

CC2016.ACCC/C/2012/71
MAD 2016.384

I sager, hvor projekter har grænseoverskridende miljøvirkninger, er myndigheden i den stat, der meddeler tilladelse til projektet, forpligtet til at sikre, at den berørte offentlighed i nabostaten er underrettet og høres i overensstemmelse med Aarhus-konventionens art. 6 (2), men en manglende organiseret høring i nabostaten udgør ikke en ulovlig diskrimination.

1.4.2 VVM - 9. Aarhus-konventionen om borgernes rettigheder

En borger, N, bosiddende i Tyskland, klagede til Compliance Committee (CC) over, at Tjekkiet havde tilsidesat forpligtelserne efter Aarhus-konventionens art. 3(9), art. 6 og art. 9 ved meddelelse af tilladelse til opførelse af et atomkraftværk nær landsbyen Temelin i Tjekkiet. Indsigelserne om art. 9 blev afvist grundet manglende dokumentation. I forhold til art. 6 lagde CC til grund, at art. 6 ikke udelukker en flerleddet proces med flere tilladelser, og at forpligtelserne i sager om grænseoverskridende miljøvirkninger ikke er afhængig af forpligtelser efter andre internationale aftaler, hvorfor det altid påhviler den stat, der huser projektet at sikre, at art. 6 er overholdt i forhold til den berørte offentlighed i en anden stat. I forhold til en potentiel ultrafarlig virksomhed som et atomkraftværk fandt CC, at art. 6(2) ikke kan opfyldes ved en offentlig bekendtgørelse på det tjekkiske ministeriums hjemmeside, da det ikke kunne forventes, at offentligheden regelmæssigt ville tjekke hjemmesiden. Den

tjekkiske lovgivning var derfor mangelfuld, da den ikke krævede, at myndighederne brugte offentliggørelsesmetoder, der sikrede, at alle borgere omfattet af den berørte offentlighed inklusive borgere uden for Tjekkiet, havde en rimelig mulighed for at få viden om det foreslåede projekt. CC fandt endvidere, at høringen ikke opfyldte kravene i art. 6 (2)(d)(ii) om adækvat og effektiv information om offentlighedens muligheder for at deltage, men da disse forhold kunne afhjælpes senere i beslutningsprocessen, afstod CC fra en konklusion. De fastsatte frister for høring fandtes i hovedsagen i overensstemmelse med art. 6, fordi myndighederne har et vist skøn mht., hvad der skal behandles på de enkelte led i en flerleddet beslutningsproces. I relation til klagerens påstand om diskrimination mellem tjekkiske og tyske borgere og dermed en overtrædelse af art. 3(9), fandt CC, at det ikke var udtryk for diskrimination, at høringen fandt sted i Tjekkiet, når dette skete tæt ved grænsen til Tyskland. Heller ikke mht. informationen om høringen og mulighederne for deltagelse var der tale om diskrimination, da der hverken i Aarhus-konventionen eller folkeretten er krav om, at en officiel høring bliver organiseret i det land, der kan blive påvirket af et projekt i et andet land, men der er heller ikke noget, der hindrer dette. Der var således ikke noget juridisk grundlag for at konkludere at den omstændighed, at der ikke fandt en officiel høring sted i Tyskland, indebar en overtrædelse af art. 3 (9).

Compliance Committee under Aarhus-konventionen. Findings af 20. december 2016 i ACCC/C/2012/71, Tjekkiet

Contents

	<i>Page</i>
I. Introduction	2
II. Summary of facts, evidence and issues	3
A. Legal framework	3
B. Facts	4
C. Domestic remedies and admissibility	4
D. Substantive issues	5
III. Consideration and evaluation by the Committee	9
IV. Conclusions and recommendations	20
A. Main findings with regard to non-compliance	20
B. Recommendations	20

I. Introduction

1. On 31 May 2012, Brigitte Artmann (the communicant), a member of the public, submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Czechia to comply with its obligations under article 3, paragraph 9, and articles 6 and 9 of the Convention. Specifically, the communication alleges that members of the public in Germany did not have the same possibility to participate in the decision-making procedure concerning the Temelín Nuclear Power Plant (Temelín NPP) as members of the public in Czechia.(1)

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

3. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 16 August 2012. On the same

date, a letter was sent to the communicant. Both were asked to address a number of questions from the Committee.

