit for indefinite operation had been granted only to Dukovany reactor 1. The Committee recognized that permits for the indefinite operation of reactors 2, 3 and 4 had been issued in the meantime. Since the public was also denied the opportunity to participate in the decision-making on those permits, the Committee noted that its conclusions equally apply to reactors 2, 3 and 4. For ease of reference, however, the ACCC focused its examination on reactor 1.

In line with its findings on communication ACCC/C/2014/104 (*Netherlands*), the ACCC reiterated 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.

The ACCC thus found that the Czech Republic was required to apply the provisions of article 6 (2) to (9) to the SONS 30 March 2016 permit. Under these circumstances, the Committee did not consider it necessary to examine whether article 6 (1)(a) of the Convention would also apply to the case (either in conjunction with paragraph 1 or paragraph 22 of annex I to the Convention).

By referring to the IAEA Safety Standards for protecting people and the environment, the ACCC noted 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.

The ACCC also made 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).

Since no evidence had been provided to the ACCC that the Czech legal framework is deficient regarding clarity, transparency, and consistency, the ACCC found the **allegation that the Czech Republic failed to comply with article 3 (1) of the Convention to be unsubstantiated**.

The ACCC, however, found that, **by not providing for public participation meeting the requirements of article 6 (2) to (9)** in the decision-making to grant the first reactor of Dukovany NPP an indefinite operating permit, the Czech Republic **failed to comply with article 6 (10) Aarhus Convention**. A lack of compliance with article 6 (10) was also noted, because the Czech Republic **failed to establish a legal framework that provides for public participation meeting the requirements of article 6 (2) to (9) in each of the 10-year periodic safety reviews** for the first reactor of Dukovany NPP.

The ACCC furthermore found 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 Czech Atomic Acts subject to article 6, **the Party concerned fails to comply with article 9 (2) of the Convention**.

In October 2021, the MoP endorsed the Committee's findings regarding the Czech Republic. It recommended that the Czech Republic take the necessary legislative, regulatory, administrative, or other measures to ensure that:

- 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) to (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 PSRs;

- Members of the public concerned meeting the requirements of article 9 (2), including environmental non-governmental organizations, 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.

Lifetime Extension of Nuclear Reactor Tihange I

Body	**ACCC**
Case Number	ACCC/C/2017/145
Party / Member State	Belgium
Date of Decision	21 September 2017
Relevant Legislation	Aarhus Convention, article 6
Communicant / Complainant	Nature and Biodiversity Conservation Union in Germany (NABU)

Background

On 11 March 2017, a German local branch of the NGO NABU submitted a communication alleging non-compliance with article 6 of the Convention in connection with the lifetime extension of the Tihange I nuclear reactor. The communicant alleged that the decision for lifetime extension of the NPP Tihange was taken without public participation and without a national or transboundary EIA procedure. The reactor Tihange I was originally planned to cease operations in 2015 at latest. Meanwhile Belgium decided to prolong its operating time until 2025.

According to the communicant there was neither a clear publication in Germany about the decision and the assessment procedure, nor a notification of Germany or the German public under the obligations of the Espoo Convention. The German public was only informed by regional German media. Due to a lack of official information, the communicant was not able to name the date when the decision by Belgium to extend the lifetime of Tihange I until 2025 taken. As far as the communicant was informed, neither an EIA (national or transborder) nor a consultation of the public, as required under Belgian, European and international law, were carried out.

The communicant further stated, that it did not have no access to Belgian Courts. Greenpeace Belgium filed a civil lawsuit against the prolongation of Tihange I and Doel I and II. The communicant, however, could not provide further details on the matter. The communicant also sent a copy of its communication to the EIC.

Decision

At its 58th meeting, the ACCC considered the preliminary admissibility of the communication as well as the additional information provided on 17 August 2017. It finally determined the communication to be inadmissible under paragraph 20(d) in conjunction with paragraph 19 of the annex to decision I/7 on compliance, on the ground that the communication was not supported by sufficient corroborating information. Specifically, the ACCC considered that neither the communication itself nor the additional information provided sufficient corroborating information to enable the ACCC to properly examine the allegations made in the communication.

Storage for Radioactive Waste at Almaraz

Body	**ACCC**
Case Number	ACCC/C/2017/152
Party / Member State	Spain
Date of Decision	12 March 2018
Relevant Legislation	Aarhus Convention, article 6
Communicant / Complainant	Pessoas – Animais – Natureza (PAN)

Background

The communication submitted on 20 January 2017 by a Portuguese NGO alleged a failure of Spain to comply with the provisions of the Convention regarding a temporary storage for radioactive waste in Almaraz.

Reactor I of the Almaraz NPP was in operation since 1981, reactor II is in operation since 1983. The Communicant reported on different incidents that happened since the 80's. In the year 2020, the Almaraz Nuclear Power Plant will reach the deadline of its operating life license, which can then be extended until 2030. For that license extension to take place there would be a previous need to build an individual temporary storage (ATI) for radioactive waste. According to the Communicant, Spain had internally decided to build a temporary deposit for nuclear waste 100km from the border of Portugal without any notification or other sign for public participation.

In a communication of August 2017, the Communicant had also complained about the lack of public participation regarding the lifetime extension of the Spanish NPP Santa Maria de Garoña.

In February 2018, the ACCC asked the Communicant to resubmit the communication using required format and further elaborating various points and the communicant submitted further information.

It explained that the ATI, located in the premises of the nuclear station of Almaraz, was currently being constructed as the permit was already validated by the Minister of Energy after the Portuguese Environmentalist Agency (APA) had stated that it complies with the ATI requirements.

The Spanish government had only carried out a national EIA, not taking into account any public participation from Portugal. Portuguese authorities only had access to the documentation of the ATI following political pressure, but no transboundary EIA was conducted, nor was the Portuguese public invited to participate in the national Spanish EIA. Due to the lack of knowledge and guidance regarding the Spanish system and not having had responses from the Spanish side, neither the communicant, nor any other Portuguese organization known of had sought to challenge the absence of Portuguese public participation in the permitting of the ATI before Spanish courts.

The ATI was intended for the storage of nuclear waste for more than 10 years. Another concern expressed by the Communicant was that it might also be the basis for the construction of a larger nuclear depository in the form of a centralized storage where radioactive waste from all of Spain could be stored for an even longer period of time.

Regarding the LTE of the NPP Santa Maria de Garoña, Spain finally had not authorized the renewal of the exploitation license of the plant.

Note: A case regarding the Almaraz permitting procedure is currently also pending before the Espoo Implementation Committee (EIA/IC/INFO/22).

The Espoo case regarding the NPP Santa Maria de Garoña (EIA/IC/INFO/26) was closed for the Spanish Government decided to cease operations.

Decision

As the allegations Santa Maria de Garoña were outdated at the time of considerations and there was a lack of substantiations regarding the Almaraz case including the fact that domestic remedies had not been exhausted, the communication was found inadmissible.

Construction of Paks II NPP – Hungary

Body	**ACCC**
Case Number	ACCC/C/2019/169
Party / Member State	Hungary
Date of Decision	14 November 2019
Relevant Legislation	Aarhus Convention, articles 6, 9
Communicant / Complainant	Österreichisches Ökologie-Institut, et al

Background

On 20 May 2019, five environmental associations and NGOs from Austria, Germany, the Czech Republic and Hungary as well as impacted citizens submitted a communication alleging non-compliance with articles 6 and 9 of the Convention in connection with the construction of the Paks II nuclear power plant.

In 2009, Hungary decided the start of the construction of a new nuclear capacity at the site of the nuclear power plant Paks and included this decision in its Energy Strategy 2030 which was not subjected to a transboundary public participation procedure. After a scoping phase beginning in 2013, the EIA was started in 2015 and Hungary notified under the Espoo Convention all EU member states, the Republic of Moldovia and the Ukraine of the process. Public hearings were also organised in Croatia, Austria, Romania, Ukraine, Slovenia, Germany and Serbia. Additional documentation was delivered during the hearing period. On 29 September 2016, the decision to approve the construction of Paks II was taken and was posted on a Hungarian website and sent to the Espoo notification contact points of the participating countries.

Each of the communicants had submitted statements during the hearing period. According to the communicants, they have never received any substantial information directly from the responsible authorities in Hungary during the procedures, even after having made submissions including their contact details. This includes the additional information released during the hearing period as well as the final decision. Instead, the communicants had to collect their information themselves indirectly either through websites of Hungarian authorities or through the authorities of participating countries. The information on the final decision was not received until early 2017, which was after the final appeal date of 30 October 2016.

The communicants further stated that upon reaching out to the Hungarian authorities to clear the matter, it appeared they were not perceived as "clients" to the procedure and were therefore not informed of the outcome. Several of the communicants tried to enter administrative or judicial proceedings against the decision or to receive information on such proceedings. In January 2019, the Supreme Court of Hungary took a decision that makes it impossible to appeal decisions after officially set time-limits have expired, also in case the potential appealer may not have known for justifiable reasons of these time-limits. The communicants stated that this decision closed the way to local remedies in the Paks II case.

In response to the Compliance Committee's questions the communicants further stated that Hungary had not provided them with clear information on how to appeal and thus the communicants had to seek the information on whether they had legal standing in front of Hungarian courts to make an appeal against the EIA decision themselves. The communicant stated that they have done all that could be expected and a larger effort would have been disproportional so that there was a de facto lack of access to local remedy as defined under the Convention.

Decision

At its 65th meeting, the ACCC considered the preliminary admissibility of the communication. It finally determined the communication to be inadmissible under paragraph 20(d) in conjunction with paragraph 21 of the annex to decision I/7 on compliance, on the ground of available domestic remedy.

Transboundary procedure regarding NPP Ostrovets

Body	**ACCC**
Case Number	ACCC/S/2015/2
Party / Member State	Belarus
Date of Findings	23 July 2021
Relevant Legislation	Aarhus Convention, Articles 3(9), 6
Communicant / Complainant	Lithuania

Background

In its submission of 27 March 2015, Lithuania alleged the failure of Belarus to comply with articles 3 (9) and 6 of the Convention regarding the decision-making on a nuclear power plant in Ostrovets, Belarus, approximately 50 km from Vilnius.

