Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2009/44 concerning compliance by Belarus (adopted by the Committee on 28 June 2011)[1]

I. Introduction

1. On 10 December 2009, a coalition of citizens' organizations and non-governmental organizations (NGOs) European ECO Forum (hereinafter the communicant) submitted a communication to the Committee alleging the failure by Belarus to comply with its obligations under article 3, paragraphs 1 and 8, article 4, paragraph 1, article 6, paragraphs 2, 4, 6 and 7, article 7 and article 8 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in relation to a project to construct a nuclear power plant (NPP).

2. Prior to the submission of its communication, on 8 October 2009 the communicant had sent the information contained in the present communication in the form of amicus memorandum in the context of communication ACCC/C/2009/37 concerning compliance by Belarus in relation to a hydro power project. During consideration of communication ACCC/C/2009/37, the Committee had noted that some elements of the amicus memorandum went beyond the scope of the communication at issue, in that for instance one of the main allegations of the amicus memorandum concerned the inadequate national legislation on public participation in decision-making on nuclear issues, and the substantial transboundary character of the NPP. The Committee decided through its electronic decision-making procedure not to expand the consideration of communication ACCC/C/2009/37 to any new facts or allegations brought about by the amicus memorandum that fall out side the scope of or are not directly relevant to that communication. The findings of communication ACCC/C/2009/37 were adopted by the Committee at its twenty-ninth meeting (21–24 September 2010).

3. Communication ACCC/C/2009/44 alleges that the Party concerned by not providing complete and accurate information to citizens and NGOs that had requested information relating to NPP, failed to comply with article 4, paragraph 1, of the Convention. The communication further alleges that the Party concerned by (a) not properly informing the public about the decision authorizing the construction of the NPP, (b) not ensuring early public participation, (c) not providing all information relevant to the decision-making and (d) denying NGOs and the public concerned to submit their comments and views during the organized hearings, failed to comply with the provisions of article 6, paragraphs 2, 4, 6 and 7 of the Convention. The communication further alleges that the Party concerned by not taking any steps to provide for the public to participate in the adoption of generally applicable rules on public participation in the field of nuclear energy, failed to comply with articles 7 and 8 of the Convention. The communication further alleges that the Party concerned put pressure on activists trying to promote their views on nuclear energy issues in Belarus and as a result it failed to comply with its obligation under article 3, paragraph 8, of the Convention.

4. Also, the communication contains a general allegation that the Party concerned by not taking the necessary legislative and regulatory measures to implement the

[1] This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes which are not part of the editorial process and aim at correcting errors in the argumentation, but have no impact on the findings and conclusions) may take place.

provisions of article 6, paragraphs 2, 3, 8 and 9, it failed to comply with article 3, paragraph 1, of the Convention.

5. At its twenty-sixth meeting (15-18 December 2009), the Committee determined on a preliminary basis that the communication was admissible.

6. 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 18 December 2009. On 7 April 2010, the secretariat sent a number of questions to the Party concerned and the communicant raised by the Committee members regarding the communication.

7. At its twenty-seventh meeting (16-19 March 2010), the Committee agreed to discuss the content of the communication at its twenty-ninth meeting.

8. The communicant and the Party concerned addressed the questions raised by the Committee on 16 July and 3 August 2010 respectively.

9. The Committee discussed the communication at its twenty-ninth meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. The Party concerned submitted additional information to the Committee on 20 October and 23 November 2010 and the communicant submitted information on 27 October 2010. In addition, the Party concerned sent a letter on 22 February 2011 in response to the Committee's letter of 7 January 2011, asking the Party concerned to comment on the Committee's recommendations on communication ACCC/C/2009/37 in the light of ongoing changes in legislation and practice during 2010.

10. The Committee prepared draft findings at its thirty-second meeting (11-14 April 2011), completing the draft through its electronic decision-making procedure. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 24 May 2011. Both were invited to provide comments by 21 June 2011.

11. The communicant provided comments on 21 June 2011. The Party concerned did not provide specific comments on the draft, but on 20 June 2011, it informed Committee about the recently adopted amendments to the EIA procedure (Resolution of the Cabinet of Ministers of the Republic of Belarus No. 689 of 1 June 2011).

12. At its thirty-third meeting (27-28 June 2011), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the meeting report. It requested the secretariat to send the findings to the Party concerned and to the communicant.

II. Summary of legal framework, facts and issues[2]

A. National Legal Framework

Access to **information**

13. The rights the citizens of Belarus to receive, store and disseminate information are guaranteed by the Constitution and the Law "On information, informatization and the protection of information". In addition, the Law of 26 November 1992 on Environmental Protection (as amended in 2007) provides more details on environmental information, its types and the procedures for its provision including the grounds for restricting access (see paras. 16-17 of findings of communication ACCC/C/2009/37).

[2] This section summarizes only the main legal instruments, facts and issues relevant to the question of compliance, as presented to and considered by the Committee.

Public participation in decision-making

14. The Law No. 407-XIII of 6 June 2006 on Applications by Citizens (where applications are defined as individual or collective proposals, statements, or complaints by citizens to officials of a public authority or other agency, in verbal or written form), details the timeframes and procedure for citizens' requests by the authorities. the relevant regulatory framework for public participation in decision-making in relation to activities subjected to EIA procedures (general EIA legislation), at the time that the activities subject to the communication took place, was as follows[3]:

(a) Law on State Environmental Expertiza of 18 June 1993 (the new Law on State Environmental Expertiza of 9 November 2009 entered into force on 21 May 2010, i.e. after the NPP-related decision-making took place);

(b) Instructions on the Procedures for State Environmental Expertiza, adopted through Decision No. 8 of 11 May 2001 by the Ministry of Environmental Protection; and

(c) Instructions on the Procedures for Environmental Impact Assessment of the Planned Economic and Other Activities in the Republic of Belarus (OVOS Instructions) and the List of Types and Objects of Economic and Other Activities which are Subject to Compulsory EIA, adopted through Decision No. 30 of 17 June 2005 by the Ministry of Environmental Protection.