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

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

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

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

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

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

10. The Committee finalized its findings in closed session at its virtual meeting on 13 September 2016, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for its fifty-sixth meeting.

II. Summary of facts, evidence and issues(2)

A. Legal framework

International and European Union law

11. Both Czechia and Germany are Parties to the Aarhus Convention. They are also Parties to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

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

13. Nuclear power plants (NPPs) are subject to the European Union Environmental Impact Assessment Directive (EIA Directive).(3)

National law(4)

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

(3) The relevant authority shall ensure that, information and statements referred to in paragraphs 1 and 2 are published:

- a. on the official notice boards of the affected territorial self-governing units
- b. on the Internet, and
- c. in at least one of the other ways usual in the affected territory (e.g. in the local press, on the radio, etc.).

(4) The date of publication shall be considered to be the day when the information and statement pursuant to paragraphs 1 and 2 were displayed on the official notice board of the affected region. The affected territorial self-governing units shall be obliged to display the information and statements pursuant to paragraphs 1 and 2 immediately on their official notice board for a period of at least 15 days and inform the relevant authority thereof.

15. For the permitting procedure on the Temelín NPP, the reference to “affected territorial self-governing units” in section 16, paragraph 4, of the EIA Act was interpreted to include municipalities whose administrative territory includes an internal or external part of the emergency planning zone (approximately the area of a circle with a radius of 13 kilometres centred in the containment area of the first production unit of the Temelín NPP).(5)

16. For projects where, according to the EIA Act “the affected territory can extend beyond the territory of [Czechia]”, the EIA Act envisages transboundary consultations with the affected States.

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

B. Facts

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

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

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

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

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

C. Domestic remedies and admissibility

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

24. On 6 August 2012, the communicant submitted a complaint with the European Commission.(6)

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

D. Substantive issues

Article 3, paragraph 9

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

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

in Czech territory, bearing the costs of travel, accommodation and time off work.

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

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

30. Regarding the official hearing, the Party concerned submits that, in order to ensure broad public participation, the invitation was sent to the public concerned in Czechia and abroad on the same day, well in advance of the meeting. The location was selected for its accessibility by road, parking capacity, venue size (capacity for 2,500 people) and proximity to borders with Germany and Austria (approximately 80 and 40 kilometres, respectively).

Article 6, paragraph 2

31. The communicant contends that there was a failure to adequately notify the public concerned in Germany. Despite the possible widespread environmental impacts of a nuclear accident, only persons living in German border districts were informed about the possibility to participate in the EIA procedure. Persons living elsewhere in Germany received no official notification at all. Even in the German border districts, there were no public notifications in newspapers or other public media. The only information available was on the official websites of the ministries and councils of the border districts and cities.

32. The Party concerned submits that, since the onset of the EIA procedure, it has kept neighbouring countries informed in a timely manner. On 29 June 2010, the EIA documentation, fully translated into German, and including an electronic version on compact disc, was sent by the Czech Ministry of Environment to the Bavarian State Ministry for Environment and Health and the Saxon State Ministry for the Environment and Agriculture with a copy “for information” to the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety. The covering letter, *inter alia*, stated:(7)

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

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

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

34. The Party concerned states that the EIA documentation was also posted online in the Czech language on the websites of the

Czech Environmental Information Agency (www.cenia.cz/eia) and the Ministry of Environment.

Article 6, paragraph 2 (d) (ii)

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

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

Article 6, paragraph 3

37. The communicant alleges that, given the project’s transboundary nature and complexity, the time frames provided in 2010 and 2012 for the public to comment and the time allotted for the formal hearing did not enable the public to participate in an adequate, timely and effective manner as required by article 6, paragraph 3.

38. The communicant alleges that the public was given 30 days in August 2010, extended by a further 30 days in September, to comment on 2,000 pages of EIA documentation. However, this period coincided with the vacation period (Bavarian summer holidays in 2010 ended on 13 September 2010), leaving effectively only 17 days for the public in Germany to participate. The period to comment on the EIA expert report, from 7 May until 18 June 2012, was similarly inadequate. In Bavaria there were holidays from 26 May until 10 June, leaving 27 days for submitting comments. Moreover, the public in the border districts of Hof and Wunsiedel, where the communicant lives, was first notified through the local newspaper on 29 May, meaning the public in that area had only 18 days to comment. The communicant refers to the Committee’s findings on communication ACCC/C/2008/24 (Spain),(8) which considered the timing of opportunities for the public to examine and comment on documentation relating to a proposed activity.