Belarus had informed Lithuania about the NPP project on 15 July 2008. Lithuania responded that it intended to participate in the EIA process. In January 2009, Lithuania informed Belarus of its concern that it appeared that Ostrovets had already been selected as the NPP's location prior to the EIA procedure. In March 2009, Belarus notified Lithuania of its intention to construct the NPP at Ostrovets as a priority location. On 24 August 2009, Lithuania received an abridged version of a preliminary EIA report (19 pages) from Belarus and was informed that the full text would be made available online in Russian and English. An annexed table referred to the possibility for the public to submit comments from "September–December 2009" and a public hearing in Ostrovets on 9 October 2009. Only very basic information about the 2009 Ostrovets hearing, namely its timing and venue, was provided in that notice. The letter (which stated that it was a notification under the Espoo Convention) invited Lithuania to provide the comments of its "experts" on the 2009 preliminary EIA report. While the annex to the letter was entitled "Notification of the public on the planned activities, the EIA procedure and participation process and consultations", it contained no clear request or instructions to Lithuania to notify the Lithuanian public of their opportunities to participate. The Lithuanian public was not informed of the 4-month commenting period. According to the ACCC's deliberations, this was due to the inadequate notice provided by Belarus on 24 August 2009 and the lack of effective communication between Belarus and Lithuania to then clarify the procedure.

On 7 September 2009, Lithuania forwarded the abridged preliminary EIA report to its public authorities and environmental NGOs. It did not notify the Lithuanian public of the possibility to submit comments. On 15 September 2009, Belarus provided Lithuania with a physical copy of the full preliminary EIA report of approximately 100 pages and set a commenting deadline of 15 October 2009 for the experts of Lithuania.

In 15 October 2009, Lithuania sent Belarus comments from its competent authorities, stating that the 2009 preliminary EIA report's findings were unjustified, that information was missing and the report was only a scoping document. Lithuania also requested that a public hearing be organized in Lithuania after the final EIA report was received. Lithuania informed Belarus that it proposed to organize a public hearing in Vilnius on 2 March 2010 to. It informed interested parties, including members of the public and competent authorities, of the public hearing. This event was attended by approximately 80 members of the Lithuanian public and representatives of Lithuania and Belarus.

During a bilateral meeting in Minsk in June 2010, Belarusian officials presented, though did not provide, a longer version of the EIA report. Lithuanian officials became aware of the full EIA report's existence at this meeting for the first time. Consequently, while the Belarusian public was advised at the 2009 Ostrovets hearing "to consult the full EIA report in Minsk and Ostrovets", the Lithuanian public had no such opportunity. On 13 July 2010, Belarus approved State ecological expertiza

conclusion No. 28 on justification of investment in the construction of an NPP in the Republic of Belarus.

In 2013, Belarus issued permit No. 02300/239-4, authorizing the installation of nuclear equipment in unit one of the Ostrovets NPP. On the same day, Lithuania reiterated its request that Belarus provide additional explanations, that it (Lithuania) wished to organize a public hearing and that no unilateral action should be taken.

In July 2013, Belarus informed Lithuania that it had published information about the project in the Lithuanian media and had informed the Lithuanian public about a hearing to be held in Ostrovets on 17 August 2013. The only notice of this hearing provided in Lithuanian was the one published on the website of the Belarusian Embassy in Vilnius.

From October to November 2013, Lithuania received comments from its public regarding the text of the 2013 EIA report. On 23 October 2013, Belarus approved State ecological expertiza conclusion No. 98 on the project documentation for the Belarusian NPP. Appendix 4 to the EIA report is dated 2010 and does not appear to contain any comments from the Lithuanian public after May 2010. Despite the ACCC's explicit request, Belarus failed to provide any other documents demonstrating how the Lithuanian public's comments were taken into account in the decision-making leading up to the adoption of State ecological expertiza conclusion No. 98. Belarus asserted that the text of the 2010 and 2013 expertiza conclusions were publicly available to both the Belarusian and Lithuanian public but has not provided evidence to support its claim. Nor did it provide evidence that it provided the text of the 2010 and 2013 expertiza conclusions to Lithuania with instructions to inform the Lithuanian public. On 2 November 2013, Decree No. 499 of the President of Belarus on construction of the Belarusian NPP was adopted. It permitted the implementation of the Ostrovets NPP project in the period 2013 to 2020 and stated that no negative impacts in a transboundary context were identified, concerned parties having failed to prove any negative impact. On 30 December 2014, Belarus issued a permit authorizing the construction of unit two of the Ostrovets NPP.

Decision

The ACCC noted that the allegations by Lithuania under article 6 (2), (4) and (6) concerning the 2010 expertiza to some extent overlap with its findings in case ACCC/C/2009/44.[8] Accordingly, the Committee examined whether its earlier findings were equally applicable to the opportunities for the Lithuanian public to participate in the 2010 expertiza. It also examined whether the Lithuanian public received less favourable treatment than the Belarusian public under article 3 (9) of the Convention. The Committee considered that the 2010 and 2013 expertiza conclusions should be seen as "tiered" decision-making "whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage". Accordingly, the Committee considered that both State ecological expertiza conclusions were decisions subject to the requirements of article 6 of the Convention.

The Committee noted the claim of Belarus that, in practice, the timeframe for the public to comment was unlimited and that Lithuania itself reported that it sent comments from its public to Belarus on 7 May 2010. It thus did not consider that the timeframe for the Lithuanian public to send written comments in practice was unreasonable. Regarding the claim by Lithuania that the presentation of the full EIA report for the first time at the bilateral meeting on 18 June 2010 meant that Lithuania was unable to effectively prepare, the ACCC pointed out that the meeting was between the Governments of Lithuania and Belarus and the Lithuanian public was not present. The fact that Belarus had not provided the full EIA report in advance of that meeting was thus not in itself a breach of article 6 (3).

The Committee considered that, if the 2013 EIA report had been published by Lithuania shortly after Belarus had provided it to Lithuania on 11 une 2013, this would have provided a reasonable timeframe for the public to prepare to participate in the 2013 Ostrovets hearing. Moreover, both the English and Russian versions of the 2013 EIA report had been provided to Lithuania by Belarus in February 2011. As 63 % of Lithuanians spoke Russian and 30 % spoke English, the ACCC considered this sufficient to meet the requirements of article 6 (3). While the ACCC found it regrettable that the two Parties did not come to a clear agreement regarding translation of at least the main consultation

[8] See p. 9.

documents in advance, it noted that this was somewhat compensated for by the fact that English and Russian translations of the full EIA report were available.

The ACCC expressed concern, however, that none of the evidence before it showed that either Belarus or Lithuania took steps to make sure that the relevant law and the rules to be applied during the decision-making procedure were explained to the Lithuanian public.

In October 2021, the MoP endorsed the ACCC's findings, that Belarus failed to comply with certain provision of the Aarhus Convention. Particularly, noncompliance with articles 6 (2), (6), (8), and (9) and 3 (9) was noted, as Belarus had failed to

- provide adequate and effective notice to the Lithuanian public concerning its opportunities to participate in the hearing in Ostrovets on 9 October 2009 and to send written comments during the decision-making on the 2010 State ecological expertiza,
- to ensure that the means used to notify the Lithuanian public of the 2009 Ostrovets hearing were effective,
- to provide adequate and effective notice of the 2013 Ostrovets hearing in the Lithuanian-language media,
- provide the Lithuanian public with the possibility to examine the full EIA report at an early stage (the Lithuanian public was informed even later than the Belarusian public, which was itself too late to comply with the Convention)
- demonstrate how due account was taken of the comments of the Lithuanian public in the decision-making on the 2013 State ecological expertiza
- make accessible to the Lithuanian public the text of the 2010 and 2013 State ecological expertiza conclusions, including the reasons and considerations on which they were based,
- provide equal treatment to the Lithuanian public regarding access to the information relevant to the decision-making on the 2010 State ecological expertiza.

The MoP recommended Belarus to take the necessary legislative, regulatory and administrative measures and establish practical arrangements in order to ensure that in decision-making on proposed activities with potential transboundary impacts:

(a) Arrangements are made to initiate cooperation with the affected States at an early stage to ensure translation of the main consultation documents and interpretation at hearings so that the public concerned in those countries can effectively participate in the decision-making;
(b) Adequate and effective notification is provided to the public concerned in the affected States, in its national languages, including in widely published media in each tate;
(c) The public concerned in the affected States is informed in a timely manner of the possibility to examine the complete draft EIA report for a proposed activity subject to article 6;
(d) Due account is taken of comments submitted by the public in the affected States during a public participation procedure under article 6;
(e) The text of State ecological expertiza conclusions, including the reasons and considerations on which they are based, is promptly made accessible to the public concerned in the affected States, and instructions are given on where it can be accessed;
(f) Concerning these procedures, the public in the affected States receives no less favourable treatment than the public in the Party concerned.

Note: Lithuania also filed a submission with the Espoo Convention Implementation Committee regarding the Ostrovets NPP. (see p. 62)

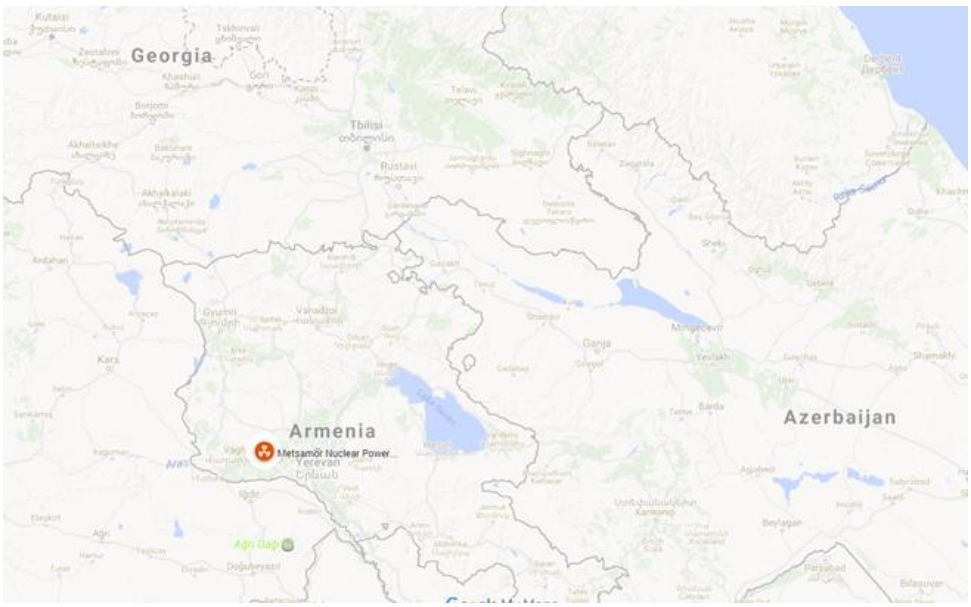
Pending cases

Case Number	Party / Member State	Date received	Relevant Legislation	Communicant / Complainant	Background
ACCC/C/2020/183	Spain	9 October 2020	Art 6	PAN	Almaraz NPP lifetime extension
ACCC/C/2021/187	Netherlands	5 September 2021	Art 6, 9(2)	LAKA, WISE, Greenpeace Netherlands	Lack of public participation regarding the LTE of NPP Borssele

