Draft findings and recommendations with regard to communication ACCC/C/2013/81 concerning compliance by Sweden

Adopted by the Compliance Committee on …

I. Introduction

1. On 27 February 2013, a member of the public, Mr. Bernd Stümer, submitted a communication to the Compliance Committee alleging that Sweden had failed to comply with its obligations under the Convention. The communication alleges that the Party concerned fails to comply with articles 4, 5, 6, 7, 8 and 9 both in relation to the permitting process for the issuance of permits for two wind turbines near the town of Strängnäs, Sweden (Helgarö/Strängnäs wind turbines), and in general. The communication alleges, among other things, that the Convention's provisions are consistently overridden with respect to building permits~~planning~~ ~~permission~~ for wind turbines.[1]

2. At its fortieth meeting (Geneva, 25-28 March 2013), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 26 April 2013.

3. Between then and 1 December 2015 the communicant and the Party concerned provided additional information and answered questions from the Committee on a number of occasions.

4. At its forty-seventh meeting (Geneva, 16-19 December 2014), the Committee provisionally scheduled that it would hold a hearing to discuss the substance of communication ACCC/C/2013/81 at its forty-eighth meeting (Geneva, 24-27 March 2015).

5. The Committee held a hearing to discuss the substance of the communication at its forty-eighth 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.

6. Following the hearing, the communicant and the Party concerned provided additional information and answered questions from the Committee on several occasions.

7. The Committee agreed its draft findings at its fifty-third meeting (Geneva, 21-24 June 2016), and 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 29 June 2016. Both were invited to provide comments by 27 July 2016.

8. *The Party concerned and the communicant provided comments on … and ….*

9. *At its … meeting (dates), 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 …. It requested the secretariat to send the findings to the Party concerned and the communicant*.]

Commented [LO1]: The wording in the English version of the communication is "planning permission". In the Swedish version Mr. Stümer writes about "bygglov". The English word used for "bygglov" in the finding is generally "building permit" (just a comment in order to try to make the text as consistent and easy to understand as possible).

Commented [LO2]: Would it not be appropriate to mention that Sweden contested the admissibility of the communication and urged the Committee to close the communication?

[1] Communication, page 2 (first to seventh paragraphs).

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

A. Facts

10. On 10 January 2008, the Diocese of Strängnäs notified ~~the~~ the ~~Strängnäs~~ environmental~~l~~ committee in the Municipality of Strängnäs ~~authority~~ (*Miljö- och räddningsnämnden i Strängnäs kommun*) about its plans to construct wind turbines near Strängnäs, and applied for a building permit for the turbines.[3]

11. Since the plans concerned two wind turbines, each with a height of 140 meters, no permit under the Environmental Code was needed (see paragraph 27). Instead the applicant ~~chose to~~ ma~~d~~ke a notification to the regulatory authority, i.e. the ~~Strängnäs~~ environmental committee ~~authority~~ in the Municipality of Strängnäs (the municipal committee responsible for the municipality's tasks within the area of environmental and health protection), and applied~~y~~ for a building permit under the Planning and Building Act (1987:19).[4]

12. The wind turbines were to be located on the properties Näs 1:4 and Knutsberg 1:2. The distance between the intended locations of the wind turbines and the nearest residential property was at least 680 metres.[5]

13. On 22 February 2008, the ~~Strängnäs~~ environmental committee~~authority~~ in the Municipality of Strängnäs decided, in accordance with the Environmental Code, on measures to be undertaken by the applicant including location and height of the turbines and the noise, shadows and reflections from the turbines/rotor blades.

14. On 31 March 2009, a notification regarding the application for the building permit under the Planning and Building Act was sent to known affected parties, namely individuals who owned land near the intended installations. They were given three weeks to comment on the application.

