Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment, Housing and Land Management Division
Bureau 332, Palais des Nations
CH-1211 Geneva 10
Switzerland

Case ACCC/C/2010/50, Czech Republic

Communicant:
Ekologický právní servis (Environmental Law Service)
Dvořákova 13, 602 00 Brno, Czech Republic
represented by Mr Pavel Černý, Head of Legal Programme
email pavel.cerny@eps.cz

Answers to the questions of the Compliance Committee

The communicant hereby answers the questions of the Compliance Committee, which were annexed to the letter of the Secretary to the Aarhus Convention Compliance Committee, dated 14 October 2010.

Question 1:
Please elaborate on your allegation of non-compliance with regard to article 3, paragraph 1 of the Convention. This allegation appears only in the summary of your communication.

Answer:
The communicant is convinced that the allegations of non-compliance of the Czech Republic with various individual requirements of Article 9, paragraphs 2, 3 and 4, as described in parts III.2., III.3. and III.4 of the communication (points 21.-82.), could be altogether considered also as illustrating and proving non-compliance of the Czech Republic with the requirements of article 3, paragraph 1 of the Convention, with regard to the access-to-justice provisions of the Convention. The communicant believes that the facts presented in the communication show that neither the legislative provisions implementing namely article 9, paragraphs 3 and 4 of the Convention, nor the enforcement measures, namely the prevailing aspects of the long-term case law of the Czech courts, establish and maintain clear, transparent and consistent framework to implement the above mentioned provisions of the Convention.

However, for case the Compliance Committee would consider this allegation as too general to deal with the question of (non)compliance of the Czech Republic with article 3, paragraph 1 of the Convention, the communicant hereby declares that it would accept this conclusion.

Question 2:
Please provide specific examples and references to illustrate your allegations in paragraphs 12, 13, 20, 26, 76 and 80 of the communication.

Answer:
In **paragraph 12**, the communicant states that the EIA in the Czech Republic is not an integral part of environmental development consent (decision-making) procedures, but a separate process. This process is finalized by issuing an "EIA statement", which represents an obligatory base for subsequent decision-making procedures, but it is not a binding permit itself and does not have to be respected by the administrative bodies issuing the "real" permit(s) (development consent(s)) for the project.

The communicant is convinced that these allegations are proven namely by the wording of article 10 of the Czech Environmental Impact Assessment (EIA) Act no. 100/2001 Coll., which reads as follows

§ 10
Statement on the Environmental Impact Assessment of Implementing the Plan[1]
(1) On the basis of the documentation or notification, expert report and public hearing pursuant to § 9 par. 9 and the viewpoints submitted thereon, if appropriate, the relevant authority shall issue a ***statement on environmental impact assessment of the plan (hereinafter "statement")****within 30 days of the date of expiration of the deadline for submitting viewpoints on the expert report. The requisites of the statement are set forth in Annex No. 6 to this Act .*
(2) Within 7 working days of issuing the statement, the relevant authority shall send the statement to the notifier, affected administrative authorities and affected territorial self-governing units. Within the same period of time, it shall publish the statement on the Internet and shall ensure that it is made available to the public pursuant to § 16.
(3) ***The statement shall be a basic expert document for issuing a decision or measure pursuant to special regulations. The statement shall be submitted by the notifier as one of the basic documents for related procedures or processes pursuant to special regulations****. The statement shall be valid for a period of 2 years from the date of issuing thereof. On the basis of a request by the notifier, the validity may be extended by two years, which may be repeated if no substantial change has occurred in implementation of the plan, conditions in the affected territory, new knowledge related to the substantive content of the documentation and developments in new technologies utilizable in the plan. This period of time shall be interrupted if a related procedure has been commenced pursuant to special regulations.1a*
(4) ***In the absence of a statement, it shall not be possible to issue a decision or measure required for implementing or carrying out the plan in any administrative or other procedure pursuant to special regulations****. In such procedures, the relevant authority shall be the affected administrative authority.* ***An administrative authority that issues a decision or measure pursuant***

[1] The translation provided by the Czech Ministry of Environment. Text of the whole Act is available at http://www.mzp.cz/ris/vis-legcz-en.nsf/B3E5ACA81B717965C125735C00438142/$file/2001100Sb_kv.pdf.
The text is not updated to the current consolidated version of the EIA Act, but the principal parts of article 10 are maintained in the current version. In opinion of the communicant, using the word "plan" in the translation (for the Czech term "záměr") is not accurate, as the provision (as well as the whole part 2 of the EIA Act – Article 4 – 10) relate to assessment of "projects" (in the sense of article 1 paragraph 2 of the 85/337/EEC EIA Directive). However, the meaning is clear from the definition included in article 3 of the EIA Act, which reads:
For the purposes of this Act , the following definitions shall be valid
a) ***plan*** *shall be a* ***construction work, activity and technology*** *as set forth in Annex No. 1 to this Act ,...*

to special regulations1a shall include, in its decision or measure, requirements for protection of the environment set forth in the statement, if set forth therein, or it shall state in its decision or measure the reasons why it did not do so or did so only partly.
(5) In case that a plan set forth in Annex No. 1 Category II and a change of a plan pursuant to § 4 par. 1 shall not be assessed pursuant to this Act, the provisions of paragraph 4 shall apply by analogy also to the conclusions of the fact-finding procedure.