2. ESPOO CONVENTION

Armenia – New Nuclear Power Unit in Metsamor

Body	**Members of the Parties, IC**
Case Number	EIA/IC/S/3
Party / Member State	Armenia
Date of Decision	5-7 February 2019
Relevant Legislation	Espoo Convention, Articles 3(5) and (8), 4(2), 5, 6
Communicant / Complainant	Azerbaijan



(Source: UNECE, https://unece.org/environment-policyenvironmental-assessment/eiaics3-armenia)

Background

On 5 May 2011 Azerbaijan sent a submission to the Committee issuing concerns about Armenia's compliance with its obligations under the Convention, with respect to the planned construction of a nuclear power station in Metsamor. To specify, Azerbaijan was concerned with the application of the Convention by Armenia, as the plans in Metsamor allegedly were activities of the type listed in item 2 of appendix I to the Convention and therefore could cause significant transboundary impact. Azerbaijan alleged that Armenia had „decided to terminate the environmental impact assessment (EIA) procedure under the Convention while proceeding with the decision-making on the planned activity".

Armenia had planned to construct a new nuclear power plant unit on an already existing NPP site built in the 1970s near Metsamor. The new unit should be owned by the Government of Armenia. and was planned to replace this unit 2, which was commissioned to be shut down in 2016. Of the neighbouring countries, only Azerbaijan is a Party to the Espoo Convention. Armenia and Azerbaijan do not have diplomatic relations and their relationship is characterized by confrontations and the absence of direct contacts and cooperation.

Armenia asked the Convention's secretariat to send the notification on its behalf to Azerbaijan, as well as to Georgia, Turkey and the Islamic Republic of Iran. On 1 September 2010, the Executive Secretary of ECE sent notification letters on behalf of Armenia to the Ministries of Foreign Affairs of the respective states. Three States, including Azerbaijan, responded to the secretariat indicating their wish to participate in the transboundary EIA procedure under the Convention. The secretary forwarded this information via e-mail to the Armenian focal point. On 19 October 2010, the Secretary to the Convention received a letter from the Armenian Minister of Nature Protection stating that,, "Armenia had not received an official response" from Azerbaijan, but only related informal e-mail messages from the secretariat "which cannot be considered as an official reply for the Republic of Armenia". Therefore, Armenia considered that in the absence of a response within the time specified in the notification, the provisions of the Convention would not apply.

Despite the exchange of several messages and the information on Azerbaijan's submission, Armenia reiterated its position that it considered it had not received "a substantial official response" from Azerbaijan on its intention to participate in the transboundary EIA within the fixed time frame and, on that basis, it had no obligations towards Azerbaijan. Moreover, Armenia confirmed its intention to pursue the application of the EIA procedure according to its national legislation and practice.

At its twenty-first session in June 2011, the EIC took note of the submission by Azerbaijan and considered the matter at its following sessions.

The present case led the EIC to consider various procedural questions, inter alia on:

- The potential role and responsibilities of the secretariat in the notification process, and its ability to be in charge of the notification on behalf of the Party of origin;
- The use of different means of communication (letter, fax, e-mail messages, etc) and their legal status for the purposes of implementing the Convention;
- Requirements relating to the content and the format of a response;
- The deadline and expiry for a response.

In general, the EIC considered e-mail to be a widely used, commonly acceptable and rapid means of communication and information exchange, including in public international relations, and acknowledged the legal validity of electronic means of communication for the purposes of notifying. It further estimated that, in case of a notification through an intermediary, the intermediary must inform the Parties of the contents of the response in a timely manner, which might also be done by e-mail. Armenia notified Azerbaijan only after informing its own public about the new unit in Metsamor, which, according to the EIC, led to non-compliance with article 3 (1).

The EIC considered that regardless of the fact that the secretariat served as an intermediary, this did not release Armenia from its obligations under the Convention. In the view of the Committee, when a Party of origin entrusts the notification procedure to an intermediary, the fulfilment of the conditions set out in article 3 (3) is to be established from the correspondence between the affected Parties and the intermediary. Any miscommunications between the Party of origin and the intermediary should have no impact on the application of the provisions of the Convention and the Party of origin retains responsibility for any actions or omissions of the intermediary in the process of notification.

Based on the information provided by Armenia, that the final decision on the construction of the NPP had not yet been taken and the works not yet initiated, the Committee concluded that there was still a possibility for Armenia to continue the implementation of the transboundary EIA procedure in conformity with the articles 3 (5) and (8), 4 (2), 5 and 6 of the Convention. The EIC recommended the designation of an intermediary as well as the use of new technologies and innovative approaches for communication (such as automated e-mail functions and videoconferences) by the two Parties to solve the difficulties in communication.

Decision

In **decision VI/2** the MOP endorsed the findings of the Committee that Armenia was in non-compliance with its obligation under the article 3 (1) of the Convention. However, taking pressure of the situation, the MOP also endorsed the findings of the Committee that Armenia was not in non-compliance with article 3 (5) and (8), article 4 (2), article 5 and article 6 of the Convention, considering that -- to the extent that the final decision on the construction of the NPP had not yet been taken and the works had not yet been initiated -- there was still a possibility for Armenia to continue the implementation of the subsequent steps in the transboundary environmental impact assessment (EIA) procedure.

The Committee was requested by the MOP to follow up and, as appropriate, monitor the steps in the transboundary EIA procedure in relation to the planned construction of the Metsamor NPP.

Impact

The Committee drafted its report on the activities of the Committee to the MoP at its seventh session.[9] In fall 2014, the Government of Armenia informed the Committee that it had adopted a new energy programme which, among other things, envisaged that no work had been initiated or carried out in relation to the planned construction of the Metsamor NPP. The information contained in the notification of August 2010 on the project -- which had originally been the subject of compliance concerns voiced by Azerbaijan -- had no further validity.

The Committee took into account the information provided and agreed that, since the decision for the planned construction of the NPP was no longer valid and activities based on that decision were suspended, there was no transboundary EIA procedure relating to that project and therefore no longer a ground to follow up.

In its **Decision IS/1b**, the MOP, whilst also recalling its decision IS/1 on general issues of compliance with the Convention adopted at the intermediary sessions, took note of the information the final decision on the construction of the Metsamor NPP was no longer valid and activities based on that decisions were suspended. The MoP thus endorsed the findings of the EIC that there was no longer a project requiring a transboundary environmental impact assessment procedure relating to the Metsamor NPP. The MoP finally urged Armenia to ensure that any projects carried out in the future in accordance with energy-related programmes, including nuclear activities, are in compliance with the Convention.

Note: As a result of the follow-up on decision VI/2, the EIC initiated an information gathering procedure in relation to the new Energy Programme adopted by the Armenian Government. For further information see Case SEA/IC/INFO/2 77.

[9] ECE/MP.EIA/2017/4-ECE/MP.EIA/SEA/2017/4, paras. 27–29.

Armenia – Governmental Energy Programme

Body	**Members of the Parties, EIC**
Case Number	SEA/IC/INFO/2
Party / Member State	Armenia
Date of Decision	4 April 2017
Relevant Legislation	SEA Protocol
Communicant / Complainant	-

Background

Within Decision VI/2, the MoP decided on Case EIA/IC/S/3 on the planned construction of a new unit for the Metsamor NPP by Armenia. After a long decision-making process, Armenia made the final decision, that the construction of the Metsamor NPP was no longer valid and activities based on that decision were suspended as the Armenian Government had introduced a new programme on energy development. As there was no longer a project requiring a transboundary environmental impact assessment procedure, the case regarding non-compliance with the Espoo Convention was closed. The MoP urged Armenia to ensure that any projects carried out in the future in accordance with energy-related programmes, including nuclear activities, are in compliance with the Convention.

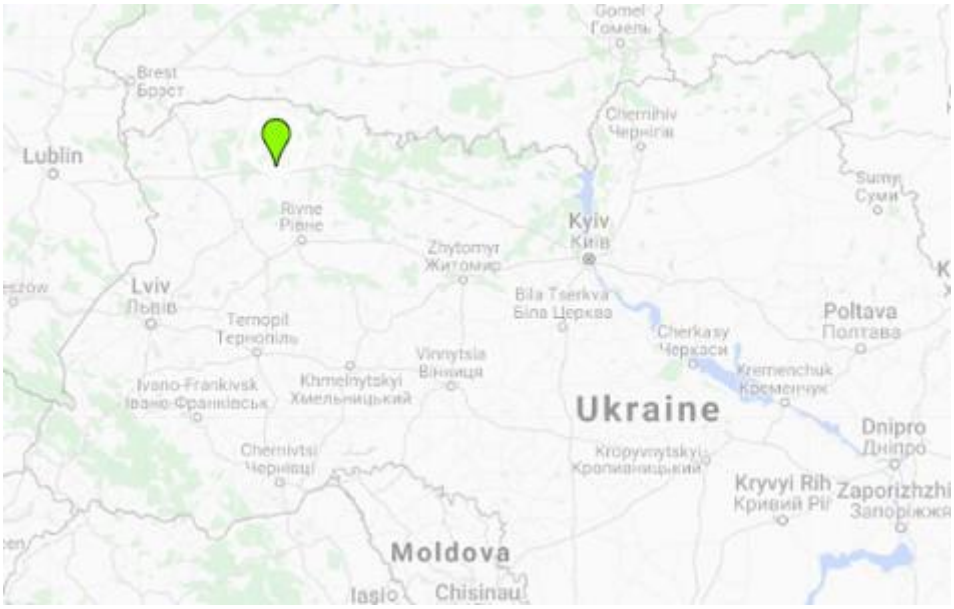
The relevant section of that programme envisaged the construction of a new reactor at the Metsamor NPP in 2018 and seemed to set the framework for future activities in the energy field. In February 2017, the Committee noted that, at the time of its examination, that Programme of the Government was no longer valid. The Committee also noted that following the resignation of the Government on 8 September 2016 and the appointment of the new Government, a new Programme of the Government had been adopted on 18 October 2016 by Government decision 1060A, which made no reference to the construction of a new reactor. Furthermore, subsequent to parliamentary elections scheduled for April 2017, a new Government would be formed, followed by the adoption of another programme of the Government.