15. On 3 April 2009, the application for the building permit was announced in the local newspaper and concerned parties were given the opportunity to comment on the application within three weeks.[6]

16. On 3 November 2010, the planning and building committee of the Municipal ~~Committee~~ of Strängnäs (*Plan- och byggnämnden i Strängnäs kommun*~~the local authority~~) issued a building permit for two wind turbines with a height of 140 meters each.[7]

17. On 14 January 2011, the communicant and other individuals living in the areas surrounding the location of the planned wind turbines and two environmental organis~~z~~ations appealed the building permit to the County Administrative Board ~~(*länsstyrelser*)~~ of Södermanland (*Länsstyrelsen i Södermanlands län*).[8] Their appeal stated, among other things, that wind turbines were dangerous machines which must comply with Directive 2006/42/EC of the European Parliament and the Council of 17 May 2006 on machinery (the Machinery Directive), and the construction of the two wind turbines would expose the communicant and other local residents to risk of life-threatening injuries.[9]

[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] See Party concerned's response to the communication dated 26 September 2013, page 3 (first paragraph); and communication, page 3.
[4] Party concerned's response to the communication dated 26 September 2013, page 5.
[5] Party concerned's response to the communication dated 26 September 2013, page 3 (first paragraph), see also letter from the communicant dated 28 June 2014, page 1.
[6] Party concerned's response to the communication dated 26 September 2013, page 3.
[7] Party concerned's response to the communication dated 26 September 2013, page 3. Communication, page 3 (as to the date).
[8] Letter from the communicant dated 18 September 2014, page 4.
[9] Comments from the Party concerned 10 December 2014, page 3.

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Commented [LO3]: Maybe the Swedish names should, for the sake of consistency, be added for all the bodies referred to in the finding (as in paragraph 17)?

Commented [LO4]: A notification to the regulatory authority was needed.

Commented [LO5]: The reader might wonder what happened with the notification, since this is not mentioned in the draft finding. So, just to clarify; Mr. Stümer appealed the environment committee's decision 22 February 2008. The County Administrative Board of Södermanland rejected his appeal. Sweden has no information about any appeals against the County Administrative Board's decision.

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18. In three separate decisions (15 December 2011, 4 January and 23 March 2012),[10] the County Administrative Board of Södermanland found the appeals by the communicant and about 30 other appellants inadmissible because ~~they~~ they were not considered to be affected by the intended activities in such a way that they had a right to appeal the decision of the Committee under section 22 of the Administrative Procedure Act. ~~their properties were situated too far away from the intended location of the closest wind turbine~~. The County Administrative Board found ten appeals admissible, but not well-founded, and the appeals were refused.[11]

19. The communicant and other appellants (both those whose appeals were found inadmissible and those whose appeals were found admissible but were unsuccessful on the merits of the case) appealed to the Nacka District Court, the Land and Environmental Court (Nacka District Court, *Nacka tingsrätt, mark- och miljödomstolen*), ~~in its capacity of Land and Environment Court (Nacka Land and Environment Court)~~.[12]

20. On 15 May 2013, the Nacka District~~Land and Environment~~ Court rejected the appeal by the communicant (case P129-12).[13]

21. The communicant appealed the decision to the ~~Svea~~ Land and Environment Court of Appeal *(Mark- och miljööverdomstolen)* but he was not given leave to appeal. The decision of 21 August 2014 by the ~~Svea~~ Land and Environment Court of Appeal cannot be appealed.[14]

22. On 15 May 2014, the Nacka District Court set aside~~revoked~~ the local authority's decision to issue a building permit for the two wind turbines because no inventory of birds had been carried out (case P635-12 and P1924-12). The Court's decision was appealed to the ~~Svea~~ Land and Environment Court of Appeal by the communicant and others. The communicant was not given standing in the appeal, but, among others, an owner of property within Helgaro-Väala 1:1 (Mr. Johan Andersson~~Håkan Lindström~~) was. The communicant remained involved in the case as the ~~Mr. Lindström's~~ representative of Mr. Johan Andersson.[15]

23. On 9 March 2015, the ~~Svea~~ Land and Environment Court of Appeal delivered its judgments in case P5593-14 and P55~~90~~4-14. In an overall consideration of what had emerged in the case, t~~T~~he Court, made the assessment that the investigation in the case did not provide sufficient support for the conclusion that the siting of the turbines on the site in question met the requirements for an adaptation to the natural values in the area. The appeals were therefore refused and no building permit was granted. ~~held that a building permit for construction of two windmills on Näs 1:4 and Knutsberg 1:2 in the municipality of Strängnäs could not be obtained because it would conflict with the protection of the sea eagle and the osprey, two protected species which use the area for foraging. In addition, the Court found that the area provided a good environment for future nesting areas for the two species and that the 2-3 kilometre buffer zone recommended by the Swedish Environmental Protection Agency between windmills and such areas could not be upheld in this case.~~[16]

Commented [LO6]: As stated in Sweden's comments dated 15 June 2015, the distance was not the only factor taken into account by the County Administrative Board when it determined who was considered a concerned party and therefore given standing in the case. The County Administrative Board made an overall consideration of everything that had emerged in the case before it came to its conclusions. The text added is from the authorized translation of the County Administrative Board's decision of 15 December 2011, page 4.