15. In addition, the following instruments are relevant with respect to nuclear energy law:

(a) Law on the Use of Nuclear Energy of 30 July 2008 with provisions relating to the location, design, construction and operation of nuclear facilities (art. 2) and to the rights and obligations of the citizens on access to information in the nuclear field (art. 3 and 39) and public participation (art. 5, 6, 8 and 40).

(b) "Regulation on the procedures for discussion of the issues in the area of the use of nuclear energy with participation of citizens' associations, other organizations and citizens", adopted through Decision No. 571 of 4 May 2009 by the Council of Ministers (the 2009 Regulation). The 2009 Regulation introduces special rules for public participation in decision-making on nuclear issues: it sets out the procedures for the discussion with citizens, their associations and other organizations, in as much as with citizens of other States who might be affected by planned activities in this area (para. 1 of the Regulation) but it does not apply to activities relating to the use of nuclear energy which are classified as state secret (para. 1, part 2 of the Regulation). The 2009 Regulation explicitly refers to the Aarhus and the Espoo Conventions.

B. Facts

Background and relevant decisions

16. The development of nuclear energy in Belarus was first considered in the 1970s and 1980s. In 1998, the Commission for Examining the Feasibility of the Development of Nuclear Energy, a body of qualified experts established by Order No. 88 of the Prime Minister on 31 March 1998, carried out an evaluation and concluded that it would be essential for the country to build nuclear power stations.

17. In 2005 the Party concerned adopted the Energy Security and Self-Sufficiency Strategy (Presidential Decree No. 399 of 25 August 2005). The Strategy examined and analyzed a number of factors and found that building a nuclear power station

[3] Description of this framework may be found in the findings of the Committee with respect to communication ACCC/C/2009/37 concerning non-compliance by Belarus in the construction of the hydro-power project

with a total capacity of 2000 MW would be the optimal solution to diversify energy supply in demand in the country.

18. The following decisions have been taken by the Party concerned to complete the NPP by 2016:

(a) Directive No. 3 of the President of Belarus "Economy and Saving – Key factors for Economic Security of the State" of 14 June 2007, which in its paragraph 1.3.1 calls the Council of Ministers and the National Academy of sciences to speed up works to construct the NPP;

(b) Decree No. 565 of the President of Belarus "On Some Measures to Construct the Nuclear Power Plant" of 12 November 2007. The Decree sets up state bodies responsible for the construction of the NPP, including the Directorate for the Construction of the Nuclear Power Plant, which is the main body for the development of the project, and the Nuclear Safety Authority within the Ministry of Emergency Situations;

(c) Decision of the National Security Council No. 1 "On the development of Nuclear Energy in the Republic of Belarus" of 15 January 2008, approved by the President of Belarus on 31 January 2008. The decision includes the plan of the Government to construct two nuclear reactors of capacity of 1,000 Mwt each, one until 2016 and one until 2018.

Access to information

19. The communication refers to the following requests for information about the NPP:

(a) On 14 May 2007, the Citizens Association "Ecohome" submitted a request to the Ministry of Energy (annex I to the communication) for information about the NPP (phase of the project, location, public participation). The Ministry replied on 1 June 2007 (annex II to the communication).

(b) In April 2008, a member of the public submitted a request to the Ministry of Energy for information about how public participation would be ensured, in particular as defined in article 6 of the Aarhus Convention. The Ministry replied on 8 May 2008 (annex III to the communication).

(c) On 18 December 2008, a member of the public submitted a request to the Council of Ministers for information about the choice of location for the NPP in the Ostrovets district ("*rayon*"). Several Ministries responded that the Ministry of Energy was the relevant authority. Indeed, the Ministry of Energy replied on 13 January 2009 (annex IV to the communication).

(d) In 2009, the Citizens Association "Ecohome" took the initiative to carry out public environmental expertiza.[4] For this purpose, on 30 December 2009 "Ecohome" requested access to the Full EIA documentation of the NPP in paper and electronic form from the Directorate for the Construction of the Nuclear Power Plant. On 17 February 2010, the Directorate replied that the EIA documentation could be accessed at its premises only and during working hours, from 22 February to 22 March 2010. The communicant obtained an electronic copy of the EIA documentation from a different source.

Public participation

20. With respect to the steps undertaken to ensure public participation, the following information was submitted:

[4] See also para. 32 of at findings on communication ACCC/C/2009/37.

(a) On 31 July 2009, the web sites of the Ministry of Energy, Ministry of Environment and Directorate for the Construction of the Nuclear Power Plant issued the public notice (in Russian and English) about the commencement of public consultations (annex V to the Communication).

(b) On 9 September 2009, the web sites of the three authorities mentioned above published the EIA documents in Russian and English, including (i) a "Brief Overview of the Environmental Impact Assessment during the Construction and Operation of the NPP in the Republic of Belarus" (hereinafter Brief EIA Overview) and (ii) a Preliminary Report/statement on possible environmental impact of NPP (hereinafter Preliminary EIA Report).

(c) On 9 September 2009, the public notice (in Belarusian) and the Brief EIA Overview (see under (b) (i) above) (in Russian) were published in the Ostrovetskaya Pravda newspaper (annex VI to the communication).

(d) On 9 October 2009, public hearings were held in the city of Ostrovets. In the view of the communicant the public hearings "were held with unprecedented security and logistics arrangements."

21. According to the communication, the construction of the road to the NPP site has already started in summer 2009 (photos in annex VIII to the communication).