Decision

The Committee deliberated on the nature of the Programme and whether an SEA procedure, including a transboundary procedure, or at least the notification of potentially affected countries, would have been required before the adoption of the Programme. Having considered all information provided by Armenia, the Committee agreed that there was no plan or programme under the provisions of article 2 (5) and article 4 of the Protocol. Consequently, that Programme was not subject to the SEA procedure stipulated in the Protocol. It concluded that the information provided by Armenia was sufficient and decided to close the information gathering on the issue.

Ukraine – Lifetime Extensions of Rivne NPP

Body	**Meeting of the Parties, EIC**
Case Number	EIA/IC/CI/4
Party / Member State	Ukraine
Date of Decision	5-7 February 2019
Relevant Legislation	Espoo Convention; Articles 2(2) and (3), 4(1), 3, 6
Communicant / Complainant	NGO Ecoclub



(Source: UNECE, https://www.unece.org/environmental-policy/conventions/environmental-assessment/areas-of-work/review-of-compliance/committee-initiative/eiaicci4-ukraine.html)

Background

Back at its twenty-first session (20 June 2011), the EIC first began its consideration regarding the planned extension of the Rivne NPP in Ukraine, close to the border with Belarus and Poland. Information on this subject had been sent to the Committee by a Ukrainian NGO on 20 April 2011, explaining that Ukraine had "initiated and partially completed a process for extending lifetime (designed period) of operation set for some nuclear reactors"[10]. A final decision was already taken regarding two nuclear reactors of the NPP. The information argued that such an extension of nuclear reactors lifetime would qualify as a "major change" and, therefore, fall under the definition of proposed activity under the Espoo Convention.

The Rivne NPP has four reactors and its construction began in 1973. Reactor 1 was commissioned in December 1980, reactor 2 one year later, reactor 3 in December 1986 and reactor 4 in 2004. In April 2004, the Ukrainian Cabinet of Ministers adopted Decision No. 263-r on "Complex Program of Works to Extend Operation Lifetime of Existing Nuclear Reactor of Nuclear Power Plants". The

[10] https://www.unece.org/fileadmin/DAM/env/documents/2019/ece/Restart/CI_Ukraine/2._Supporting_Information_3.0_FINAL.pdf.

operator of all Ukrainian NPPs, Energoatom, adopted a Workplan to implement the decision. In December 2009, Energoatom filed an application to amend its license for the lifecycle operation of the Rivne NPP. In December 2010, the Board of the State Committee on Nuclear Regulation took decision No. 15 extending the lifetime of nuclear reactors 1 and 2 by twenty years and issuing a new license for the operation of nuclear reactors 1 and 2 by Energoatom until 31 December 2031.

In its 23rd session in December 2011, the EIC found that Ukraine had not applied the Espoo Convention in relation to the planned extension of the NPP. It noted that the main issue was to establish whether the activity in question was a "proposed activity" subject to the Convention and concluded that lifetime extension of NPPs could be considered as a major change to an activity in appendix I, and thus fell under the scope of the Convention.[11] In its 24th session, the EIC reached a consensus that the extension of the life-time of a NPP, even in absence of any works, was a major change to an activity and thus subject to the Convention referring to paragraph 10(c) of the background note by the secretariat on the application of the Convention to nuclear energy-related activities[12]. In its final findings the Committee agreed the extension of the lifetime of an NPP originally designed to operate for 30 years for a further 20 years represented an activity that would require a comprehensive EIA of its effects according to the Convention*, regardless of whether it was treated as a major change to an existing activity or a new activity*, and regardless of whether originally it had been subject to such an EIA or not.[13]

The EIC further considered the information received during its following sessions. At its 27th session in March 2013, it decided to begin a Committee initiative and invited Ukraine to participate in the discussion and to present information and opinions on the matter under consideration at its 28th session. It addressed several questions to Ukraine, inter alia, whether the extension of the lifetime of the Rivne NPP units 1 and 2 had been subject to a transboundary EIA procedure or if a report covering environmental impacts had been submitted to the Ukrainian public for comments.

The Committee adopted its findings and recommendations on its 30th session in February 2014 to be considered at the MOP6:[14]

It noted that this was the first time that the EIC was to consider the application of the Convention to the extension of lifetime of an NPP and the impact of its considerations to the application of the Convention to nuclear activities. The EIC also found that the Ukrainian legislation at hand did not provide for the carrying out of neither a domestic nor a transboundary EIA procedure, in case of extension of the license through its renewal, because – according to Ukraine – the actual object of the project remained the same as originally licenced. It considered that the re-evaluation should have been conducted after having properly and comprehensively assessed the environmental impact, including transboundary impact, of the activity subject to extension through the license renewal. The EIC considered that the decision to authorize a proposed activity, according to the national procedure, only for a limited period of time meant that any subsequent decision to extend that limited period of time would, under the Convention, be another final decision, different from the initial one, making less relevant the examination of whether this was an activity or any major change to an activity. The Committee also established whether the activity in question had a significant adverse transboundary environmental impact: Referring to its previously stated opinion, that "notification is necessary unless a significant transboundary impact can be excluded"[15], it concluded that in absence of a transboundary EIA documentation arguing to the contrary it could not exclude the significant transboundary impact of the proposed activity. Ukraine therefore should have notified the possibly affected Parties.

[11] The EIC also referred to the background paper for the nuclear panel discussion held during the MoP in June 2011 (ECE/MP.EIA/2011/5).
[12] ECE/MP.EIA/2011/5.
[13] http://www.unece.org/fileadmin/DAM/env/documents/2014/EIA/IC/ece.mp.eia.ic.2014.2.e.pdf .
[14] For more information and access to relevant documents visit https://www.unece.org/environmental-policy/conventions/environmental-assessment/areas-of-work/review-of-compliance/committee-initiative/eiaicci4-ukraine.html.
[15] Decision IV/2, annex I, para. 54.

Decision

At its 6th session in June 2014, the MOP considered the Committee's findings and recommendations, as reflected in **Decision VI/2**: It endorsed the findings of the Committee that the extension of the lifetime of the NPP, subject to the proceedings, after the initial license had expired, should be considered a proposed activity under article 1 (v), and is consequently subject to the provisions of the Convention. The MOP also decided that Ukraine was in **non-compliance with its obligations under article 2 (2) with respect to the general legal and administrative framework** applicable in the decision-making for the extension of the lifetime for nuclear reactors. Lastly, the MOP endorsed the findings of the EIC that Ukraine was in **non-compliance with its obligations under article 2 (2) and (3), article 4 (1), as well as articles 3 and 6 with respect to the extension of lifetimes of reactors 1 and 2 of the Rivne NPP**.

The MOP invited the Committee, in its follow-up assessment of the case, to consider the specific circumstances of the case as well as the fact that Ukraine had acted in good faith.

Implementation and further process

In its 39th session, the EIC continued its consideration of the follow-up by Ukraine. Ukraine had informed Austria about its intention to conduct a transboundary EIA procedure with respect to the Rivne NPP. Ukraine was requested to:

(a) Notify all potentially affected Parties (including Austria, Belarus, Hungary, Poland, the Republic of Moldova, Romania and Slovakia), in accordance with article 3;
(b) Prepare the EIA documentation, including transboundary aspects;
(c) Carry out consultations with authorities of the affected Parties based on the EIA documentation, according to article 5;
(d) Ensure public participation;
(e) Revise the final decision taking into account the outcomes of the EIA procedure, including the EIA documentation and comments received by the affected Parties.

By the EIC's 41th session in April 2018, Ukraine had initiated the transboundary EIA procedure notifying Austria, Belarus, Hungary, Poland, the Republic of Moldova and Slovakia. The Committee, on the other hand, noted a lack of clarity about the proposed activity referred to in the notification and that the notification had not included a suggestion for a time frame within which the EIA procedure was to be carried out. It noted that such lack of clarity might cause difficulties for the potentially affected Parties to plann their involvement and efficiently participate in the transboundary procedure.

In its 42nd session, the Committee noted that all the possibly affected parties had responded to the notification by Ukraine of 29 January 2018, expressing their wish to participate in a transboundary impact assessment procedure. The Committee highlighted that, in its letter of 27 July 2018, Ukraine had neither responded to the questions regarding the request to clarify the nature of the proposed activity and its subsequent steps, nor to the requested timeline and documentation of the progress made of the transboundary procedure. It also stated that Ukraine should prove clarifications regarding the nature of the proposed decision.

For the outcomes of the EIC's deliberations since the MOP7 in June 2017 in Minsk, please see the Committee's report on its 42nd session[16].

In its **Decision IS/1g** the MOP finalized its findings on compliance by Ukraine with its obligations under the Convention in respect of the extension of lifetime of the Rivne NPP. Recalling its Decision IS/1 on general issues of compliance with the Convention adopted at the intermediary session, the MoP noted the steps taken by Ukraine to comply with the provisions of the Convention referred to in Decision VI/2 and welcomed the adoption by Ukraine of the Law on EIA in May 2017 followed by a number of pieces of secondary legislation.

The Government of Ukraine was requested to adopt without delay the remaining secondary legislation, with a view to fully aligning its national legislation with the Convention. The EIC also endorsed that, despite the positive steps taken, Ukraine remained in non-compliance with its obligations under the Convention, as referred to in paragraph 70 of Decision VI/2 and requested Ukraine to continue the transboundary EIA procedure with Parties wishing to participate in the

[16] ECE/MP.EIA/IC/2018/4, paras 27-31.