Commented [LO7]: The Land and Environmental Courts are special courts which are part of the District Courts in Nacka, Vänersborg, Växjö, Umeå and Östersund (http://www.domstol.se/Funktioner/English/The-Swedish-courts/District-court/Land-and-Environment-Courts/)

Commented [LO8]: The Land and Environment Court of Appea is part of the Svea Court of Appeal.

Commented [LO9]: Terminology used in the translation of the judgment by the authorized translator.

Commented [LO10]: Text from the court's conclusion in the English translation of the judgment by the authorized translator.

[10] Annexes 1-3 of the additional information from the communicant dated 7 September 2015.
[11] Party concerned's response to the communication dated 26 September 2013, page 3 (second to last paragraph).
[12] Party concerned's response to the communication dated 26 September 2013, page 4.
[13] Comments from the Party concerned dated 10 December 2014, page 3.
[14] Decision 2014-08.21, case 5592-14. See comments from the Party concerned dated 10 December 2014, page 3-4, and letter from the communicant 18 September 2014, page 2.
[15] ~~15~~ Comments from the Party concerned dated 10 December 2014, page 4; letter from the communicant dated 18 September 2014, page 4.
[16] ~~Update from the Party concerned dated 17 March 2015.~~

B. Legal framework

Access to information

24. The right of access to environmental information is provided forguaranteed under the general principle of public access to official documents, prescribed in chapter 2 of the Freedom of the Press Act.[17] The procedure for management of officialpublic documents and the grounds provisions for secrecy are specified in the Public Access to Information and Secrecy Act. A public authority's decision to refuse access to public official documents must be communicated to the person that made the request and the decision should be in writing. The decision must state the reasons for refusal and inform about the applicant's access to appeal, and when and how such appeal should be made (sections 20-21 of the Administrative Procedure ActCode).

25. A person whose request to obtain a document has been rejected or whose request to an official document has been granted subject to reservations, is normally entitled under the Freedom of the Press Act to request that the matter be reviewed by a court. The Public Access to Information and Secrecy Act contains provisions concerning when reservations may be imposed and the court to which appeals should be addressed. If the requester wishes to go to court, he or she is generally entitled to appeal against the decision (Freedom of the Press Act, chapter 2, section 15 and Public Access to Information and Secrecy Act chapter 6, section 7). Appeals are generally made to an Administrative Court of Appeal. A decision of such a court may be appealed to the Supreme Administrative Court, though the Supreme Administrative Court must first grant a leave of appeal, which is mainly done in cases of precedential interest. If the request is made to a Land and Environment Court, an appeal is handled by the Land and Environment Court of Appeal and then by the Supreme Court (Public Access to Information and Secrecy Act, chapter 6, sections 8 and 9). The appeal must be made within three weeks from the day when the appellant was notified of the decision (section 23 Administrative Procedure Act and section 6a of the Administrative Court Procedure Act) and, if the appeal concerns a decision by a Land and Environment Court, within three weeks from the date of the decision (Public Access to Information and Secrecy Act, chapter 6, section 10 and the Code of Judicial Procedure, chapter 52, section 1). The appeal is delivered to the decision-making authority, which then sends the appeal to the court. Before sending over the appeal the authority has the opportunity, if the appeal concerns a decision that the authority has made as first instance, to review its decision. If the decision is manifestly wrong, it has a duty to correct it, provided that this can be done rapidly and simply without detriment to a private party (section 27, Administrative Procedure Act). On appeal, the court steps into the role of the decision-maker, and decides whether or not to give the appellant access to the relevant information.

24.26.