The unanimous interpretation of this provision by the Czech Ministry of Environment, all relevant administrative bodies and courts is that the "statement on environmental impact assessment" (EIA statement) is not a binding decision, but an expert document necessary for the subsequent decision-making procedures, which conclusions however do not have to be respected in such procedures.

The Supreme Administrative Court (hereinafter also "SAC") also repeatedly decided that the "EIA statement" cannot be challenged at court directly. For example, in the decision of **28 August 2007, no. 1 As 13/2007-63**, it declared that opinions, statements and expressions of the administrative bodies, the aim of which is to enforce the viewpoints of protection of public interests, are not considered as decisions by the court practice nor the doctrine. The doctrine classifies them as so called "other administrative acts", which do not create, change, nullify nor prove specific legal relations. Therefore, the Supreme Administrative Court finds the statement of the applicant, according to which the EIA statement is a decision, as unfounded. The EIA statement cannot be subject to judicial review separately. [2]

In **paragraph 13,** the communicant dealt with the fact while the EIA procedure (preceding issuing of the EIA statement) is fully open to the public, the scope of participants of the subsequent decision making procedures is not compatible with the minimal requirements of article 9 paragraph 2 of the Aarhus Convention. This fact stems namely from article 85 of the Act no. 183/2006 Coll., on town and country planning and building code (Building Act), which reads as follows:

§ 85
Participants in the planning permission proceedings[3]
(1) The participants in the planning permission proceedings are
a) the applicant,
b) the municipality, within the territory of which the required programme shall be realized.
(2) Furthermore the participants in the planning permission proceedings are
a) owner of the ground or the structure, within which the required programme shall be realized, if the participant is not the applicant, or the subject, which has a real right to this land or the structure, if it does not refer to the case mentioned within letter d),
b) ***persons, whose proprietary or another real right to the neighbouring structures or neighbouring grounds or the structures built up on them may be directly affected by the planning permission****,*

[2] Summarized by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2007/0013_1As__0700063A_prevedeno.pdf . Extract from the decision with relevant parts highlighted is attached.
[3] The translation provided by the Czech Chamber of Architect – text of the whole Act is available at http://www.cka.cc/prilohy/building_code_183_english.pdf. The text is not updated to the current consolidated version of the Building Act, but the principal parts of article 85 are maintained in the current version.

c) persons, who are specified in the special regulation,
d) associations of the owners of flat units pursuant to the special regulation35; in the event that the association of the owners of flat units, pursuant to a special legal regulation, has not a legal status, the owner, whose co-owner's share in house property is more than one half.
(3) ***The participants in the proceedings are not the tenants of flats, non-residential facilities or land****.*

As the communicant stated in paragraph 23 of the communication, the planning permission (land use permit) is the most important for most activities subject to Art. 6 of the Aarhus Convention. The scope of participants of the building procedures is regulated similarly in article 109 of the Building Act.

Paragraph 20 of the communication mentions the fact that while the Czech Courts referred to the Aarhus Convention in some of their decisions, they mostly came to the conclusion, in most of them, that the Convention in general, or its article 9, are cannot be directly applicable, as they are not "sufficiently specific" and it "only constitutes general obligations for the national authorities". The communicant quotes following court decisions with that regard as examples:

Decision of the Constitutional Court of 2 September 2010, no. I ÚS 2660/08[4]
Concerning the opinion of the complainant on the direct applicability of the Aarhus Convention, the Constitutional Courts judges that wording of this convention, which in its article 1 assumes continual fulfilling of its generally formulated goals by the parties, makes it impossible to find out that that this Convention could be a direct source of any rights or duties of the citizens, the less so of fundamental rights and freedoms. The Convention contains commitments of the parties, which are of general nature and are continually realized by the member states.

Decision of the SAC of 27 March 2010, no. 2 As 12/2006-111[5]
According to article 10 of the Constitution, international treaties ratified by the Parliament which are binding for the Czech Republic shall be applied prior to the provisions of national regulations. For this principle to apply, the respective international treaty must be "self-executing", i.e. specific enough so that it could be applied without implementing provisions of national law. The Aarhus Convention, however, is "self executing" and natural nor legal persons cannot derive their rights directly from it, without national implementing legislation.