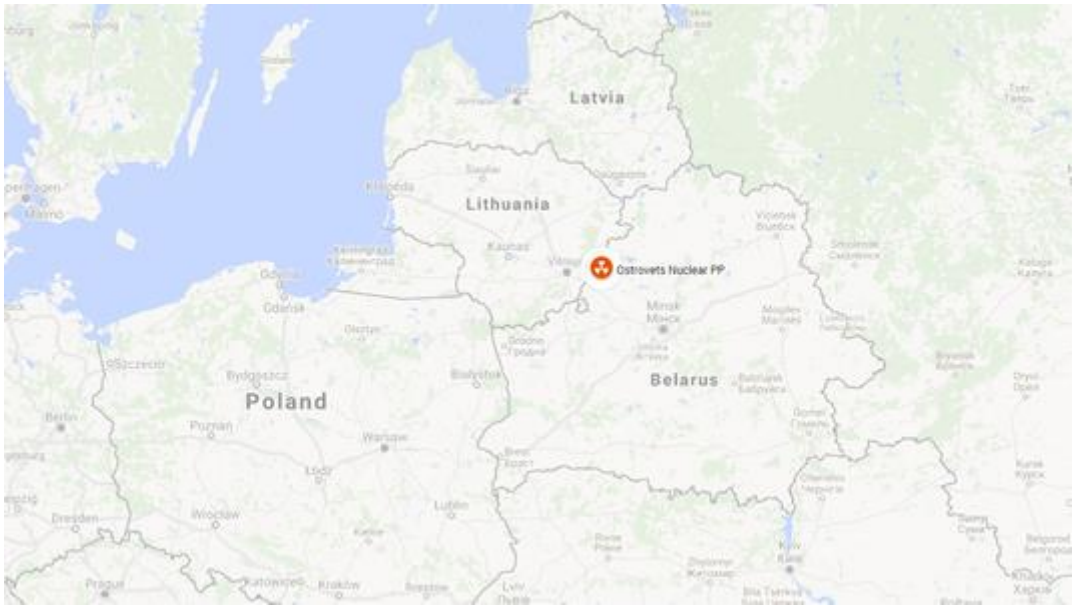
procedure in order to bring the project into compliance with the Convention without delay, including preparing the EIA documentation, consulting with authorities and the public of the affected Parties based on the EIA documentation, and revising the final decision on the lifetime extension of reactors 1 and 2 of the Rivne NPP, taking due account of the outcomes of the EIA procedure, including the EIA documentation and comments received from the affected Parties.

Draft decision VIII/4e on compliance by Ukraine with its obligations under the Convention was presented by the Implementation Committee at MOP8 in December 2020 in Vilnius. Recalling its decisions VI/2 and VIII/4, the adoption of the Law on EIA in May 2017 including related secondary legislation was welcomed while expressing concern that not all secondary legislation had yet been adopted. In the final version of Decision VIII/4e adopted at the high level segment, it was furthermore noted that "all pieces of related secondary legislation establishing legal provisions for the transboundary environmental impact assessment in accordance with the Convention, including for the extension of the lifetime of nuclear power plants" had been adopted. It was also added that "the steps taken by Ukraine to ensure the proper participation of all the affected Parties participating in the transboundary procedure" were acknowledged.

The Government of the Ukraine was requested to complete the transboundary EIA procedure with affected Parties that wish to participate in that procedure. The Government of the Ukraine was further requested to provide the EIC with a detailed timetable for the foreseen implementing steps and to report annually to the EIC on the steps taken. The Committee was requested to report to the MOP9 on its evaluation of compliance by Ukraine in respect of the LTE of Rivne reactors 1 and 2 and of the national legislation adopted to implement the Convention.

Belarus – Permitting the Ostrovets NPP

Body	**Meeting of the Parties, EIC**
Case Number	EIA/IC/S/4
Party / Member State	Belarus
Date of Decisions	June 2014, February 2019
Relevant Legislation	Espoo Convention, Article 2(6), 3(8), 4(2), 5(a), 6(1) and (2)
Communicant / Complainant	Lithuania



(Source: UNECE; http://www.unece.org/env/eia/implementation/eia_ic_s_4.html)

Background

On 16 June 2011 Lithuania sent a submission to the Committee issuing concerns about Belarus' compliance with its obligations under the Convention, with respect to the planned construction of a nuclear power station in Ostrovets, Belarus. Following this submission the Committee closed the information-gathering case on Belarus (EIA/IC/INFO/5), initiated earlier further to information provided by the Ukrainian NGO Ecoclub, since the submission by Lithuania addressed the same factual situation (project).

To sum it up, following points were made in the submission letter: Firstly, Lithuania requested the Committee to draw attention on the issue and to take action by reminding Belarus to not only fully comply with the requirements of the Espoo Convention, but also to restart the environmental impact assessment (EIA) process. Secondly, the Committee should invite Belarus to suspend all construction processes until the EIA report was fully finished. The third and final request made in Lithuania's letter was to invite Belarus once again to revise their decisions and to withdraw all actions regarding the NPP in Ostrovets, as it were only 50 kilometers away from the center of Vilnius, Lithuania's capital city.

Lithuania had pointed out that the contents and procedural aspects of the EIA procedure in Belarus were unclear, whereas Belarus explained that legislation regulating the procedure of EIA implementation, i.e. the Law on State Ecological Expertise of 9 November 2009, amended on 14 July 2011, Resolution No. 755 of 19 May 2010, amended by resolution No. 689 on 1 June 2011 as well as Decision No. 571 of 4 May 2009, introducing special rules for public participation in decision-making on nuclear issues, had recently been introduced. Other disputed aspects included the date of notification of the project, the preliminary and final EIA report as well as the conduction of public hearings in Ostrovets and Vilnius and other procedural questions regarding public participation. Other arguments brought up were insufficient or undetailed information on the project and the lack of reasonable alternatives concerning the chosen site.

At its twenty-second session (5-7 September 2011) the Committee addressed the submission by Lithuania for the first time, forwarding it to Belarus. In session twenty-three the Committee took note of the reply that had been received from Belarus on 22 September 2011. It also agreed to invite the two Parties to its next session, where each Party could briefly present their case. In its following sessions, the Committee continued to work on the topic, finalizing its draft version of Decision VI/2 during its twenty-seventh session (12-14 March 2013).

In its findings and recommendations on the case, the EIC pointed out that the two Parties had agreed that the requirements concerning the notification had been fulfilled by the notification of 24 August 2009. Furthermore, Belarus had attended a public hearing in Vilnius on 2 March 2010 at thus started the consultation at an early stage and before the final decision concerning the site selection was taken. According to the EIC, Belarus failed to provide the final EIA documentation to the affected public in Lithuania. Furthermore Lithuania was not informed on the availability of the final EIA report. Although there had been meetings and exchanges of letters between the two Parties dedicated to the NPP issue, the EIC noticed a lack of response to several questions by Lithuania and delays in answering.

Regarding the questions of alternatives, Ostrovets was chosen as the priority site at the beginning of the process in 2008, prior to the notification and the completion of the final EIA. In this regard, the EIC explained that the description of locational alternatives to be included in the EIA documentation should be especially required when an activity is planned near a city. Belarus had split the final decision on the NPP into one part on the location and another part on permitting the construction on this location, which had not yet been taken. The EIC noted that article 6 would apply in each case as both of these decisions were part of the final permitting decision.

Decision

In Decision VI/2, the Meeting of the Parties (MOP) endorsed the findings of the Committee that Belarus had improved its legal framework on EIA and that there were no grounds for non-compliance with article 2 (2). The MoP also endorsed that, on 14 March 2013, Belarus was in compliance with its obligations under article 3 (2)(a) and (c) and article 3 (8) of the Convention in relation to the activities referred to in the submission by Lithuania. The MOP also endorsed the findings of the Committee that Belarus was in non-compliance with its obligations under article 2 (6), article 4 (2), article 5(a) and article 6 (1) and (2).

Therefore, the MOP requested a few things (among others): The Government of Belarus should take a final decision on the site selection, ensuring that due account had been taken to the course of the outcome of the EIA documentation as well as forward it to Lithuania. The MOP further requested Belarus to continue the procedure of transboundary EIA on the basis of the final EIA documentation, agree with Lithuania on the steps to be followed, answer all of Lithuania's questions and take into consideration the Lithuanian comments. It also requested both Belarus and Lithuania to ensure that the Lithuanian public is informed and sufficiently involved in the EIA procedure. To conclude, the MOP requested the Committee to thoroughly analyze the steps undertaken after the adoption of the Committee's report on its twenty-seventh session and to report to the MOP at its seventh session on the matter.

The Committee fulfilled the request for further analysis in its report made for the seventh session of the MOP[17], which makes it redundant to introduce further relevant Committee sessions (namely the ad hoc, thirty-ninth, fortieth, forty-first and forty-second session), as this report sums up the development between decision VI/2 and the later decision IS/1b. In the beginning of its report the

[17] ECE/MP.EIA/2017/4-ECE/MP.EIA/SEA/2017/4, paras. 36-44.

Committee noted, that Belarus and Lithuania submitted regular reports and information during the intersessional period. In September 2016, the Committee: a) recognized efforts made by Belarus to satisfy the language requirements of public consultations; b) noted that Belarus and Lithuania had made some efforts on agreeing on the steps for the post-project analysis with respect to the NPP, which might involve the establishment of a joint body; and c) observed efforts by both Parties in negotiating a bilateral agreement for the implementation of the Convention. In February 2017, the Committee concluded that Belarus had undertaken all the required steps to reach the final decision as provided for in the Convention. However, based on the available information, the Committee could not reach a final conclusion on the compliance of the steps taken by Belarus, as the essence of the compliance case was about unresolved substantive aspects of the EIA documentation that could not necessarily be treated separately from the procedural aspects of EIA.

In this context, the Committee recalled that the persistent disagreement between the two Parties related in particular to scientific and other technical matters (for example finding reasonable locational alternatives). Since the Committee did not have the capacity nor the mandate to examine scientific issues, it recommended to establish and finance an expert body modelled after the inquiry commission provided for under appendix IV to the Convention. Belarus, despite encouragement from the Bureau in January 2016, maintained its reservations regarding the Committee's proposal. In December 2016, the Committee noted that the Parties had been unable to find consensus on their points of disagreement through bilateral expert consultations.

At its intermediary session in February 2019, the MOP chose to adopt Decision IS/1 on general issues of compliance with the Convention together with separate decisions specific for each relevant Party. Within Decision IS/1, the MOP, inter alia, considered that

(a) Early and appropriately wide notification plays an essential role in the transboundary procedure, in keeping with the precautionary approach and the principle of prevention enshrined in the Convention and with the Convention's objective of enhancing international cooperation in assessing environmental impact, in particular in a transboundary context, as mentioned in its preamble;
(b) […]
(c) […]
(d) in so far as their consideration is required, procedural and substantive aspects of transboundary EIAs should not necessarily be treated separately by the EIC when assessing compliance, where such consideration is essential for the assessment. The EIC does not examine compliance with technical provisions and requirements outside the scope of the Convention, such as those related to nuclear safety;

Environmental impact assessment documentation should contain sufficient information, including any of a substantive nature on the selection of the alternatives and the reasons and considerations to be taken into account in the final decision. In its decision IS/1d, the MOP gave a lengthy report on compliance by Belarus with its obligations under the Convention in respect to the Belarusian NPP in Ostrovets -- the most important aspects of decision IS/1d shall be introduced.[18]

To decide on the subject, the MOP recalled its decision VI/2 and also the decision at its seventh session to finalize deliberations on the review of compliance with the Convention at an intermediary session[19], based on a revised draft decision to be prepared by the Committee. Furthermore, it considered the report of the Committee made for the seventh session of the MOP, as well as the reports of the Committee on its ad hoc, thirty-ninth, fortieth, forty-first and forty-second sessions.