25. If the requester is refused access to information or considers that the required procedure has not been followed, he or she can also complain to the Parliamentary Ombudsman (*Justitieombudsmannen, JO*) or seek leave to appeal to the court. The Ombudsman may criticize the authority, and also more rarely bring charges for misuse of office according to Section chapter 20, section1 of the Penal Code. Criticism by the Ombudsman carries considerable authority, though it is not binding and the Ombudsman cannot require an authority to release information in an individual case.

26. If the requester wishes to go to court, he or she is generally entitled to appeal against the decision (Freedom of the Press Act, section 2:15 and Public Access to Information and Secrecy Act section 6:7). Appeals are generally made to an administrative Administrative court Court of appealAppeal. A decision of such a court may be appealed to the Supreme

[17] Party concerned's response to the communication dated 26 September 2013, page 8.

Commented [LO11]: Would it be possible to add a footnote clarifying if the legal framework described is the legal framework applicable in Sweden at the time for the finding (2016), at the time for the complaint to the Committee (February 2013) or at the time for the Diocese of Strängnäs notification to the Municipality of Strängnäs about its plans to build wind turbines (January 2008)?

Since the application concerning the building permit for the wind turbines in Strängnäs was made before 2 May 2011, the older wording of the Planning and Building Act was applied in the Swedish courts, i.e. the wording of the Planning and Building Act (1987:10).

Commented [LO12]: See http://www.regeringen.se/contentassets/2c767a1ae4e8469fbfd0fc044998ab78/public-access-to-information-and-secrecy-act

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Commented [LO13]: Information about the possibility to complain to the Ombudsman should, preferably, be separated from the information about the possibility to appeal an authority's decision to reject a request to the court.

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~~Administrative Court, though the Supreme Administrative Court must first grant a leave of appeal, which is mainly done in cases of precedential interest. If the request is made to a Land and Environment Court, an appeal is handled by the Land and Environment Court of Appeal and then by the Supreme Court (Public Access to Information and Secrecy Act, section 6:8 and 9). The appeal must be made, if a decision from an Administrative Court, within three weeks from the day when the appellant was notified of the decision (Section 23 Administrative Procedure Code Act and section 6a of the general Administrative Court Procedure Act) or, if a decision from the a Land and Environment Court, within three weeks from the date of the decision (Public Access to Information and Secrecy Act, section 6:10 and the Code on of Judicial Procedure, section 52:1). The appeal is delivered to the decision-making authority, which then sends the appeal to the court. Before sending over the appeal the authority, if a decision from an Administrative Court, has the opportunity to review its decision. If the decision is manifestly wrong, it has a duty to correct it, provided that this can be done rapidly and simply without detriment to a private party (section 27, Administrative Procedure CodeAct). On appeal, the court steps into the role of the decision-maker, and decides whether or not to give the appellant access to the relevant information.~~

Permitting process for wind turbines

27. The building of wind turbines and the establishment of wind farms are activities regulated under the Swedish Environmental Code and the Planning and Building Act. A building permit is not mandatory if the wind farm or turbine requires a permit under chapter 9 of the Environmental Code (so to avoid overlapping processes). Under the Swedish Environmental Code, a wind farm with more than six wind turbines, or ~~more than~~ two or more wind turbines with a height that exceeds 150 metres requires a permit. If an application does not exceed six wind turbines or alternatively, two~~hree~~ wind turbines with a height that exceeds 150 metres, a permit can be replaced by a notification to the regulatory authority under chapter 9 of the Environmental Code. If an application is dealt with by a notification to the regulatory authority the applicant will also need to apply for a building permit.[18]

Access to justice regarding building permits under the Planning and Building Act

28. Building permits under the Planning and Building Act and decisions relating to violations of the Planning and Building Act are subject to administrative appeal~~, first~~ to a County Administrative Board~~,. and further~~The decision by the County Administrative board can then be appealed to ~~the~~ a Land and Environmental~~al~~ Court (Planning and Building Act, chapter~~sections~~ 13, sections~~:~~ 3 and ~~13~~6). The court~~s~~ decide the case on the merits and decide whether or not to change the decision~~replace it with a new decision.~~ An appeal can be made by concerned parties, namely section 22 of the ~~1986~~ Administrative Procedure ~~Code~~ Act provides:

> A person whom the decision concerns may appeal against it, provided that the decision affects him adversely and is subject to appeal.