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

40. The communicant alleges that, though the organizers were informed that she was nominated as a speaker on behalf of the German Greens and others, she was not included on the speakers’ list. Only three questions were allowed per speaker per turn. Her first opportunity to speak came at around 5:30 p.m., and then she had to queue for another turn. Her next turn to raise three questions came at 3 a.m., when both the public and organizers were extremely tired. She had 68 further questions, but no opportunity to raise them. She submitted those questions in writing after the hearing, but received no response.

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

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

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

44. The Party concerned refutes these allegations, submitting that German citizens had ample opportunity to participate. The EIA documentation was translated into German and disseminated to the public in Germany and Austria. Moreover, the EIA Act provides longer commenting periods for the public outside Czech territory. The public in Germany had 60 days in 2010 to provide comments on the EIA documentation, and 43 days in 2012 to submit comments on the EIA expert report. The Party concerned states that around 70,000 comments were received, the majority from Germany and Austria.

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

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

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

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

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

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

50. The communicant further submits that, through its failure to provide access to all technical and scientific information relevant to the decision-making, the Party concerned breached article 6, paragraph 6, and particularly subparagraphs (a) and (c), of the Convention. Moreover, as it was denied access to that information, the public was unable to comment on the design alternatives while they were under consideration, and was therefore unable to participate when all options were open, as required by article 6,

paragraph 4, or to submit its own analyses of the potential risks or impacts of those designs, pursuant to article 6, paragraph 7.

51. The Party concerned refutes the allegations concerning article 6, paragraphs 4, 6, and 7. It states that, given that no supplier for the reactor had yet been selected, the "envelope" method was used for the EIA procedure. The assessment of impacts proceeded with the potential maximum impacts of the individual types of reactors in the "envelope", represented by the option with the worst possible environmental impact and also taking into consideration the concurrent effect of existing power plant operations and the existing background. It submits that this approach is consistent with other countries' practice and article 6, paragraph 4, of the EIA Directive. A technical description of all reactor types under consideration was provided in chapter B.I.6 of the EIA documentation, "Description of the technical and technological solution for the project". The description was divided into a general part, defining the project with generation PWR type power units, and a specific part, describing the technical aspects of the power units. The input and output parameters of the project were conservatively estimated on the basis of this information, and that made it possible to make a qualitative and quantitative evaluation of the environmental impact in accordance with article 3 of the EIA Directive. The approach secured the timely and effective participation of the public concerned when all options were open.

Article 6, paragraph 7 -- questions at the hearing

52. The communicant alleges that at the hearing she was denied her rights under article 6, paragraph 7, of the Convention because she was limited to three questions per turn, and was not able to ask the 68 further questions she wished to raise on behalf of the public in Germany that she represented.

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

Article 6, paragraph 8

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

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

Article 9, paragraphs 2 and 4

56. The communicant submits that there are no opportunities for physical persons (either Czech or German citizens) to challenge decisions, acts or omissions regarding the EIA procedure. Moreover, not all of the potentially affected public is entitled to participate in

the subsequent procedures. Lastly, a German citizen seeking to appeal to Czech courts will be faced with high costs. She alleges that the Party concerned thus fails to comply with article 9, paragraphs 2 and 4, of the Convention.

57. The Party concerned states that the EIA procedure is concluded by the issuing of the EIA statement, which is not a decision to construct the project, but a professional basis for subsequent procedures in which it will be taken into account. The EIA statement will thus be subject to judicial action only when it is taken into account in subsequent procedures. The public has a right to bring an action during the subsequent procedures on condition that they meet the statutory requirements, e.g., they are affected owners of neighbouring plots. The Party concerned stresses that the courts interpret the term “neighbouring” extremely widely; all owners of property, even distant, which might be affected can be participants in the subsequent procedures. The Party concerned did not comment on the cost issue.