Environmental activists obstructed by the authorities

22. The following facts of defamation, detention and home inspection, and arrest related to environmental activists carrying out awareness raising activities about the potential effects of NPP were brought to the attention of the Committee:

(a) Defamation: The night of 8 to 9 January 2009 unidentified individuals disseminated leaflets (annex VII to the communication) in the Ostrovets and Smorgon districts. The leaflets included statements about the effects of nuclear energy, invited citizens to some gay events and included the contact details (home address and telephone numbers) of two environmental activists. One of the activists filed a complaint with local police alleging that the leaflets were prepared and disseminated by state agencies. Different leaflets were also distributed allegedly on behalf of a local opposition activist discussing in a manifestly unreasonable manner the negative aspects of NPP construction.

(b) Detention and home inspection: an environmental activist, was detained on 5 March 2009, and had home inspection in his apartment on 6 and 12 March 2009, with police, upon a permit from the prosecutor, searching for leaflets and o printing materials.

(c) Arrest: On 9 October 2009, a Russian expert was detained and then arrested when he tried to bring copies of NGO EIA Critique to the public hearings in Ostrovets. He was sentenced by the local court to seven days of administrative arrest and released on 16 October 2009.

C. Substantive issues

Allegations concerning the general legal framework

23. The communicant alleges that the Party concerned is not in compliance with the Convention, for the following reasons:

(a) The distinction between nuclear activities of "national" and "local" character (para. 11 of the 2009 Regulation) and the organization of "national" or "local" hearings is not clear and may limit public participation.

(b) The law provides that the public notice for planned nuclear activities is given to the public in the area of the activity (para. 15 of the 2009 Regulation) and

the use of this "location" criterion substantially limits the scope of the "public concerned".

(c) The Party concerned fails to implement correctly article 6, paragraph 2, of the Convention, because the developer and the local authorities are responsible for making the public notice through the publication of the environmental impact statement (OVOS Statement) by distributing flyers, mail, email, etc. (paras. 14, 17 and 18 of the 2009 Regulation) and there is no requirement to publish the OVOS Statement, except when organizing nation-wide public hearings.

(d) The Party concerned fails to implement article 6, paragraph 3 because of the relation between the time-frames set for public notice, for public consultations and for making available the information relevant for decision-making. According to the law (para. 19 of the 2009 Regulation), public consultations should not be held earlier than 30 days after the public notice, while the OVOS Statement should be made available during these 30 days before the start of public consultations period, which itself can not exceed one month. These provisions combined provide for unreasonably short in practice time-frames for the public to prepare and participate.

(e) The Party concerned fails to implement article 6, paragraph 8, since the 2009 Regulation (paragraphs 25-26) requires only that the developer includes the records of the public consultations and grounds for accepting/rejecting any comments in the EIA (OVOS) Report. Since the EIA Report is a document prepared by the developer and further submitted to the public authority for approval (state environmental expertiza) it cannot be qualified as "decision". This contradicts the requirement of article 6, paragraph 8, of the Convention.

(f) The Party concerned fails to implement article 6, paragraph 9, because the EIA (OVOS) process carried out by the developer cannot be considered a national decision-making procedure and there is no requirement that the public be informed about the expertiza conclusion, as it is required for a decision under article 6.

(g) Generally, the national legislation does not provide for any other possibilities to participate in decision-making on nuclear issues than only during the OVOS (EIA) process carried out by the developer, and is not consistent. For example, the 2009 Regulation includes the requirement to publish the EIA (OVOS) Report (para. 28) together with a note on comments (proposal) rejected and the grounds for their rejection.At the same time, the EIA legislation and the 2009 Regulation require that the EIA (OVOS) Report includes full list of comments and proposals received from the public and explanations for accepting or rejecting them (paras. 25-26). Another contradictory point relates to paragraph 4 of the 2009 Regulation which provides that the EIA Report is subject to public consultations, while the EIA legislation clearly states that EIA (OVOS) Report is the final stage of OVOS process. Neither EIA legislation, nor the 2009 Regulation provide for any procedures to discuss the EIA (OVOS) Report.

24. With respect to the specific points raised by the communicant about alleged non-compliance with article 3, paragraph 1, the Party concerned maintains that:

(a) The Convention does not include any requirement or recommendation regarding the local or national level of the public hearings.

(b) Paragraph 15 of the 2009 Regulation on the public notice is not in breach with the Convention.

(c) The law is clear (paras. 14, 17, 18 and 19 of the 2009 Regulation) on how the developer should inform the public in advance of the hearings. The public participation procedure commences with the public notice and the hearings cannot take place before the lapse of thirty days from the public notice, so as

to allow for distribution of the relevant documentation and inspection by the public.

(d) The Convention does not detail how the outcomes of public participation are to be taken into account, and in this respect maintaining detailed records of the public participation procedure is optimal, while comments received are summarized with explanation for their rejection or approval (para. 28 of the 2009 Regulation).

(e) Project documentation is finalized to reflect the outcome of public consultations and then is publicly available on the Internet.

(f) The expertiza conclusion is not a decision but an essential condition for taking a decision.

(g) The public, under the EIA legislation, is entitled to undertake so called "public environmental expertiza".

25. The Party concerned informs the Committee that recently significant amendments have been made to national law and further amendments are envisaged to strengthen the public's right to participate in public discussions and hearings of environmental impact assessment (EIA) reports in compliance the Espoo Convention. In addition, legislation on the use of nuclear energy has been developed to include provisions regarding discussion of a project with public associations, other organizations and citizens.

26. The communicant alleges that the new regulatory framework that entered into force in May 2010 continues to be in non-compliance with the Convention and that at the moment there is confusion with regard to public participation in decision-making for nuclear projects.