29. Environmental NGOs meeting the requirements specified in the Environmental Code have standing in appeal cases concerning detailed plans entailing revoking shore protection, or concerning projects and plans requiring Environmental Impact Assessment (Planning and Building Act 2010:900, chapter~~section~~ 4, section~~:~~34, implementing Directive 2001/42/EC). Hence, according to chapter 16, section 13 of the Environmental Code these decisions under the Planning and Building Act can be appealed by non-profit association whose purpose according to its statues is to promote nature conservation, environmental protection or outdoor recreation interests provided the organisation has been active for at least 3 years in Sweden and has at least 100 members or else can show that it has the "support from the public".

[18] Party concerned's response to the communication dated 26 September 2013, page 5.

Commented [LO14]: According to chapter 21, section 10.1 in ordinance (2013:251) under the Environmental Code, a permit is required if the application includes two or more wind turbines standing together, if each of the wind turbines is 150 meters or higher.

Commented [LO15]: Just to clarify, these are only examples and not an exhaustive description of when a permit is required.

Commented [LO16]: According to a new provision in the Planning and Building Act (new provision, chapter 13, section 2 a, in force since 1 of June 2016) municipal decision concerning detailed plans and area regulations (områdesbestämmelser) are appealed directly to the Land and Environmental Courts (and not to the County Administrative Boards).

Commented [LO17]: The appeal court has the power to affirm, set aside or vary the judgment by the lower court/body.

Commented [LO18]: The provision in chapter 16, section 13 § of the Environmental Code was changed in 2010 and the provision no longer includes a criteria saying that the purpose of the association must be stated in its statues. Also, an association fulfilling the criteria has a right to appeal. An association not fulfilling the criteria is however not automatically denied standing.

30. ~~An appeal concerning detailed plans can only be made by persons that have submitted their views in the decision-making procedure, according to chapter 5 of the Planning and Building Act (section 13:11)~~.[19]

Commented [LO19]: This may not be relevant information in this case since no decisions concerning detailed plans are at issue in the case in question. In the conclusion of the draft (paragraph 105) a reference is made to "the circumstances of this case", and that SE is not in non-compliance with the articles of the convention "in the circumstances of this case". It is not clear to SE what is meant by the circumstances of the case.

C. Substantive issues

31. Among other things, the communicant states that development of wind power in the Party concerned has caused, and continues to cause, damage to the environment and to human health. In addition, building of wind turbines creates a very large emission of carbon dioxide which "can never be made good by electricity from wind turbines replacing electricity from coal plants that do not exist in Sweden".[20]

Access to information

Article 4

32. With respect to article 4 of the Convention, the communicant alleges that the Strängnäs Municipality and the County Administrative Board of Södermanland~~Provincial Government~~ have refused to respond to his and his network's questions about the safety of wind turbines and the safety measures required under the Machinery Directive.[21] He alleges that they have never received any explanation as of why their information requests have been denied.[22]

33. The communicant also alleges that he requested documents necessary for an appeal against ~~the~~ permit for ~~the~~ wind turbines, but the authorities refused access to the necessary documents. He made a complaint to the Parliamentary Ombudsman and received 740 pages of documentation.[23] He alleges however that these were not the documents about market surveillance under the Machinery Directive he had requested but rather documents of inspection notices under the Work Environment Act (*Swedish Arbetsmiljölagen (1977:1160)*) and had nothing to do with Machinery Directive.[24] The communicant submits that even the Ombudsman was unable to obtain answers from the Swedish Work Environment Authority~~gency~~ regarding the communicant's questions to that Agency on the safety of wind turbines or requirements on action taken in accordance with the Machinery Directive. The requested information included, inter alia, questions regarding warning signs as required under the Machinery Directive and documentation demonstrating that market surveillance in accordance with the Machinery Directive had been carried out.[25]

Commented [LO20]: To clarify the text, it might be worth mentioning that the communicant writes about two different processes, one concerning wind turbines at Helgarö, one concerning wind turbines at Selaö.
The communicant writes (page 3 in the communication):
"However, the building permits were in an advanced state of handling, as shown by the planning permission for three wind turbines in the middle of Lake Mälaren on Selaö in Strängnäs dated to 05-03-2008 already was given. We tried to enter an appeal against the permission but the authorities tried to stop us by refusing to give us copies of necessary documents".