III. Consideration and evaluation by the Committee

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

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

60. With respect to the submissions on admissibility of the Party concerned (para. 25 above), the Committee notes that the Party has not denied that article 6 must be applied in the context of a multi-stage decision-making process such as the present.⁽⁹⁾ The Committee reiterates that, since the EIA procedure is normally linked closely to decisions that determine whether or not a proposed activity may proceed, it should thus be regarded as part of the decision-making process regardless of the fact that in the Czech legal framework the EIA statement is not a permitting decision per se. Furthermore, according to the evidence before the Committee, the EIA procedure is the principal procedure in the Party’s legal framework to address environmental concerns and to allow broad public participation. It is, moreover, the stage of the decision-making which is specifically designated to address transboundary issues, including by allowing the participation of the foreign public. While the entire decision-making procedure on the Temelín NPP may not yet have been concluded, the EIA stage has been completed and therefore can be assessed against the Convention’s requirements. Thus, the Committee finds the objection of the Party concerned to the admissibility of the communication to be unsustainable.

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

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

63. The Committee also will not deal with the allegations regarding article 9. The communicant has not submitted case law or any other evidence to substantiate her allegations concerning that article, for

instance on costs or standing of German citizens to challenge the EIA statement before the courts of the Party concerned.

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

Article 2, paragraph 5 - the public concerned

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

Article 6 in the transboundary context

66. Concerning the application of article 6 in a transboundary context, the Committee welcomes the recommendations on how to ensure more effective participation of the public concerned from affected countries contained in the 2014 Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations).⁽¹⁰⁾

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

68. The situation in such cases is akin to those where the domestic legal order delegates administrative tasks for public participation to other domestic bodies. Accordingly, as the Maastricht Recommendations state, if “the legal framework seeks to delegate any administrative tasks related to a public participation procedure to persons or bodies other than the competent public authority, it should be borne in mind that the ultimate responsibility for ensuring the public participation procedure complies with the requirements of the Convention will still rest with the competent authority”.⁽¹¹⁾ The Committee considers this wording applies equally to situations where the responsibility for certain tasks related to public participation in the affected country’s territory rests (by virtue of an international instrument or ad hoc agreement) on that country’s public authorities.

69. In the light of the above, the Committee stresses that, whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the requirements of article 6 lies with the competent authorities of the Party of origin.

Article 6, paragraph 2 - notification

70. With respect to the allegations concerning article 6, paragraph 2, the Committee will focus on two aspects: notifying the public concerned; and appropriate and adequate information regarding the public hearing.

(a) Notifying the public concerned

(i) Notification in a transboundary context

71. Though the Convention does not expressly address a Party’s responsibilities when organizing a public participation procedure in a transboundary context, it nevertheless makes clear that, for all decision-making subject to article 6, the Party must ensure that the public concerned is informed in an adequate, timely and effective

manner. The Committee notes that the Czech Ministry of Environment gave clear instructions to the German authorities on how to notify the public in Germany (see para. 32 above) and that these instructions were consistent with the means of notification envisaged for notifying the public in Czechia. Nevertheless, the Committee is not convinced that these instructions were sufficient to ensure effective notification in the transboundary context. The Committee recalls its findings on communication ACCC/C/2006/16 concerning Lithuania, where it noted that “the requirement for the public to be informed in an ‘effective manner’ means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities”.(12) The Committee notes that neither the notification requirements in article 16, paragraphs 3 and 4, of the EIA Act (see para. 14 above) nor the Ministry’s request to the German authorities include a clear requirement to this effect.

72. As indicated above, ultimately it is for the competent public authorities of the Party of origin to ensure that the public participation procedure complies with the requirements of article 6, also in situations where the foreign public is involved. In cases that are not subject to a transboundary procedure under an international treaty (e.g., the Espoo Convention), the requirement to inform the public concerned in the affected countries in an adequate, timely and effective manner will be the sole responsibility of the competent authority of the Party of origin. Ensuring that the notification is effective may include, inter alia, publishing announcements in the popular newspapers and by other means customarily used in the affected countries, as well as by exploring possibilities for using more dynamic forms of communication (e.g., through social media). In cases that are subject to a transboundary procedure under an international treaty, the Party of origin remains responsible under the Aarhus Convention for the adequate, timely and effective notification of the public concerned in the affected country, either by carrying out the notification itself or by making the necessary efforts to ensure that the affected Party has done so effectively.

(ii) Notification regarding ultrahazardous activities

73. The Committee notes that, for the purposes of the permitting procedure on the Temelín NPP, the reference to “affected territorial self-governing units” in section 16, paragraph 4, of the EIA Act was interpreted to include municipalities whose administrative territory included an internal or external part of the emergency planning zone (approximately the area of a circle with a radius of 13 kilometres centred in the containment area of the first production unit of the Temelín NPP) (see para. 15 above).