Harassment (art. 3, para. 8)

27. The communicant alleges that the Party concerned failed to comply with article 3, paragraph 8, of the Convention because it has put pressure on activists trying to promote their views on the NPP (see para. 22 above).

28. The Party concerned denies these allegations and submits that the environmental activists had all opportunity to actively participate to the discussions according to the same rules as other participants. As regards the alleged detention and arrest (see para. 22(c) above), the Party concerned submits that the Russian expert was arrested for breach of peace during the meeting, while the charges for distribution of material had been dropped. With respect to the defamation, the investigation was initiated but no persons to be held responsible were found. The Party concerned provided explanation in this respect in consultation with its Ministry of Internal Affairs.

Access to information (art. 4)

29. The communicant alleges that in its reply of 1 June 2007 (see para. 19(a) above), the Ministry of Environment (a) did not acknowledge that the Government planned to speed up works related to the construction of the NPP (as reflected in the decision taken shortly after (see para. 18(a) above)); (b) did not adequately explain how public participation would be ensured; and (c) did not provide any information about important measures, such as the establishment of special state bodies for the construction and nuclear safety, as reflected in the later adopted Decree No. 565 (see para. 18(b) above).

30. The communicant further alleges that in its reply of 8 May 2008 (see para. above) the Ministry of Energy (a) similarly did not acknowledge that a decision to construct the NPP had already been taken by the Security Council on 15 January 2008 (see para. 18(c)above); (b) did not provide information about measures on public participation; (c) provided misleading information about the identification of the public to be involved in the context of the decision-making according to article 6 of the Convention; (d) did not acknowledge the need to consult with the public early

enough, by stating that the public would be consulted after the choice of the location and the technology was made; and (e) provided misleading information about the requirements of the Aarhus Convention for informing the public concerned, because according to the reply, at the time no decision falling under article 6 of the Convention had been made.

31. The communicant further alleges that in its reply of 13 January 2009 (see para. 19(c) above), the Ministry of Energy provided misleading and premature information about the effects of the NPP to human health and the environment, by stating that "no negative effects would take place" and that "the absence of such effects would be explained in the EIA report".

32. The communicant also alleges that in response to the request for full EIA documentation the Directorate replied that the EIA documentation could be accessed at its premises only and during working hours from 22 February to 22 March 2010

33. In the view of the communicant, all information requested was environmental information within article 2, paragraph 3(b) of the Convention and the Party concerned failed to comply with article 4, paragraph 1, by providing incomplete and misleading information.

34. The Party concerned argues that public authorities provided timely and exhaustive replies to all requests, based on the knowledge available at the time. The requesters could have submitted additional requests with specific questions, if they were not satisfied.

35. The Party concerned points out that information about the NPP was publicly available from the earliest stages of the project through media coverage and the Internet: the 2005 Strategy, the 2007 Decree No. 565, the 2008 Security Council Decision No. 1 (see paras. 17-18 above) and the Law on the Use of Nuclear Energy (see 15(a)above) were widely publicized. A study carried out by the Belarus Aarhus Center in 2008 showed that citizens who were interested in nuclear energy could get a full picture of the developments. In 2008, the National Academy of Sciences' Institute of Sociology carried out a study on the public opinion on nuclear energy and how to increase public trust; the Study showed that the public's attitude toward nuclear energy and the construction of NPP had positively changed over recent years and that the "Chernobyl syndrome" had been replaced by a rational approach taking into consideration immediate energy needs and international trends and experience.

Adequate, timely and effective public notice (art, 6, para. 2)

36. The communicant alleges that public notice for the commencement of public consultations concerning a big project of national concern published only on the Internet and on a local newspaper (the *Ostrovetskaya Pravda*) with about 5,500 issues is not adequate as required by article 6, paragraph 2, of the Convention. The communicant submits that approximately 29% of the population of the country has access to Internet. In addition, the public notice included the date and location of public discussions on NPP EIA, brief information about EIA (on pp. 3-5 of the local newspaper) and instructions about where and when the full EIA report could be obtained; but no information about where the public could submit comments or which authority would be responsible for taking the decision.

37. The Party concerned maintains that the public notice for the planned activity, the EIA process and the participation and consultation process, were published on the Internet on 17 June 2005 and that Internet is widely used in the country. Furthermore, the notice was published not only in the local *Ostrovetskaya Pravda* paper but also in national newspapers (*Respublika* and *Sovietskaya Belorussia*) and a regional newspaper (*Grodnenskaya Pravda*). The notice contained all information as per the requirements of the Convention.

38. In addition, on 9 September 2009, the Brief EIA Overview and the Preliminary EIA Report on the NPP (see para. 20(b) above) were available on the Internet. Most

project-related documents were available on the web sites of the relevant authorities. Hence, the public notice and the relevant documentation were made available to the public at the national, regional and local levels.

Early public participation, when all options are open (art. 6, para. 4)

39. The communicant alleges that the public consultations began at a late stage when most options were closed and that the Party concerned failed to comply with article 6, paragraph 4: the public was not given any possibility to discuss the non-NPP alternative, the choice of technology or the choice of location.

40. According to the Party concerned the allegations of non-compliance with article 6, paragraph 4, are not valid. The Brief EIA Overview and the Preliminary EIA Report contained full information about alternative sources of energy, alternative nuclear technologies, alternative locations, etc. The proposals were made after consideration of all options and on the basis of natural, technogenic and public safety considerations. In particular the proposal for the location, which was not a final decision, was the outcome of thorough consideration of 74 locations. Also, the road currently under construction (annex VII to the communication, see para. 21 above) is not part of the NPP, but part of a different transport project in the area.

Access to information relevant to decision-making (art. 6, para. 6)

41. The communicant alleges that the Party concerned failed to comply with article 6, paragraph 6, of the Convention, because the Brief EIA Overview t, 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 Documentation (about 1000 pages), which was never available to the public.