34. The Party concerned argues that nothing in the communication shows that the communicant has been denied access to documents held by the m~~M~~unicipality concerning the application of the building permit for the two wind turbines in question.[26]

Article 5

35. The communicant alleges multiple breaches of article 5. He alleges a general breach of article 5 because no information about the dangers of the wind turbines has been given to the public.[27] He also alleges failure to comply with a number of the specific requirements of

[19] Party concerned's response to the communication dated 26 September 2013, page 11.
[20] Communication, pages 5-6.
[21] Communicant's reply dated 24 September 2013 to Committee's questions, pages 4, 5, 24.
[22] Communicant's reply dated 24 September 2013 to Committee's questions, page 5.
[23] Communication, page 3. Similarly, in the letter from the communicant dated 8 December 2014 (received 10 December 2014), page 1.
[24] Communicant's reply dated 24 September 2013 to Committee's questions, page 24.
[25] Communicant's reply dated 24 September 2013 to Committee's questions, page 25.
[26] Party concerned's opening statement for the hearing at the Committee's 48th meeting.
[27] Communicant's reply dated 24 September 2013 to Committee's questions pages 5 to 7 and 28.

article 5, including paragraphs 1(a), 1(b), 1(c), 2, 2(b)(ii), 3, 3(a), 3(b), 4, 5, 7(a), 7(b) and 7(c) of that article.[28]

36. The Party concerned observes that on 31 March 2009 the municipality of Strängnäs sent information to concerned parties regarding the application for a building permit for construction of the two wind turbines in Strängnäs. Whilst the communicant was not considered to be a concerned party by the municipality and was not therefore sent the information personally, the same information was also published in the local newspaper, the Journal of Strängnäs (Strängnäs tidning) on 3 April 2009. The Party concerned considers that it has correctly implemented the requirements of article 5, paragraph 2, of the Convention in its national law.[29]

Public participation

Article 6, paragraphs 2, 3, 6 and 7

37. The communicant alleges the Party concerned has failed to comply with article 6 of the Convention both in respect of the wind turbines near Strängnäs and wind turbines generally in Sweden.[30] The communicant alleges that the public concerned has been denied information about how the safety requirements of the Machinery Directive apply to wind turbines.[31] He alleges that as a result of this denial, the Party concerned is in breach of article 6, paragraph 2, of the Convention regarding notification of the public concerned. He also submits that being denied this information has meant that the public concerned cannot prepare and participate effectively, and this is a breach of article 6, paragraph 3, of the Convention. Furthermore, being denied this information is in breach of article 6, paragraph 6, of the Convention as the public concerned is entitled to have access to all information relevant to the decision-making.

38. As a separate allegation under article 6, paragraph 2, of the Convention, the communicant alleges that in several cases the only information provided on the permit process for a wind turbine was a simple advertisement in a local newspaper. He asserts that this is a clear violation of legal procedure and deprives the public concerned of their rights under the Convention.[32]

39. With respect to article 6, paragraph 7, of the Convention, the communicant alleges that on direct orders from the government the Machinery Directive is not applied in decision-making procedures for permits for wind turbines in Sweden.[33] Similarly, during public consultations on wind turbines in Sweden, the authorities will not answer questions from the public about safety under the Machinery Directive, and this is in breach of article 6, paragraph 7, of the Convention.[34]

40. The Party concerned contends that a permit for construction of ~~the~~ two wind turbines of the kind at issue in this case is not an activity that falls under annex 1 of the Convention nor is it such a type of a project that the Swedish legislator has decided may have a significant effect on the environment. The Party concerned therefore fails to see that the requirements of article 6 of the Convention are relevant in respect of the building permit procedure regarding these two turbines.

[28] Communicant's reply dated 24 September 2013 to Committee's questions, page 5 to 7.
[29] Party concerned's opening statement for the hearing at the Committee's 48th meeting.
[30] Communicant's reply dated 24 September 2013 to Committee's questions, page 8.
[31] Communicant's reply dated 24 September 2013 to Committee's questions, page 8.
[32] Communicant's reply dated 24 September 2013 to Committee's questions, page 23.
[33] Communication, page 4, Communicant's reply dated 24 September 2013 to Committee's questions, page 11.
[34] Communicant's reply dated 24 September 2013 to Committee's questions, page 9-20.