Therefore, the MOP

- *Endorsed* the findings of the Committee[20] that Belarus had taken all the required procedural steps to reach the final decision on the planned activity at Ostrovets, as provided for in the Convention.
- *Endorsed* that the essence of the compliance matter concerned unresolved substantive aspects of the environmental impact assessment documentation, including reasonable locations alternatives and the methodology and data used in determining the siting -- in order to enable the Committee to reach its final conclusion additional resources and specific expertise were needed, as they had not been made available to it;

[18] For more detailed information see ECE/MP.EIA/27/Add.1 - ECE/MP.EIA/SEA/11/Add.1.
[19] ECE/MP.EIA/23-ECE/MP.EIA/SEA/7, para. 27.
[20] ECE/MP.EIA/IC/2017/2, para. 8.

- *Endorsed* that in order to reach a final conclusion on whether Belarus complied with its obligations both procedural and substantive aspects of the environmental impact assessment procedure had to be examined, since those two aspects could not be treated separately.
- Also *endorsed* that the environmental impact assessment documentation, which had been made available to the affected parties and the public, made reference to locational alternatives for a NPP and to criteria for the site selection, but did not provide sufficient information about the reasons and considerations -- explaining the selection of the Ostrovets site over the alternative locations to be taken into account in the final decision on the activity in accordance with the Convention;
- Further *endorsed* that by not providing such information in the EIA documentation and the final decision on the activity, Belarus **failed to comply with article 4 (1), article 5 (a) and article 6 (1) of the Convention**.

To finish its decision IS/1d the MOP brought up a few additional points. It urged Belarus to ensure that, in the context of any future decision-making that could fall under the Convention, the Convention is applied and the environmental impact assessment documentation contains a proper evaluation of reasonable alternatives -- including the no-action alternative. Showing good faith, the MOP also encouraged both Belarus and Lithuania to continue bilateral expert consultations on issues of disagreement. It also encouraged both Parties to continue working on the post-project analysis and to establish a joint bilateral body.

Implementation and further process

Decision VIII/4c on compliance by Belarus with its obligations under the Convention was adopted at MOP8 in December 2020 in Vilnius. Recalling its decisions VI/2 and IS/1d as well as VIII/4, the MOP reaffirmed decision IS/1d on compliance by Belarus in respect of the Belarusian NPP Ostrovets and urged Belarus to apply the Convention in the future with regard to a proper evaluation of reasonable alternatives. The MOP also noted the annual reports by Belarus und Lithuania as well as the steps Belarus and Lithuania have taken since the intermediary session of the MOP in February 2019 in Geneva. However, the MOP expressed concern regarding the limited progress made by the Parties concerned in addressing the requirements set out in para's 17, 18 and 19 of that decision.

The MOP therefore encouraged both Parties to comply with these requirements, with a view to concluding the bilateral agreement, carrying out a post-project analysis, including reaching an agreement on establishing a joint bilateral body and procedures for such analysis, and continuing bilateral expert consultations on issues of disagreement, including on matters that are beyond the scope of the Convention. The Governments of Belarus und Lithuania were requested to report annually to the Espoo IC on the progress.

UK – International Notification on Hinkley Point C

Body	**Meeting of the Parties, EIC**
Case Number	EIA/IC/CI/5
Party / Member State	UK of Great Britain and Northern Ireland
Date of Decision	5-7 February 2019
Relevant Legislation	Espoo Convention, Articles 2(4) and 3(1)
Communicant / Complainant	Germany

(*Source: UNECE, https://www.unece.org/environmental-policy/conventions/environmental-assessment/areas-of-work/review-of-compliance/committee-initiative/eiaicci5-united-kingdom.html*)

Background

At its twenty-eighth session, the Committee began its consideration of the information provided by a German Member of the Parliament and the Irish NGO Friends of the Irish Environment, in March 2013, respectively, regarding the planned construction of NPP Hinkley Point C by the United Kingdom. The Committee noted that the German Government had not been notified and the German public had not been consulted on the planned activity.

Therefore, the Committee held preliminary discussions on the matter and agreed that the United Kingdom should be invited to clarify, inter alia: whether the Government had notified any potentially affected Parties; if so, which ones; in what form the notification had been made; whether they had used the format for notification provided in decision I/4 of the Meetings of the Parties (MOP); and what had been the response received, if any.

Further to its twenty-eighth session the Committee continued its consideration. It reviewed clarifications received from the Government of Austria, Germany, Ireland and the United Kingdom in response to the Committee's letters of 15 October 2013. Additional information had also been submitted on 9 December 2013 by the member of the German parliament representing the Green Party who had originally submitted the information. The Committee asked the Chair to write to the Governments of other neighboring countries as well -- i.e., Belgium, Denmark, France, the

Netherlands, Norway, Portugal and Spain, -- with a copy to the German member of the Parliament and the Irish NGO, to enquire whether they shared the opinion of the UK that the project would not have any significant transboundary negative impact.

In its thirtieth session the Committee noted that the UK had failed to notify any potentially affected Party about the planned activity. The Committee further noted the information that national legislation in the UK did not provide for the possibility to extend the transboundary consultations, as presented in the transboundary procedure with Austria, which had requested the UK to exchange information following to article 3 (7). To underline this point, the Committee recalled its previous opinion in decision IV/2 that: while the Convention's primary aim, as stipulated in article 2 (1) was to *"prevent, reduce and control significant adverse transboundary environmental impact from proposed activities"*, even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with article 3. This means that notification is necessary unless a significant adverse transboundary impact can be excluded.[21] The EIC also recalled that a procedure regulated in article 3 (7) did not substitute the obligations of a party of origin and considered that, in the principle of prevention, parties of origin should be "exceptionally prospective and inclusive" and ensure that all parties potentially affected by an accident – however uncertain – are notified as well as take into account the worst-case scenario. On the above grounds, the Committee found that there was a profound suspicion of non-compliance and decided to begin a Committee initiative.

In the following sessions it was all about gathering information, sending information back and forth between the potentially affected Parties and giving the UK a chance to participate in the meetings. Some states referred to an opinion issued by the European Commission in February 2012, considering that the proposed activity concerning Hinkley Point C was not likely to cause significant adverse transboundary environmental impact. In the Committee's view (during its thirty-second session), the opportunity provided by the United Kingdom to Austria to participate under the Espoo Convention had demonstrated the agreement of the two Parties that a likely significant environmental impact on Austrian territory could not be excluded according to article 3 (7) of the Convention. The likelihood of a significant environmental impact outside the territory of the United Kingdom had also not been excluded by the Netherlands and Norway.

By the EIC's thirty-eighth session, the United Kingdom had written to all 44 Parties to the Convention on 21 December 2016, asking them whether they considered that a notification under the Espoo Convention was useful at the current stage of the proposed activity. However, the NPP had been granted development consent by the relevant Secretary of State on 19 March 2013, and, according to a letter of the United Kingdom, the work under the development consent had already commenced. The Committee was therefore concerned that the continuation of works at Hinkley Point C might influence the views of the Parties consulted by the United Kingdom. Moreover, if the potentially affected parties considered that a notification was useful and therefore asked to participate in the transboundary EIA procedure, the continuation of works might render the results of the procedure irrelevant.

The Committee prepared draft Decision VII/2 on its conclusions drawn from the Hinkley Point C case. At the MOP7 in June 2017, however, the European Union provided its comments on draft decision VII/2 and the MoP agreed that further efforts to reach consensus were needed and decided to finalize its deliberations at an intermediary session. It mandated the Implementation Committee to prepare a revised draft for the intermediary session.

The following sessions, namely the thirty-ninth, the fortieth and the forty-second, were recalled by the MOP in its decision IS/1h and are therefore of highest importance as to understand the reasoning for the decision. The Committee noted that the United Kingdom had contacted all the Parties to the Espoo Convention and then entered into discussions with those Parties that had indicated to it that they would find a notification regarding the activity at Hinkley Point C useful (i.e., Germany, Ireland, the Netherlands and Norway) or that had expressed their interest in further discussions and/or information about the planned activity (Denmark and Luxembourg). The Committee further noted that, on 28 July 2017, the United Kingdom had shared information with the Parties that had expressed interest in receiving a notification or further information about the activity and had offered them "an opportunity to comment in relation to potential transboundary impacts" by 20 October 2017 so as to give those Parties "ample opportunity to consult their public (should they consider it necessary)". These ongoing consultations with the interested Parties were welcomed by the Committee -- nevertheless, it still maintained its view that the UK was to refrain from carrying out works until the transboundary environmental impact assessment procedure was finalized.

[21] Decision IV/2, annex I, para. 54.

The Committee finalized draft decision IS/1h at its forty-second session.

Decision

To decide on the subject, the MOP considered, inter alia, the findings and recommendations of the Implementation Committee with regard to the Hinkley Point C NPP, as set out in the report of the Committee on its thirty-fifth session.[22] The MOP endorsed the Committee's finding that the UK failed to comply with the Convention by not notifying the potentially affected parties in accordance with article 2 (4) and article 3 (1) of the Convention in the case of the Hinkley Point C NPP project in its Decision IS/1h.

While acknowledging the steps taken by the UK in consulting with the potentially affected Parties and sharing additional information with them after the construction of the Hinkley Point C nuclear power plant had commenced, the MoP endorsed that these steps do not remedy the breach of the Convention.

The MOP also endorsed the Committee's finding that no further action from the United Kingdom is required on the grounds that the potentially affected Parties have accepted the consultation process offered by the United Kingdom at the current stage of the activity and on the understanding that, in future, it will provide notification of planned nuclear power plants in accordance with the Convention.