42. The Party concerned disagrees with the allegations of non-compliance with this provision because the full Preliminary EIA Report was a very large document and the public was therefore advised to consult it in Minsk and Ostrovets, while the Brief EIA Overview anyway contained the same sections as the Preliminary EIA Report. In addition, the Party concerned informed that the studies carried for the selection of the project site and the Full EIA Documentation were classified according to national legislation, because they were carried out by private entities and it was an expensive assignment. For this reason, when the project was discussed with officials from neighboring countries, only the electronic version of the full report was shown during the consultations, but no copies were allowed to be made.

Possibility to submit comments (art. 6, para. 7)

43. The communicant alleges that the procedures for public participation did not comply with article 6, paragraph 7, of the Convention, for the following reasons:

(a) There was only one public hearing which was organized in a small town and national NGOs and individuals from Minsk were not able to participate. The hearing was initially announced as “local” and as “national” a few days before it took place.

(b) The public hearing was organized on a working day (Friday) and during working hours (from 10am – 5pm) and many people were not able to attend.

(c) The registration process was scheduled from 10am -12 pm, but at 10:10 am, the room was already full with representatives of employees’ collectives, who had been registered in advance. This impeded and effectively limited NGO participation.

(d) NGOs that registered were not allows to express their views or disseminate material. For example, NGOs had prepared about 100 copies of the NGO Critique of the EIA, but all copies were confiscated at the meeting. Also, NGOs were given only three minutes to speak.

44. The Party concerned disagrees with the allegations of non-compliance with article 6, paragraph 7, and maintains that everyone who was interested was able to participate and express their views. It adds that apart from the Ostrovets hearing on 9 October 2009 (see para. 20(d) above), where approximately 800 people participated, the Preliminary EIA Report was discussed with staff of over 1670 companies and institutions and 70 public organizations at meetings, in which a total of about 182,670 people participated; and that the Public Coordination Committee on the Environment (within the Ministry of Environment involving representatives of the 18 largest public environmental associations and organizations in Belarus) also examined the EIA on 17 September 2009.

45. According to the Party concerned, the Ostrovets hearing in particular was organized as per the provisions of the Convention:

(a) The location was chosen to allow for maximum involvement of the local population.

(b) In practice, in many countries public hearings take place during working hours.

(c) Upon registration, participants had to fill out a form (appendix I to the response of the Party concerned) indicating comments and whether they would like to speak.

(d) Seats had been reserved for public environmental organizations and ministries' officials were also affected by the high number of attendance.

(e) Large screens were placed in the foyer and outside the building.

(f) Under Belarusian legislation the developer is responsible for the public participation process and it is at his discretion whether written material should be distributed during the hearing. In this case, the developer did not accept any material to be disseminated at the Ostrovets hearing. In any event, the NGO EIA Critique was already a public document.

(g) The time was limited to accommodate everyone who had requested to speak. The hearing was extended by two hours to fit as many speakers as possible.

(h) Due to the importance of the project and the interest it attracted, the period for submission of comments was extended. Any comments from the public will be considered by the authorities at the expertiza phase.

(i) Public drop-in sessions run by the Aarhus Center have been regularly scheduled at the Ministry of Environment since October 2009.

Public participation concerning plans, programmes and policies (art. 7)

46. The communicant alleges that the Party concerned failed to comply with article 7 of the Convention, because it did not take any steps to provide for public participation in adopting plans, programs and policies in the field of nuclear energy. In particular, the communicant considers that the 2005 Energy Security Strategy is a policy and that the Directive No. 3 of 14 June 2007, the Decree No. 565 of 12 November 2007 and the decision No.1 of the Security Council of 15 January 2008 signed by the President on 31 January 2008, were plans or programs, all in the meaning of article 7 (see paras. 17-18 above), irrespective of the fact that they were not called "policy", "plan" or "programme". These acts were adopted by the highest executive bodies for the purpose of future nuclear projects and the public was never informed about their adoption.

47. The Party concerned disagrees with the communicant's allegations: the public was adequately informed about these acts through printed and digital media and actively involved in any decision relating to future plans for the country's energy sector. Sociological surveys had been conducted to analyze the public opinion in this regard and meetings with staff from private and public sector and with local

authorities had been organized. In particular for the 2008 Decision No. 1 which dealt with preparatory work for the NPP, a large-scale public information campaign had been organized and due account had been given to the public opinion (see also appendix II to the response of the Party concerned with a list of comments and questions received).

48. In addition, according to the Constitution and the legislation, it is possible for the public at any time to initiate a referendum for the NPP and the nuclear energy strategy.

Public participation concerning normative acts (art. 8)

49. The communicant alleges that the 2009 Regulation (see para. 15(b) above) is a decision within the meaning of article 8 of the Convention, and that by not publishing the draft of the 2009 Regulation and not giving any opportunity to the public to comment, the Party concerned failed to comply with article 8 of the Convention.

50. The Party concerned disagrees with these. First of all, it considers that such normative legal instruments dealing with procedural matters do not have any impact on the environment and therefore are not covered by article 8 of the Convention. Nevertheless, the Party concerned maintains that as a rule, all draft normative instruments are posted on the web sites of public authorities and of the National Centre for Legal Information with the purpose of informing the public and taking into account the views of the public concerned.

Use of domestic remedies

51. The communicant submits that national courts do not provide adequate protection of public rights in the country.

52. Refusal by an authority to provide environmental information may be challenged to a higher public authority or to the court (art. 74.4 of the Law on Environmental Protection). The first option is not available, when a request for information is submitted to the highest unit within the authority. The second option involves two possibilities depending on the parties or the subject: general jurisdiction courts consider lawsuits about illegal denial by the authorities to provide information, and commercial courts consider lawsuits about illegal denial by commercial or other private interest entities to provide information.