Decision of the SAC of 24 January 2007, no 3 Ao 2/2007-42[6]
The Supreme Administrative Court was considering the Aarhus Convention, namely article 1, article 3 paragraphs 1 and 4, article 7 and article 9 paragraph 2 and came to the conclusion that it is not possible to apply them directly and prior to the national regulations. The applicants is therefore mistaken, when it tries to base its standing to sue on article 2 paragraph 5 of the Convention.

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[4] Translation by the communicant. The whole text of the decision is available at http://nalus.usoud.cz/Search/Search.aspx (case number must be filled-in). Extract from the decision with relevant parts highlighted is attached.
[5] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2006/0012_2As__0600111A_prevedeno.pdf .
[6] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2007/0002_3Ao__0700042A_prevedeno.pdf.

In **paragraph 26**, the communicant alleges that not all members of the public concerned haw granted the right according to article 6 paragraph 8 of the Convention, according to which, with respect to the decisions on whether to permit proposed activities listed in annex I, due account shall be taken of the outcome of the public participation. This allegation follows from the combination of facts and legislative provisions already mentioned above. According to article 10 of the 100/2001 Coll. EIA Act, only the "EIA statement", and not another the outcomes of the EIA procedure, including the outcomes of the public participation, shall be taken into account in the subsequent decision making procedures. At the same time, only part of the public concerned can participate in these procedures directly (see the wording of article 85 of the 183/2006 Coll. Building Code quoted above). As the result, part of the public concerned (the individuals who are affected or likely to be affected by, or have an interest in, the environmental decision-making, but do not have "a real right to this land or the structure", which "may be directly affected by the permission") may express their opinion in the EIA procedure, yet they have no legal instrument to force the responsible authority to take due account of it.

In **paragraph 76**, the communicant referred to the decisions of the Czech Supreme Administrative Court, which in a number of cases refused the requests of both individuals and NGOs, who originally asked district courts to directly review "EIA statements" (see above), to address the European Court of Justice with a preliminary question, if according to Article 10a of EIA Directive the "EIA statement" should be subject to direct judicial review (namely for sake of effectiveness of the judicial protection).

For example, in the **decision of 28 August 2007, no. 1 As 13/2007-63**,[7] the SAC specifically stated that "*In accordance with the constant case law of the European Court of Justice (see e.g. the decision of 6 October 1982 in case C238/81, CILIFT), if the interpretation of the EC law is completely apparent and clear, there is no duty of the court to submit a preliminary question. In this respective case, it is so, because... the EIA Directive states that "Member States shall determine at what stage the decisions, acts or omissions may be challenged"... Submitting of the preliminary question by the Supreme Administrative Court is therefore not necessary*."

In **paragraph 80** of the communication, the communicant refers to the fact that the Czech courts, have repeatedly refused a direct review of the EIA screening procedures and decisions with the same arguments they applied on the "EIA statements". The SAC has expressed this opinion e.g. in the decision of **5 September 2008, no. 2 As 68/2007-50**. It stated e.g. that "*Article 9 of the Convention does not require that any of the decisions, acts and omissions according to the provisions of article 6 is subject to judicial review in a separate procedure. ... It is therefore in compliance with the Convention, if the screening decisions are subject to the judicial review together with the final permit.*" [8]

[7] See footnote 2 above. Translation by the communicant.
[8] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2007/0068_2As__0700050A_prevedeno.pdf.

Question 3:
At paragraph 12 of the communication, you state that the EIA is an obligatory base for subsequent decision-making procedures, which must be reflected (but not necessarily respected) in the development consent decisions." Could you provide a translation in English of regulatory provisions, if any, in support of this statement?

Answer:
The relevant regulatory provisions are quoted above in the answer on question 2, when illustrating the allegations included in paragraph 12 of the communication. The most important provision with that respect is article 10 of the 100/2001 Coll. EIA Act (full translation of this provision is above).

Question 4:
Please clarify your allegation in paragraphs 32-33 of the communication. Do you think that the public concerned has not access to the documentation, as required by article 6, paragraph 6 ? Or do you mean that the public concerned has restricted access to review procedures under article 9, paragraph 2?

Answer:
In paragraphs 31 and 32 of the communication, as well as in the whole part 2.2 (paragraphs 31 – 40), the communicant deals with the problem of the doctrine developed by the Czech courts, according to which, the **NGOs promoting environmental protection** and meeting the requirements of national law for participation in the decision making procedures under article 6, **can only challenge procedural legality of the decisions, act or omissions subject to the provisions of article 6** (related to their procedural rights), while they **cannot challenge the substantive legality of such decisions, act or omissions**.