Article 7

41. With regard to article 7 of the Convention, the communicant alleges that there has been a breach in the case of the wind turbines near Strängnäs and in general.[35] The communicant alleges that on no occasion were the public invited to participate in the preparation of plans, programs and policies relating to the expansion of wind turbines on Helgarö. He alleges that, on the contrary, the municipality had tried to conceal its plans concerning~~for planning~~ building permit~~ssion~~ for wind turbines on Helgarö.[36]

Article 8

42. The communicant alleges that the public concerned has not been able to participate during the preparation of executive regulations and/or generally applicable legally binding normative instruments concerning permits for wind turbines.[37] The communication alleges that media reports in 2012 reported that the Government intended to speed up the process for the issue of wind turbines by amending the Environmental Code. The communicant states that his network wrote to the Government requesting to participate in the preparation of this legislation.[38] No response was received from the Government.[39]

43. The Party concerned did not respond to this allegation.

Access to justice – article 9

44. With regard to article 9 of the Convention, the communicant submits that there are breaches both in the case of the wind turbines near Strängnäs and under the law of the Party concerned in general.[40] The communicant submits that the courts of the Party concerned rarely or never mention Aarhus Convention on issues related to wind turbines.[41] He claims that from 2008 to date, during hundreds of lawsuits regarding permission for wind turbines, the Convention was mentioned by the judicial system only once, case HD 2012-12-18 O 4925-11.[42]

Denial of access to challenge contravention of national law regarding environment (the Machinery Directive)

45. The communicant claims that the County Administrative Boards reject all references to the European Union's Machinery Directive. The communicant further contends that by Government decree the Machinery Directive may not be included in a judicial review of permits for wind turbines.[43] In support of his allegation, he refers to two documents from the Swedish Government that he claims state that "In this trial Machinery Directive is not to be taken into account."[44] By order of 9 March 2012 from the Swedish Government only the

[35] Communication, page 2 (first to seventh paragraphs).
[36] Communication, page 5.
[37] Communication, page 2.
[38] Letter to Minister of 18 November 2012 (in Swedish) available at http://www.helgaro-liv.se/FN 2013/18-11-2012 till minister Ek.doc.
[39] Communication, page 5.
[40] Communication, page 2.
[41] Communicant's reply dated 24 September 2013 to Committee's questions, page 23.
[42] Communicant's reply dated 24 September 2013 to Committee's questions, page 33.
[43] Communication, page 7, and communicant's reply dated 24 September 2013 to Committee's questions, page 20.
[44] Documents available (in Swedish) at http://www.helgaro-liv.se/FN 2013/9-3-2012 reg arbdep.pdf. http://www.helgaro-liv.se/FN 2013/17-3-2011 regering.pdf. See communicant's reply dated 24 September 2013 to Committee's questions, page 28 (see also pages 30 – 31).

Commented [LO21]: A response was sent to Mr Stümer by e-mail December 10 2012 (M2012/3057/Brev). The response, in Swedish, is attached. In the response there's a link to the government's webpage with the proposal to amend the Environmental code and the list of organisations and others who had been asked to comment on the proposals, including environmental organisations (se below). The communicant was also informed that there was still time to comment on the proposal. http://www.regeringen.se/rapporter/2012/08/effektivare-identifiering-beskrivning-och-bedomning-av-miljokonsekvenser/

Commented [LO22]: Sweden prefers if this statement is not left unchallenged.

The communicant writes that the public concerned have **never** been able to participate during the preparation of executive regulations and/or generally applicable legally binding normative instruments concerning permits for wind turbines.

This is simply not true.

Legislative proposals and similar documents are regularly referred to authorities, interest organisations and others for consultation and the government answers questions and requests from the public.

If the communicant had been more concrete, the allegation would have been easier to respond to. To mention one example in addition to the example above, the government proposal for the Plan and Building Act (2010:900) was sent to interest organisations for comments before adoption.

See also the latest Swedish National implementation Report, article 8 which states. "The Government and other legislative bodies regularly use a consultation procedure in connection with the drafting of rules of general interest. The widespread gathering of comments from public authorities, organizations and other associations as part of the preparation of matters is a characteristic and important part of the political decision-making process in Sweden. The obligation to prepare government business is regulated specially in the Constitution (chapter 7, article 2 of the Instrument of Government). The Riksdag Committee on the Constitution also considers in its annual examination of the Government whether administrative matters have been handled in accordance with the applicable principles of administrative law. Under the Administrative Procedure Act, when authorities handle matters, they have to consider the possibility of obtaining information and opinions from other authorities by themselves if necessary."