53. The communicant did not use any of the above review procedures for access to information, because at the time the correspondence took place (see para. 19above), it was not aware that the information provided was misleading. In any event judicial remedies take very long and the project would already be at an advanced implementation phase.

54. In addition, the NGO Ecohome filed a lawsuit at the Ostrovets court of general jurisdiction for failure of the Directorate for the Construction of the Nuclear Power Plant to provide the requested Full EIA Report (see para. 19(d) above). In its application, Ecohome referred to the relevant provisions of the Convention (art. 4) and requested the Court to order the Directorate to provide the requested Full EIA Report. On 22 March 2010, the Court denied to accept the case on the grounds that the dispute between the Directorate and the NGO was of an economic nature and should be addressed by the commercial courts. Ecohome appealed this decision at the Grodno regional court; the appeal was subsequently rejected.

55. On 29 April 2010, Ecohome and an individual member of the public filed a lawsuit to the Ostrovets court of general jurisdiction on the same subject. On 16 June 2010, the Court denied to accept the case based on the same reasoning as in its decision of March 2010. With respect to the standing of the individual, the Court found that this person had not submitted its own claims and no separate decision was

necessary. The applicants appealed this decision to the Grodno regional court. The hearing was scheduled to take place on 21 July 2010.

56. The NPP issue was brought before the attention of the Espoo Convention Implementation Committee by the Ukrainian NGO Ecoclub on 1 July 2009.

III. Consideration and evaluation by the Committee

Legal basis and scope of consideration of the Committee

57. The Aarhus Convention was signed by Belarus on 16 December 1998 and entered into force for Belarus on 30 October 2001.

58. It is common ground that the requests for information reported in the communication related to "environmental information" in the meaning of article 2, paragraph 3 of the Convention, and that the procedure for authorization of NPP is subject to the public participation provisions of article 6 of the Convention as an activity referred to in article 6, paragraph 1(a) (in conjunction with annex I to the Convention).

59. The communication includes allegations related both to specific instances of non-compliance and to general non-compliance. As for the allegations related to general non-compliance the Committee notes that while it has considered non-compliance of the system applicable in 2009 with article 3, paragraph 1, in conjunction with several provisions of the Convention in its findings and recommendations for communication ACCC/C/2009/37, it was informed during the formal discussions about ongoing amendments in Belarus law with respect to public participation. The Committee finds that it would be premature and not relevant for the present case concerning the NPP to examine in detail the ongoing regulatory amendments.

60. For the above reasons, the Committee decides to focus its attention on the allegations related to specific instances of non-compliance. Nevertheless it finds useful to make some general observations relating to the applicable legal framework in general.

61. In addition, the communication contains allegations of non-compliance with articles 6, 7 and 8 of the Convention. The Committee decides to focus its considerations on article 6. However, the Committee stresses that the scope of obligations under article 8 relate to any normative acts that may have a significant effect on the environment, which should be considered as including acts dealing with procedural matters related to authorization of activities subject to environmental assessment, as well as to public participation in environmental matters.

Observations concerning the general legal framework

62. Without examining the general legal framework, the Committee makes the following general observations. The Committee does not consider the distinction between "national" and "local" activities, for the purpose of public participation, as such, to be contrary to the Convention. However the Committee considers that the designation of a project as "national" or "local" should be the responsibility of public authorities and not of the developer. Moreover, the Committee considers that a project of such a magnitude and potential environmental impact as the NPP at issue can by no means be subjected to participatory procedures designed for the local level only.

63. Furthermore, bearing in mind its findings and recommendations for communication ACCC/C/2009/37, the Committee notes that there is considerable uncertainty as to the participatory procedures applicable in case of nuclear activities. In this respect it is of the outmost importance that in amending its legislative, regulatory and other measures the Party concerned ensure the compatibility of and coherence between the general framework for public participation in decisions on

specific activities and the framework for public participation applicable to nuclear activities. Moreover, the Party concerned should ensure that the amended legal framework clearly designates which decision is considered to be the final decision permitting the activity in terms of article 6, paragraph 9, of the Convention.

64. In the above context and reiterating its findings in ACCC/C/2009/37 concerning the role of the developer in the procedure the Committee stresses that it is not in compliance with the Convention that the authority responsible for taking the decision (including the authorities responsible for the expertiza conclusions) are provided only with the summary of the comments submitted by the public. The Convention requires that the full content of all the comments (whether claimed to be accommodated by the developer or refused to be accepted) made by the public is submitted to such authorities.

Harassment (art. 3, para. 8)

65. The allegations concerning harassment are serious and the alleged facts, if sufficiently substantiated, would amount to harassment in the sense of article 3, paragraph 8 and would therefore constitute non-compliance with the provisions of the Convention. However, on the basis of the information provided, the Committee could not assess with sufficient certainty what happened exactly and therefore the Committee refrains from making a finding on this issue.

Access to information (art. 4)

66. The allegations concerning non-compliance by the Party concerned with article 4, paragraph 1 (see paras. 29-33 above), are related to the accuracy of the information provided and the form of provision information. The Committee notes that in all instances the authorities duly replied within one month.

67. The Committee acknowledges that not all information provided on facts and the interpretation of the Convention was accurate and complete. Nevertheless, the information provided might have reflected the current knowledge of the authorities. The requests were formulated in a manner that assumed a certain level of interpretation of facts, and the replies reflected this interpretation. Thus the authorities provided the information that was held by them at that time and there is no evidence that they knowingly provided inaccurate and incomplete information. Therefore in these instances, the Committee does not find that the Party concerned failed to comply with article 4, paragraph 1.