Decision IS/1h recalled Decision IS/1 on General issues of compliance with the Convention, which, as regards the Hinkley case, considered that:

- Early and appropriately wide notification in accordance with the Convention, regardless of the number of the affected Parties, plays an essential role in the transboundary procedure, in keeping with the precautionary approach and the principle of prevention enshrined in the Convention and with the Convention's objective of enhancing international cooperation in assessing environmental impact, in particular in a transboundary context, as mentioned in its preamble;
- Although the likelihood of a major accident, accident beyond design basis or disaster occurring for nuclear activities listed in appendix I is very low, the likelihood of a significant adverse transboundary environmental impact can be very high, if the accident occurs. Consequently, when assessing, for the purpose of notification, which Parties are likely to be affected by a proposed nuclear activity listed in appendix I, the Party of origin should make the most careful consideration on the basis of the precautionary principle and available scientific evidence;
- Where no notification has taken place in accordance with article 3 (1), but where a Party that considers that it would be affected by a likely significant transboundary environmental impact of a proposed activity listed in appendix I enters into discussions on the application of the Convention with the Party of origin, that discussion should be conducted under article 3 (7). It may also be regarded as good practice to offer Parties that have indicated their wish to be notified under article 3 (1), an opportunity to receive a notification in line with the provisions of the Convention.[23]

[22] ECE/MP.EIA/IC/2016/2.

[23] *Note*: Draft Decision IS/1 prepared in the second two points went further, than the final Decision adopted on the EU's imitative:
(b) For certain activities, in particular nuclear energy-related activities, while the probability of a major accident, accident beyond design basis or disaster occurring is very low, the likelihood of a significant adverse transboundary impact of such an accident can be very high and its consequences severe. Therefore, on the basis of the principle of prevention, when considering the affected Parties for the purpose of notification, the Party of origin should be exceptionally prospective and inclusive, in order to ensure that all Parties potentially affected by an accident, however uncertain, are notified. The Party of origin should make such consideration using the most careful approach on the basis of available scientific evidence, which indicates the maximum extent of a significant adverse transboundary impact from a nuclear energy-related activity, taking into account the worstcase scenario;
(c) In the absence of notification, in particular regarding nuclear power plants, when a potentially affected Party considers that a significant adverse transboundary impact of a proposed activity cannot be excluded and expresses the wish to be notified, the Party of origin should apply the Convention. In this situation, a failure to notify would infringe on the right of the potentially affected Parties and their public to be informed and to participate in a timely manner in the environmental impact assessment procedure

Spain – Cessation of NPP Santa Maria de Garoña

Body	**EIC**
Case Number	ECE/IC/INFO/26
Party / Member State	Spain
Date of Decision	7 December 2018
Relevant Legislation	Espoo Convention
Communicant / Complainant	Portuguese polit. Party Pessoas-Animais-Natureza

Background

Compared to some of the other presented cases, this one is of different nature: The EIC used it as an illustration of a proper and sufficient response from a Party addressing the issue.

On 17 August 2017, the Portuguese political party Pessoas-Animais-Natureza sent information to the EIC concerning the planned lifetime extension of the Santa Maria de Garoña NPP. The EIC proceeded to analyze the information and asked its Chair to request Spain to inform the EIC by the end of 2017 about:

1. The status of operation of the Santa Maria de Garoña NPP; and
2. the Plans of the Government of Spain regarding that NPP, including the next steps to be taken.

Spain informed the EIC on 27 October 2017, as requested by the EIC. In its document, Spain declared the permanent cessation of the operation of that plant by order ETU/754/2017 adopted on 1 August 2017 and that Spain subsequently intended to issue a permit to dismantle the plant followed by the closure declaration.

Decision

On its 43rd session in December 2018, the EIC concluded that the information provided by Spain was sufficient and decided to close the information gathering on the issue. The EIC further recommended that Spain should ensure that further activities related to the decommissioning of the Santa Maria de Garoña NPP should be carried out in accordance with the Convention, as appropriate.

The Committee wrote the Government of Spain to inform it accordingly and to thank Spain for its consideration. It also requested the agreement of the Government place the correspondence between the EIC and Spain on the Convention's website, with the intention to use it as an illustration of the EIC's approach to the compliance issue and of a proper and sufficient response from a Party in addressing the issue.

Pending cases

Case Number	Party / Member State	Date received	Communicant / Complainant	Background
EIA/IC/INFO/10	Ukraine	Closed in 2015, resumed in 2017	Ecohome	Construction of units 3 and 4 of NPP Khmelnitsky
EIA/IC/INFO/15	Netherlands	7 May 2014	Greenpeace	Borssele NPP lifetime extension
EIA/IC/INFO/18	Belgium	8 March 2016	German federal states North Rhine-Westfalia and Rhineland-Palatinat	Tihange NPP lifetime extension (originally also Doel)
EIA/IC/INFO/19	Czech Republic	27 July 2016	ÖKOBÜRO et al	Dukovany NPP lifetime extension
EIA/IC/INFO/20	Ukraine	1 August 2016	CEE Bankwatch Network	lifetime extension of several NPPs (Rivne, South-Ukrainian NPP, Zaporizhzhya, and Khmelnitsky)
EIA/IC/INFO/21	Belarus	17 February 2017	Committee	Ostrovets NPP
EIA/IC/INFO/28	Bulgaria	13 March 2013	Actiunea pentru Renasterea Craiovei (ARC)	Kozloduy NPP lifetime extension
EIA/IC/INFO/32	France	9 March 2020	Greenpeace France	LTE of 32 units of eight French NPPs (especially Tricastin and Bugey)
EIA/IC/INFO/34	Spain	30 July 2020	Portuguese political party, Pessoas–Animais–Natureza	Lifetime Extension of NPP Almaraz

3. EU DIRECTIVES

Lifetime extension of Doel 1 and 2

Body	**ECJ**
Case Number	C-411/17
Party / Member State	Belgium
Date of Decision	29 July 2019
Relevant Legislation	EIA Directive, Habitats Directive, Birds Directive
Communicant / Complainant	Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu ASBL

Background

On 31 January 2003, Belgium introduced a Law "on the phasing out of nuclear energy for the purposes of industrial production of electricity", providing that "Nuclear power stations used for the industrial production of electricity by the fission of nuclear fuels shall be deactivated 40 years after the date on which they were brought into service for industrial purposes and may no longer produce electricity thereafter". This law was later amended by the Law of 28 June 2015, according to which reactor 1 of the Doel NPP should resume operations until 15 February 2025 and Doel 2 should be deactivated on 1 December 2025, extending both their operations by ten years. The explanations to this amendment included that, given the major uncertainties surrounding restarting the Doel 3 and Tihange 2 stations, and the planned closure of thermal power stations in 2015, combined with the fact that foreign capacity could not in the short term be integrated into the Belgian grid. In September 2015, the responsible authority confirmed the decision it had adopted in August 2015 not to carry out an EIA in respect of the changes envisaged by the operator.

The Belgian environmental protection associations Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen brought proceedings before the Belgian Constitutional Court seeking annulment of the Law of 28 June 2015.

The implementation of the lifetime extension would be accompanied by substantial investment and major upgrading work to the two power stations concerned, inter alia, renewal of the spent fuel pools, building a new pumping station and adaptation of the base to offer better protection to the power stations against flooding. These measures were not involved in the Law of 28 June 2015 itself, but in an Agreement of 30 November 2015 which was made after it entered into force.

The two reactors in question are located on the banks of the Scheldt, close to protected areas under the Habitats Directive and the Birds Directive, designated as such specifically for protected species of fish and cyclostomata in that river.

The Constitutional Court addressed the ECJ with the following questions (summarized version):

- Can legislative acts such as the Law of 28 June 2015 be excluded from the scope of the **Espoo Convention** according to Article 1(ix)? Must articles 2-6 of the Espoo Convention be applied prior to the adoption of such a legislative act?
- Can legislative acts such as the Law of 28 June 2015 be excluded from the scope of the **Aarhus Convention** according to Article 2 (2)? Must articles 2-6 of the Aarhus Convention be applied prior to the adoption of a legislative act postponing the date of deactivation and the end of the industrial production of electricity of the Doel 1 and Doel 2 nuclear power station?

- Is Article 1 (2) of the **EIA Directive**[24], in conjunction with Annex II applicable to the postponement of the date of deactivation and of the end of the industrial production of electricity of a nuclear power station? Are articles 2-8 and 11 of the EIA Directive and Annexes I-III applicable prior to the adoption of legislation like the Law of 28 June 2015? Does Article 2 (4) EIA Directive permit an exemption from the application of Articles 2-8 and 11 for overriding reasons in the public interest linked with the security of the country's electricity supply? Can legislative acts such as the Law of 28 June 2015 be excluded from the scope of the EIA Directive according to the concept of "specific act of legislation" within the meaning of its article 1 (4)?
- Is article 6 of the **Habitats Directive**[25] in conjunction with Articles 3 and 4 of the **Birds Directive**[26] applicable to the postponement of the date of deactivation and of the end of the industrial production of electricity of a NPP? Must article 6 of the **Habitats Directive** be applied prior to the adoption of a legislative act postponing the date of deactivation of Doel 1 and Doel 2? Does article 6 (4) of the Habitats Directive allow grounds linked with the security of the country's electricity supply to be considered an imperative reason of overriding public interest?
- Can the national court maintain the effects of the Law of 28 June 2015 in order to avoid legal uncertainty and to allow the environmental impact assessment and public participation obligations arising under those Conventions or directives to be fulfilled?

Judgement

The ECJ first answered the questions related to the EIA Directive. It recalled that the term "project" in this context refers to work or interventions involving alterations to the physical aspect of the site. The Court therefore decided that measures and the upgrading work inextricably linked to the Law of 28 June 2015 together constitute a single project. The fact that the implementation of those measures required the adoption of subsequent acts in respect of one of the power stations concerned, according to the Court, did not change that analysis.

The Court further recalled that articles 2 (1) and 4 (1) of the EIA Directive, read together, indicate that projects covered by Annex I, present an inherent risk of significant effects on the environment and therefore an EIA is indispensable in those cases. It noted that the measures have the effect of extending, "by a significant period of 10 years", the duration to produce electricity for industrial purposes with respect to both power stations combined with major renovation works necessary due to the ageing of those power stations. The ECJ therefore found these measures comparable, in terms of the risk of environmental effects, to that when those power stations were first put into service.

Given that the Doel 1 and Doel 2 are located close to the Belgian border to the Netherlands, the Court found it indisputable that the project could also have significant effects on the environment in the latter Member State, within the meaning of Article 7 (1) of the EIA Directive.