74. The Committee is convinced that in the case of decision-making on ultrahazardous activities⁽¹³⁾ 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 in order to ensure that all those who potentially could be concerned in the decision-making, including the public concerned outside its territory, have a reasonable chance to learn about the proposed activities and their possibilities to participate. In this regard, the public may potentially be concerned both because of the possible effects of the normal or routine operation of the NPP and because of the possible effects in case of an accident or other exceptional incident. In both cases, the decision-making may impact not only on matters, such as property or health, but also on less measurable aspects, like quality of life. For an ultrahazardous activity such as an NPP, members of the public may be affected or be likely to be affected by, or have an

interest in, the environmental decision-making within the scope of the Convention even if the risk of an accident is very small. In determining who is concerned by the environmental decision-making, the Committee also considers the magnitude of the effects if an accident should indeed occur, whether the persons and their living environment within the possible range of the adverse effects could be harmed in case of an accident, and the perceptions and concerns of persons living within the possible range of the adverse effects. It is clear to the Committee that with respect to NPPs, the possible adverse effects in case of an accident can reach way beyond State borders and over vast areas and regions.

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

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

77. In the light of the above, the Committee finds that by requiring that only the public in Czechia living in the “municipalities whose administrative territory includes an internal or external part of the emergency planning zone” (i.e., within a radius of 13 kilometres) be notified, the Party concerned failed to ensure that all the public in Czechia that potentially could be concerned had a reasonable chance to learn about proposed activities. Likewise, although the distance in which the public in Germany was notified was wider, only the public in the districts of Bavaria bordering with Czechia was notified and not in other parts of Germany (see paras. 31-32 above).

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

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

(b) Appropriate and adequate information regarding the public hearing

80. The Committee notes that only very basic information about the hearing, namely its timing and venue, was provided in advance. While that might meet the requirements of article 6, paragraph 2 (d) (iii), the Committee considers that it does not meet the requirement in article 6, paragraph 2 (d) (ii), to adequately and effectively inform the public concerned of its opportunities to participate. If a hearing is to be held, the public concerned should be notified of its opportunities to participate in that hearing, e.g., the format of the hearing, the format in which the public may make interventions, and any time limits on those interventions. This is particularly important in the case of a foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin, though it should not be presumed that all members of the public concerned from the Party of origin will necessarily know this either. Moreover, the Party concerned has not disputed that it failed to respond to the communicant's request to the Ministry of Environment on 26 May 2012 for further information regarding the format of the upcoming hearing.(14)

81. In the light of the above, the Committee considers that the Party concerned did not provide adequate and effective notification of the opportunities for the public to participate in the public hearing on 22 June 2012 in accordance with article 6, paragraph 2 (d) (ii), of the Convention. The Committee is thus convinced that if the hearing on 22 June 2012 were to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelín NPP, and in particular to provide its input on the issues under consideration at the hearing on 22 June 2012, the Party concerned would have failed to comply with article 6, paragraph 2 (d) (ii). However, since the shortcomings identified above could be rectified at a future stage of the multistage permitting procedure, provided that all options under consideration at the time of the hearing on 22 June 2012 would then still be open, the Committee does not make a finding of non-compliance on this point. The Committee stresses, however, that, were the permitting procedure to continue without rectifying the shortcomings identified above, the Party concerned would be in non-compliance with article 6, paragraph 2 (d) (ii).

Article 6, paragraph 3

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

(a) Timing and duration for submitting written comments

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

84. As the communicant observed, in its findings on communication ACCC/C/2008/24, the Committee considered the timing of the commenting period (as opposed to its duration) (see para. 38 above). In those findings, the Committee stated:

While the month of August is indeed a traditional summer holiday season month in many countries, the given time frame began on August 25 2005 and included most of the month of September, which is considered a "regular" working month. Under these circumstances, the Committee does not consider the given time frame as amounting to non-compliance with the Convention.(15)

The Committee considers that finding to be equally relevant to the present case.