Access to information in the form requested (art. 4, para. 1 (b), in conjunction with art. 6, para. 6)

68. As far as access to the Full EIA Documentation is concerned, the understanding of the Committee is that access to this document was limited only to the examination at the premises of the Directorate, while the provision of the electronic copy of this report was denied because of the economic interest of the developer.

69. Emphasizing that overall economic interests as such, are not sufficient in order to reasonably restrict access to environmental information, and considering that the Party concerned did not successfully invoke any of the exemptions referred to in article 4, paragraph 4, to justify why this information was restricted, as well as the fact that a significant part of the information was not available in the form requested, the Committee recalls its findings in communication ACCC/C/2009/36 (paras. 60-61) where it recognized that article 6, paragraph 6, refers to giving "access for examination" of the information that is relevant to decision-making, but the Committee noted that article 4, paragraph 1, requires that "copies" of environmental information be provided. In the Committee's view "copies" does, in fact, require that the whole documentation be available close to the place of residence of the person requesting information or entirely in electronic form, if this person lives in another town or city. According to the facts presented in this case, access to information was restricted in the Directorate of the NPP in Minsk only and no copies could be made.

For these reasons, the Committee finds that the Party concerned failed to comply with article 6, paragraph 6, and article 4, paragraph 1 (b), of the Convention.

Adequate, timely and effective public notice (art. 6, para. 2)

70. In its findings concerning communication ACCC/C/2009/37, the Committee found that the Belarusian legislation does not adequately regulate the public notice requirements and does not allow for adequate, timely and effective public participation, as required by article 6, paragraph 2, of the Convention (see paras. 83-86 and para. 104 (b)).

71. Regarding the NPP project, on 31 July 2009, an advance public notice was issued on the web site of three public authorities (see paras. 20 (a) and (b) above), for the public hearings which were estimated to take place in fall 2009. Later that year, on 9 September 2009, the public notice was published in printed media at the national and local level and on the Internet (web sites of the relevant public authorities, such as ministries responsible for the environment and for energy) and announced that the public hearing would take place on 9 October 2009.

72. The Committee examined the public notice (see annexes 5 and 6 to the communication) and finds that it contained most elements prescribed in article 6, paragraph 2, of the Convention, including a brief description of the planned activity (location, potential transboundary impact, schedule of implementation, timeframe for the preparation of the EIA documentation and for the public discussions), communication point for public participation (where the public concerned could send their comments), and information on the participation process (time-frame for participation, consultations and submission of the comments, and that the EIA documents could be accessed by the public on the web sites of public authorities and at the Power Plant Construction Office in Ostrovets).

73. The Committee notes that the public notice was published on the Internet and also on the national (*Respublika* and *Sovietskaya Belorussia*) and local printed media (*Ostrovetskaya Pravda* and *Grodnenskaya Pravda*). As for the use of Internet, according to statistic data, as of June 2010 there was 46.2% Internet penetration in the country,[5] considered to be the highest level of penetration in the Commonwealth of Independent States, after the Russian Federation. In addition, Internet is widely spread in the urban areas, where 75% (2010) of the total population is concentrated.[6] The fact that public notice was published in the local press and the project-related documentation could be accessed in Ostrovets compensates for the fact that Internet is not widely spread in rural areas. For these reasons, the Committee is not convinced that the Party concerned failed to comply with article 6, paragraph 2.

74. The Committee notes however that the public was not duly informed that in addition to the EIA report (about one hundred pages long) which was made available to the public, there was also the full version of the EIA Report (more than 1000 pages long). In this respect the Committee finds that the Party concerned failed to comply with Article 6, paragraph 2 (d) (vi), of the Convention.

Early public participation, when all options are open (art. 6, para. 4)

75. The legal framework and the facts of the present case show that the public participation process was scheduled to take place when the location for the project had already been selected. The submissions of the Party concerned and also the letters of the Ministry of Energy dated 1 June 2007, 8 May 2008 and 13 January 2009 (see annexes 2, 3 and 4 to the communication) show that extensive assessment and feasibility studies were already underway, including the study for the selection of the project location, already since 2007 (see information contained in annex 2

[5] Internet World Stats at http://www.internetworldstats.com (last viewed on 12 May 2011).
[6] CIA World Factbook at https://www.cia.gov/library/publications/the-world-factbook/geos/bo.html (last viewed on 12 May 2011).

dated 1 June 2007), while a number of acts were adopted towards implementation of the project (see para. 18 above).

76. The public participation process for the NPP was part of the EIA (OVOS) procedure undertaken by the developer. The question that arises here is whether public participation at that stage is not limited, when advance preparations for the project have been undertaken since at least 2007, the project site has been selected, and the developer has been selected, who has established project offices near the site (project documentation was accessible there): the option of not building the NPP at the particular location was no longer open for discussion.

77. As already noted in the past (findings on communication ACCC/C/2006/16 concerning Lithuania, ECE/MP.PP/2008/5/Add.6 para. 71 and findings on communication ACCC/C/2006/17 concerning the European Community, ECE/MP.PP/2008/5/Add.10, para. 51), the requirement for "early public participation when all options are open" should be seen first of all within a concept of 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. Thus, taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain degree of discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards. Within each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place.

78. 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 about the need for NPP and selected its location. Once the decision to permit the proposed activity in the Ostrovets area has already been taken without public involvement, providing for such involvement at a stage that followed could under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide for "early public participation when all options are open" (see also findings on communication ACCC/C/2005/12 concerning Albania, ECE/MP.PP/C.1/2007/4/Add.1, para. 79; and findings on communication ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, paras. 61-63). This is the case even if a full EIA procedure is being carried out. Providing for public participation only at the stage of the EIA (OVOS) procedure for the NPP with one hearing on 9 October 2009, effectively reduced the public's input to only commenting on how the environmental impact of the NPP could be mitigated, and precluded 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. Therefore, the Committee finds that the Party concerned failed to comply with article 6, paragraph 4, of the Convention.