So indeed, the respective paragraphs and the whole part 2.2 deals with the fact that the NGOs, as a part of the public concerned, have restricted access to review procedures under article 9, paragraph 2. The review procedures are formally accessible for them, but they cannot use them for challenging the substantive legality of the decisions, act or omissions subject to the provisions of article 6 (what is, in the majority of the cases, the most important right the public concerned needs to promote).

With that respect, the communicant quotes bellow a number of decisions of the Czech courts illustrating these allegations:

Decision of the SAC of 29 July 2004, no. 7 A 139/2001-67[9]
As the applicant is a civic association (NGO), promoting environmental protection, and not a holder of substantive rights, which were affected by the administrative decision-making, it could only challenge violation of its procedural rights in the lawsuit.

[9] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2001/0139_7A___0100067A_prevedeno.pdf .

Decision of the SAC of 30 January 2008, no. 8 As 31/2006-78[10]
The right to sue of the applicant is based on its procedural rights. Therefore, the applicant can only challenge the legality of the administrative decision with respect to alleged violation of its procedural rights.

Decision of the SAC of 11 December 2008, no. 8 As 31/2008-72[11]
The applicant has also challenged the shortcomings concerning not carrying out the EIA screening procedure. However, with that regard, it only argues with the conclusions of the administrative organ and the district court. It is not possible to find out, that this alleged breach of law would relate to violation of the procedural rights of the applicant on the scope of the administrative procedure.

Decision of the SAC of 11 December 2008, no. 6 As 18/2008-107[12]
The applicant can ask court for protection against alleged violation of its own rights. If the applicant challenges violation of substantive rights, i.e. the content of the decision form the perspective of validity of the reasons for permitting the logging, suitability of a project alternative or breaching the duty of carrying out EIA, the SAC refers to its above quoted case-law.

Decision of the SAC of 31 March 2009, no. 8 As 10/2009-58[13]
The Supreme Administrative Court agrees also with the conclusions of the district court concerning the scope of the right of the applicant for access to court.... This right is based on the rights the applicant had in the procedure before the administrative authority. Therefore, the applicant, as a civic association, can claim illegality of the administrative decision only with respect to alleged violation of its procedural rights.... If the applicant challenges the violation of substantive rights, i.e. matters concerning the content of the decision from the perspective of breaching the duty of carrying out EIA, including the assessment of the impacts on the NATURA 2000 localities, or absence of biological assessment, the Supreme Administrative Court refers to its above findings concerning the scope of the right of the applicant for access to court.

This approach of is related to the law of the Czech Constitutional Court, according to which **NGOs cannot claim a right for a favorable environment**, as it can "self-evidently" belong only to natural, not legal persons, as mentioned in paragraph 24 of the communication. In a recent decision of **2 September 2010, no. I ÚS 2660/08**, the Constitutional Court stated that in the administrative procedure concerning permission for starting the operations in the nuclear power plant, rights of an environmental NGO for protection of life, privacy or favorable environment could not be affected, because these rights cannot belong to legal persons. Therefore, they also cannot claim violation of the right for access to court (due process of law) with that regard.

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[10] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2008/0031_8As__0800072A_prevedeno.pdf.
[11] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2008/0031_8As__0800072A_prevedeno.pdf.
[12] Translation by the communicant. The whole text of the decision is available at http://www.nssoud.cz/files/SOUDNI_VYKON/2008/0018_6As__0800107A_prevedeno.pdf.
[13] Translation by the communicant. The whole text of the decision is available at. http://www.nssoud.cz/files/SOUDNI_VYKON/2009/0010_8As__0900058A_prevedeno.pdf Extract from the decision with relevant parts highlighted is attached.

Question 5:
Could you specify the link of the case example 1 (below para. 36 of the communication) with the Aarhus Convention? Please focus on specific provisions of the Convention that you allege as having been contravened.

Answer:
Subsequently to the answer of the previous question 4, the communicant specifies and alleges that the court decisions summarized in the case example 1 of the communication have contravened the right of a member of the public concerned (an environmental NGO, promoting environmental protection and meeting the requirements of national law for participation in the decision making procedures under article 6), to **challenge not only procedural, but also substantive legality of a decision subject to the provisions of article 6**, which is granted by article 9, paragraph 2 of the Convention.

Brno, 14 March 2011

Pavel Černý
on behalf of Ekologický právní servis

Annexes:
- Act no. 100/2001 Coll. on Environmental Impact Assessment – extract with relevant parts highlighted
- Act no. 183/2006 Coll., on town and country planning and building code (Building Act) – extract with relevant parts highlighted
- Decision of Supreme Administrative Court of 28 August 2007, no. 1 As 13/2007-63 – extract with relevant parts highlighted
- Decision of Constitutional Court of 2 September 2010, no. I ÚS 2660/08 – extract with relevant parts highlighted
- Decision of Supreme Administrative Court of 31 March 2009, no. 8 As 10/2009-58 – extract with relevant parts highlighted