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

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

(b) Timing and duration of public hearing

87. Regarding the timing of the hearing, which was held four days after the period for written comments ended, the Committee does not consider this inherently problematic. Article 6, paragraph 7, of the Convention does not require the hearing to be a vehicle through which public authorities must demonstrate how they have already taken due account of the public's written comments. Rather, the hearing is an opportunity for the public to be heard and also offers the opportunity for the applicant to present the project and respond to questions and comments.(16)

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

89. Bearing the above in mind, the Committee considers that the time frame for the hearing on 22 June 2012 was neither reasonable nor could ensure that the public participating therein could do so effectively in accordance with article 6, paragraph 3. The Committee is convinced that if that hearing were to remain the last possibility for the public concerned, including the public concerned in Germany, to participate in the permitting procedure for the Temelín NPP, the Party concerned would fail to comply with article 6, paragraph 3. However, since this shortcoming could be rectified at a future stage of the multi-stage permitting procedure, provided that all options under consideration at the time of the hearing on 22 June 2012 would then still be open, the Committee does not make a finding of non-compliance on this point. It stresses, however, that if the permitting procedure were to continue without

rectifying the shortcoming identified, the Party concerned would be in non-compliance with article 6, paragraph 3, of the Convention.

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

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

(a) Article 6, paragraph 4

91. With respect to article 6, paragraph 4, the Committee cites with approval the Maastricht Recommendations, which state that:

While the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage where public participation is required, it should occur when all the options to be considered at that stage are still open and effective public participation can take place. If a particular tier of the decision-making process has no public participation, 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.(17)

92. The Committee considers that the discretion as to the range of options to be addressed at consecutive stages of the decision-making is closely related to the opportunities for public participation on those options. A multi-stage decision-making procedure in which certain options are considered at a stage without public participation and where no subsequent stage provides an “opportunity for the public to also participate on the options decided at that earlier tier”(18) would be incompatible with the Convention. Similarly, a multi-stage decision-making procedure that provides for public participation on certain options at an early stage but leaves other options to be considered at a later stage without public participation would likewise not be compatible with the Convention.

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

(b) Article 6, paragraph 6

94. Since the permitting of the Temelín NPP is a multi-stage decision-making procedure, the obligations in article 6, paragraph 6, must be seen in that context. In this regard, while the competent authority may have certain discretion as to the range of options to be addressed at each stage of the decision-making, at each stage at which public participation is required all information relevant to the decision-making at that particular stage which is available to

the public authorities should be made available to the public concerned (excepting information exempted from public disclosure in accordance with article 4, paragraphs 3 and 4).

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

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

97. However, having reviewed the evidence before it, the Committee understands that the “envelope” approach was also used to provide information to the competent authorities, and the Committee has been provided with no evidence to indicate that the competent authorities were provided with any further information at the EIA stage than was provided to the public concerned. In the light of the above, the Committee finds the allegation that the use of the “envelope” approach in this case resulted in non-compliance with article 6, paragraph 6, to be unsubstantiated.

(c) Article 6, paragraph 7

98. The communicant alleges that the use of the “envelope” approach was also in non-compliance with article 6, paragraph 7, of the Convention because the public concerned was not able to submit any comments, information, analyses or opinions that it considered relevant to the proposed activity. In keeping with its finding in paragraph 93 above, the Committee finds that, so long as at the stage of the decision-making at which the exact designs or technical specifications (including risk factors and potential environmental impacts) are to be considered by the competent authorities, the public concerned, including the public concerned in Germany, will be allowed to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity while all options are still open and having been provided with all information relevant to the decision-making, the use of the “envelope” or “black box” approach at the EIA stage does not, in itself, constitute non-compliance with article 6, paragraph 7.

Limit on number of questions and questions not answered

99. Concerning the allegation that the communicant was denied her rights under article 6, paragraph 7, at the hearing because she was limited to three questions per turn, the Committee notes that the Convention leaves considerable discretion to Parties as to how public hearings should be conducted. However, as *The Aarhus Convention: An Implementation Guide* correctly states, while the Convention does not establish particular standards for public hearings, rules for their conduct should be made in accordance with the Convention’s provisions, in particular article 3, paragraphs 1 and 2.(19)

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

the foreign public concerned, which may be entirely unfamiliar with how hearings are conducted in the Party of origin.

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

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

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

104. Regarding the communicant's allegation that she had a large number of unanswered questions at the end of the hearing, the Committee notes the parties' differing factual accounts on this point, since the Party concerned asserts that the hearing only finished "when no further questions had been raised by the general public".⁽²⁰⁾ Irrespective of which version of events is correct, the Committee does not find that the fact the public concerned may have had a large number of remaining questions at the end of the hearing, in itself, to amount to non-compliance with article 6, paragraph 7. Rather, at the end of the hearing and regardless of whether any participants had indicated their wish to submit additional questions or comments, the competent authorities should have informed the public concerned of its opportunity to put any further questions or comments in writing and to have informed the public concerned of the time frames for it to do so.