Access to information relevant to decision-making (art. 6, para. 6)

79. Article 6, paragraph 6 of the Convention aims at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore effective. While active dissemination of certain documents by way of publishing them in newspapers (like for example publishing in the present case a Brief EIA Overview which is a non-technical summary of the EIA Report as) is certainly a good practice, only ensuring access for examination to all documents relevant to the decision-making satisfies the requirement of this provision.

80. The Committee refers to its findings on access to information in paragraphs 68-69 above. In addition, failing to inform the public about the possibility to examine the full EIA report when notifying the public under article 6, paragraph 2, and informing it only during the hearing about this document, deprives the public in practice of its right under article 6, paragraph 6. Therefore the Committee considers that by not informing the public in due time of the possibility of examining the Full EIA Documentation , being a critical document containing important details about a proposed project, the Party did not comply with article 6, paragraph 6, of the Convention.

Possibility to submit comments (art. 6, para. 7)

81. Article 6, paragraph 7, aims at ensuring that the procedures for public participation allow for submission of any comments, information, analyses or opinions from the public. It is for the public to judge the relevance of such comments for the activity.

82. In the present case, members of the public were impeded in their attempts to submit comments and disseminate them to the public attending the hearing. The Party concerned claims the developer/organizer of the hearings did not accept the material. At this point, the Committee would like first to reiterate its finding in communication ACCC/C/2009/37 (para. 104 (d)) 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 fails to comply with article 6, paragraph 7, of the Convention. Furthermore, while no provision of the Convention prevents organizers of the hearing from making arrangements to keep certain order in distributing documents during the hearing, by no means are they entitled to be provided with the discretion whether to allow the public to submit their comments and corroborating documents in written form and to distribute them during the hearing.

83. With regard to the timing of the public hearing, the Committee observes that organizing only one hearing on a working day and during working hours indeed effectively limits the possibility of the public to participate and submit comments. If it was absolutely necessary to organize only one hearing on a working day and during working hours, the Party concerned should have taken the measures to ensure that people, who were impeded to participate due to their employment commitments, would be able to participate otherwise, such as view the recorded hearing and submit comments later.

84. The fact that a significant number of employees from the private and public sector had prior to the hearing of 9 October 2009 given the opportunity to discuss the Preliminary EIA Report, and that the Public Coordination Committee on the Environment had also examined the EIA Report, are not sufficient measures. In this respect the Committee wishes to underline that any discussions in closed groups (for example within certain professional groups or employees of certain enterprises) or in closed advisory groups can not be considered as public participation under the Convention and in particular cannot substitute for the procedure under article 6 of the Convention. In order to meet the requirements of article 6 such a procedure must be in principle open to all members of the public concerned, including NGOs, and subject only to technical restrictions based on objective criteria, and not having any discriminatory nature.

85. For these reasons, the Committee finds that the Party concerned failed to comply with article 6, paragraph 7, of the Convention in the NPP case and that this has mainly to do with the systemic issues of the prior legislation, as identified in the findings for communication ACCC/C/2009/37.

Access to justice (art.9 para 1)

86. While there were no specific allegations concerning access to justice, in the light of the information regarding use of domestic remedies (paras. 51-56) the Committee

observes that qualifying redress procedures regarding access to justice as being of economic nature and therefore subject to rules for commercial disputes may well lead to limiting effective access to justice as required under article 9, paragraph 1, and therefore would like to draw the attention of the Party to monitor the situation.

IV. Conclusions and recommendations

87. 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

88. In relation to the general legal framework, the Committee recalls its findings on communication ACCC/C/2009/37 and observes that:

(a) There is considerable uncertainty as to the participatory procedures applicable in case of nuclear activities (para. 63);

(b) There is lack of clarity as to the decision which is considered to be the final decision permitting an activity in terms of article 6, paragraph 9 (para. 63);

(c) Concerning the role of the project developer, it is not in compliance with the Convention that the authority responsible for taking the decision (including the authorities responsible for the expertiza conclusions) are provided only with the summary of the comments submitted by the public (para. 64).

89. In relation to the NPP, the Committee finds that the Party concerned:

(a) By restricting access to the full version of the EIA Report in the Directorate of the NPP in Minsk only and by not allowing any copies to be made, it failed to comply with article 6, paragraph 6, and article 4, paragraph 1(b), of the Convention (para. 69 above);

(b) By not duly informing the public that in addition to the publicly available 100-pages EIA report, there was a full version of the EIA Report (more than 1000 pages long), it failed to comply with article 6, paragraph 2 (d) (vi), of the Convention (para. 74 above);

(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, paragraph 4, of the Convention (para. 78);

(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, paragraph 6, of the Convention (para. 80);

(e) By limiting the possibility of members of the public to submit comments, it failed to comply with article 6, paragraph 7, of the Convention (para. 85).

B. Recommendations

90. 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 measure referred in paragraph 37 (b) of the annex to decision I/7, recommends to the Party concerned that it:

(a) In amending its legislative, regulatory and other measures, take note of the Committee recommendations on communication ACCC/C/2009/37 with respect to the general legal framework and ensure 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;

(b) 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, paragraph 9, of the Convention;

(c) Ensure that the full content of all the comments (whether claimed to be accommodated by the developer or refused to be accepted) made by the public, is submitted to the responsible authorities for taking the decision (including those responsible for the expertiza conclusion);

(d) Make appropriate practical and other provisions for the public to participate during the preparation of plans and programmes relating to the environment;

(e) Organize training of public officials to raise awareness with regard to the Convention and ensure that public officials are adequately informed so as to prevent the dissemination of inaccurate information.