Regarding the stage at which the EIA must be conducted, the Court recalled that the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes to prevent the creation of pollution or nuisances at source rather than to counteract their effects subsequently. An EIA must therefore be carried out as soon as it is possible to identify and assess all potential effects of the project on the environment. Where one of those stages is a principal decision and another an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. The Court saw this to be the case as the Law of 28 June 2015 already defined the essential characteristics of the project and should no longer be a matter for debate or reconsideration. The EIA should extend to work inextricably linked to the measures at issue in the main proceedings, if both the work and its potential effects on the environment were sufficiently identifiable at that stage of the consent procedure.

[24] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.
[25] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013.
[26] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, as amended by Directive 2013/17.

As regards the exemption from the EIA Directive according to article 2 (4), the ECJ noted that the European Commission in this case would have needed to be notified of Belgium's decision to ensure the security of the electricity supply. A Member State may exempt a project such as that at issue in the main proceedings from the requirement to conduct an EIA in order to ensure the security of its electricity supply only where it can demonstrate that the risk to the security of that supply is reasonably probable and that the project in question is sufficiently urgent to justify not carrying out the assessment. The Court also noted that this exemption would apply without prejudice to article 7 on the obligations incumbent on Member States in whose territory a project that is likely to have significant effects on the environment in another Member State is intended to be carried out.

Concerning article 4 (1) EIA Directive, the Court noted that as its first condition a project must be adopted by a specific act of legislation that has the same characteristics as a development consent. In addition, the project must be adopted in a "sufficiently precise and definitive manner", so that the legislative act adopting the project must include all the elements of the project relevant to the EIA. The legislative act must demonstrate that the objectives of the EIA Directive have been achieved as regards the project in question, which was not the case regarding the Law of 28 June 2015.

Regarding the Habitats Directive the Court first noted that an activity can only be authorised according to article 6 (3) where "there is no reasonable scientific doubt as to the absence of such effects". On the definition of a "project" it held that if an activity is covered by the EIA Directive, it must, a fortiori, be covered by the Habitats Directive. The fact that a recurrent activity has been authorised under national law before the entry into force of the Habitats Directive does not constitute an obstacle to such an activity being regarded, at the time of each subsequent intervention, as a distinct project for the purposes of that directive. The fact that the national authority that is competent to approve the plan or project in question is the legislature has no bearing in this matter. In this respect, the Court named the fact that one of the reactors in question had been recommissioned and there were new safety standards and an increase of capacity.

In contrast to the provisions of the EIA Directive, no derogation is possible from the assessment under article 6 (3) of the Habitats Directive on the grounds that the competent authority to grant consent to the project in question is the legislature.

In the present case the ECJ clearly saw it likely to undermine the conservation objectives for nearby protected sites, given the scale of the work involved and the length of the extension granted for industrial production of electricity and by collecting large volumes of water from the nearby river for use in the cooling system, which are then discharged into that river, but also the risk of a serious accident.

The ECJ therefore concluded that measures such as those at issue together with the work of upgrading and of ensuring compliance with current safety standards, constitute a project in respect of which an appropriate assessment of its effects on the protected sites concerned should be conducted. The fact that the implementation of those measures involves subsequent acts is not decisive in that respect. Work that is inextricably linked to those measures must also be subject to such an assessment before the adoption of those measures if its nature and potential impact on the protected sites are sufficiently identifiable at that stage.

Regarding article 6 (4) Habitats Directive, the Court first stressed the condition to interpret it strictly and to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. Knowledge of the effects of a plan or project is thus a necessary prerequisite for the application of article 6 (4) – as well as a weighing up against the damage caused to the site. The prerequisite of overriding public interest presupposes that it must be "of such an importance that it can be weighed against that directive's objective". Furthermore, the only ground capable of constituting a public security ground that would justify proceeding with the project is the need to nullify a genuine and serious threat of rupture of that Member State's electricity supply.

The Court decided **not to answer the questions concerning the Espoo Convention** as that project in question must undergo an assessment procedure of its transboundary effects in accordance with Article 7 of the EIA Directive, which takes account of the requirements of the Espoo Convention.

It also chose **not to answer the question concerning the Aarhus Convention** arguing that it is clear that the EIA Directive applies to those measures, which is intended to take account of the provisions of the Aarhus Convention.[27]

[27] Advocate General *Kokott*, on the contrary, chose to answer these questions in her opinion of 29 November 2019. She found that *the extension of the period of industrial production of electricity by 10 years is an activity*

Regarding the last question the EJC concluded that a national court may, by way of exception, maintain the effects of measures, such as those at issue in the main proceedings, adopted in breach of the obligations laid down by the EIA Directive and the Habitats Directive, where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned, which cannot be remedied by any other means or alternatives. The effects may only be maintained for as long as is strictly necessary to remedy the breach.

within the meaning of Article 1 (5) and Appendix I, point 2 to the Espoo Convention which requires a transboundary environmental impact assessment pursuant to Article 2 (3) because it may cause a significant adverse transboundary environmental impact.

Advocate General *Kokott* also found that *the extension of the period of industrial production of electricity by certain nuclear power stations is to be regarded, on the one hand, as consent for an activity within the meaning of Article 6 (1)(a) and the fifth indent of point 1 of Annex I to the Aarhus Convention and, on the other, as a change to and extension in time of the operation of nuclear power stations within the meaning of Article 6 (1)(a) and the first sentence of point 22 of Annex I in conjunction with the fifth indent of point 1*.

State aid for Hinkley Point C

Body	**ECJ (General Court)**
Case Number	C-594/18 P
Party / Member State	European Union
Date of Decision	22 September 2020
Relevant Legislation	Articles 107(3)(c), 11 and 194 TFEU Euratom Treaty
Communicant / Complainant	Austria

Background

On 22 October 2013, the UK notified three aid measures to support the Hinkley Point C NPP. The beneficiary of the aid measures is NNB Generation Company Limited (NNBG), a subsidiary of EDF Energy plc (EDF). The first aid measure is a contract to ensure price stability for electricity sales by NNBG during the operational phase of Hinkley Point C. The second measure is an agreement to pay compensation to NNBG's investors by the UK's Secretary of State for Energy and Climate Change in case of an early shutdown of Hinkley Point C on political grounds. The third measure is a credit guarantee by the UK on bonds to be issued by NNBG.

On 18 December 2013, the European Commission (EC) decided to initiate a formal investigation procedure on the aid measures. On 8 October 2014, the EC adopted the decision stating that the aid measures constituted State aid within the meaning of article 107 (1) TFEU. The EC further examined those measures and declared them to be compatible with the internal market pursuant to article 107 (3)(c) TFEU, authorizing their implementation.

On 6 July 2015, the Republic of Austria lodged an action for annulment of that decision. Taking issue with the Commission for having declared that the measures at issue were compatible with the internal market within the meaning of Article 107 (3)(c) TFEU, the Republic of Austria put forward 10 pleas in law in support of its action.

The Grand Duchy of Luxembourg was granted leave to intervene in the proceedings in support of the form of order sought by the Republic of Austria, whilst the Czech Republic, the French Republic, Hungary, the Republic of Poland, Romania, the Slovak Republic and the United Kingdom were granted leave to intervene in support of the form of order sought by the Commission.

The General Court rejected those 10 pleas and dismissed the action in its judgement T-356/15, from 12 July 2018. The Republic of Austria brought an appeal on that judgement on 21 September 2018, putting forward five grounds of appeal.

Judgement

The ECJ examined all of five grounds of appeal closely and found them partly inadmissible and partly unfounded. As a consequence, the Court dismissed the appeal.

By its first ground of appeal, the Republic of Austria maintained that the Court had departed from the Commission's decision-making practice in requiring State aid to pursue an objective of common interest in order to be declared compatible with the internal market. The ECJ, however, found that article 107(3)(c) TFEU does not lay out such a requirement. Regarding the Euratom Treaty, the ECJ declared that the TFEU is applicable where the Euratom Treaty does not contain specific provisions, and since the Euratom Treaty does not contain specific rules concerning State aid, article 107 (3)(c) TFEU is applicable in this case. The Court still clarified that the objectives pursued by the Euratom Treaty do in fact cover the construction of nuclear power stations or the creation of new nuclear energy generating capacity, with the result that the grant of state aid for them is not contrary to those objectives. Moreover, since Member States have the right to choose their energy sources freely according to article 194 (2) TFEU, the Court found the choice of nuclear energy not to be in conflict

with the principle of protection of the environment, the precautionary principle, the "polluter pays" principle and the principle of sustainability.

By its second ground of appeal, the Republic of Austria submitted that the aid measures were wrongly held to be compatible with the internal market, the Court having defined the relevant economic activity incorrectly and having failed to verify whether there was a market failure. The Court rejected the arguments by Austria, stating that the Commission had not erred when determining that those measures for developing the generation of nuclear energy constitute an economic activity within the meaning of article 107 (3)(c) TFEU. The CJE further found that even though the Commission may consider it necessary to examine whether the planned aid enables the remedy of a market failure when determining its compatibility with the internal market, the existence of such a failure does not constitute a condition for declaring aid to be compatible with the internal market.

The third ground of appeal questioned the examination of the proportionality of the aid measures by the Commission which had been upheld by the Court in its judgement. The ECJ reaffirmed its decision stating that it had examined the proportionality of the aid measures not solely in the light of the objective of creating new nuclear energy generating capacity but in the light of the United Kingdom's electricity supply needs, whilst pointing out that the United Kingdom is free to determine the composition of its own energy mix. The Court further rejected the argument by Austria that the examination of the proportionality should take into consideration speculation to the precedent effect of the decision or on other considerations relating to the cumulative impact of that aid plans that may arise in the future.

By its fourth ground of appeal, the Republic of Austria maintained that the aid measures in question constitute operating aid rather than investment aid and thus are not compatible with the internal market. While the Court agreed in its findings that operational aid is not compatible with the internal market, it did not find the Commission in error when considering the aid measures to be such that facilitate the development of an economic activity, as the aid enabled NNBG create new nuclear energy generating capacity with the construction of Hinkley Point C.

By its last ground of appeal, the Republic of Austria submitted that the aid elements had been determined insufficiently in breach of several guidelines and regulations concerning State aid, which should have made it impossible for the Commission to assess its compatibility with the internal market. The Court pointed out in its findings that the Commission's authorisation covered only the project as notified to it and that any subsequent amendment liable to affect the assessment of compatibility of the aid measures with the internal market would have to be notified anew.