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

Article 3, paragraph 2 - assistance to the public

106. The communicant did not make an allegation under article 3, paragraph 2, so the Committee does not make a finding regarding this provision. However, it expresses its concern that the Party concerned did not appear to take steps to make sure that the rules to be applied during the hearing were known and understood by the public concerned in advance. The Committee reminds the Party concerned of its obligation under article 3, paragraph 2, of the Convention to endeavour to ensure its officials assist and provide guidance to the public, inter alia, in seeking access to information and public participation in decision-making.

Article 3, paragraph 9 - without discrimination as to citizenship, nationality or domicile

107. In deciding whether the Party concerned has complied with article 3, paragraph 9, the Committee considers the general test to be whether the public concerned in Germany was given any less favourable treatment than the public concerned in Czechia with regard to its opportunities to participate in the procedure. The Committee considers three aspects of this question, as set out below.

(a) Distances travelled to the hearing by the public

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

(b) Information about the hearing made available to the public

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

(c) No formal hearing in Germany

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

111. In the light of its findings in paragraphs 108-110 above, the Committee does not find the Party concerned to have failed to comply with article 3, paragraph 9.

IV. Conclusions and recommendations

112. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

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

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

115. However, since the shortcomings identified in paragraphs 81 and 89 above could be rectified at a future stage of the multi-stage permitting procedure, provided that all options under consideration at the time of the EIA procedure would then still be open, the Committee does not make findings of non-compliance with respect to these points. It stresses, however, that if the permitting procedure were to continue without rectifying these shortcomings, the Party concerned would be in non-compliance with article 6, paragraphs 2 (d) (ii) and 3, of the Convention.

116. Likewise, the Committee finds that, so long as the public concerned, including the public concerned in Germany, is provided with the opportunity to participate effectively in the stage of the decision-making at which the exact designs or technical specifications (including risk factors and potential environmental impacts) are under consideration, the use of the “envelope” or “black box” approach at the EIA stage does not, in itself, constitute non-compliance with article 6, paragraphs 4, 6 and 7. The Committee stresses, however, that if the permitting procedure were to continue without providing the public concerned with the opportunity to participate effectively in that stage, the Party concerned would be in non-compliance with article 6, paragraphs 4, 6 and 7, of the Convention.

B. Recommendations

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

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

- (ii) There will be proper possibilities for the public concerned, including the public outside the territory of the Party concerned, to participate at the subsequent stages of the multi-stage decision-making procedure regarding the Temelín NPP;
- (c) A report to the Committee at the latest nine months in advance of the sixth session of the Meeting of the Parties on the measures taken and the results achieved in implementing the above recommendations.

- (1) Documents concerning this communication, including correspondence between the Committee, the communicant and the Party concerned, are available on a dedicated web page of the Committee's website (<http://www.unece.org/enenv/pp/compliancecommittee/71tablecz.html>).
- (2) This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.
- (3) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended.
- (4) This subsection refers to the legislation of the Party concerned at the time of the decision-making procedure at issue in this case.
- (5) Response of the Party concerned to communication, annex E1.
- (6) See annexes to communicant's letter of 28 November 2012.
- (7) See response from the Party concerned to communication, annex A1.
- (8) See ECE/MP.PP/C.1/2009/8/Add. 1.
- (9) See Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (ECE/MP.PP/2014/2/Add.2), para. 17.
- (10) ECE/MP.PP/2014/2/Add.2, paras. 23-26.
- (11) *Ibid.*, para. 28.
- (12) ECE/MP.PP/2008/5/Add.6, para. 67.
- (13) "An activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions", *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V. 17 (Part 2)), draft articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, 2001, commentary to article 1, para. 2.
- (14) See Communication, annex 3.
- (15) ECE/MP.PP/C.1/2009/8/Add.1, para. 93.
- (16) *The Aarhus Convention: An Implementation Guide*, United Nations publication, Sales No. E.13.II.E.3, p. 154.
- (17) ECE/MP.PP/2014/2/Add.2, para. 18.
- (18) *Ibid.*
- (19) *Implementation Guide*, p. 154.
- (20) Response of the Party concerned to communication, p. 4.