Commented [LO23]: Sweden prefers if this statement is not left unchallenged. If not mentioned before, Sweden would like to make a comment to this submission by the communicant. The statement is simply not true. However, it might be more common that the Aarhus Convention is mentioned in decisions and judgments about permits for wind turbines handled by courts and other judicial bodies under the environmental code than under the planning and building act.

Environment Code (*Miljöbalken 1998:-808*) and Planning and Building Act (*Plan- och bygglagen 2010:-900*) can be considered in the judicial review of permits for wind turbines. The communicant alleges that Swedish courts comply with that order and no judgment exists concerning the application of the Machinery Directive.[45] He submits that the Government's order prevents the public's right to challenge the substantive and procedural legality of decisions, acts or omissions subject to article 6 of the Convention.[46]

46. The communicant submits that the Government's order of 9 March 2012 prevents the proper implementation of access to justice as courts cannot take into account the Government's failure to implement the design and safety regulations and market surveillance requirements of the Machinery Directive.[47] He contends that a court should not be entitled to exempt certain laws that do not fit the court's views on the merits or that the Government has ordered to be excluded.[48]

47. The Party concerned states that the courts in Sweden have an independent status within the Swedish constitution. Neither the Government nor any other authority may decide how a court should adjudicate in a particular case.[49]

Denial of standing

48. The communicant alleges several problems with the Party concerned's law on standing:

49. First, the Party concerned's rules for locus standi are so vague that they can be interpreted arbitrarily by the courts.[50]

50. Second, even though the Party concerned's law for the standing of associations has been reduced from 2000 members to 100 members, this still deprives locus standi for most associations concerned with wind turbines as in Sweden wind turbines are located in sparsely populated rural areas where it is almost impossible to create an association of 100 members.[51] The communicant cites the case of Taggen Hanöbukten, where leave to appeal was refused because their association only comprised 92 members and not 100.[52]

Commented [LO24]: If not mentioned before, Sweden would like to add that in the cited case about wind turbines in Hanöbukten (NJA 2012 page 921), the the Supreme Court handled 33 appeals, including appeals from 2 associations (Föreningen för Åhuskustens bevarande and Skånes Ornitologiska Förening). One of the associations, Skånes Ornitologiska Förening (The Scanian Ornithological Society), was given standing in the case. The other association, Föreningen för Åhuskustens bevarande (the Åhus Coastal Conservation Association), was not given standing. According to the judgment the association appeared to have only 10 members, had only been active a short time period (since January 2010) and it had not provided evidence that it had support from the public.

51. Third, with respect to his own standing to challenge the wind turbines in Helgarö-Strängnäs, the communicant claims that his property, located at Välää gåård Helgarö, 64592 Strängnäs, is situated next to the land on which the wind turbines were to be built,[53] yet he was denied standing.

52. With respect to the communicant's standing to appeal the permit for the wind turbines, the Party concerned submits that the address of the communicant is Välää 3, 64592 Strängnäs, which corresponds to the real estate property Helgarö-Välää 1:2.[54] The Party concerned asserts that all of the real estate properties named Helgarö-Välää (except Helgarö-Välää 1:1) are located between 1.5 kilometres and 3 kilometres from the location of the closest proposed wind turbine, and therefore the Party believes that the communicant does not live closer than 1.5 kilometres from the location of the closest turbine.[55] The Party concerned submits that the fact that the courts did not hold the communicant to be a concerned party and therefore denied him legal standing in the case concerning the

[45] Communicant's reply dated 24 September 2013 to Committee's questions, page 20.
[46] Communicant's reply dated 24 September 2013 to Committee's questions, page 31.
[47] Communication, page 4, 6, and communicant's reply dated 24 September 2013 to Committee's questions, page 11, 32, 33.
[48] Communicant's email of 08.03.2014 (mislabelled as 08.03.2013).
[49] Party concerned's response to the communication dated 26 September 2013, page 4.
[50] Communicant's reply dated 24 September 2013 to Committee's questions, page 30.
[51] Communication, page 10.
[52] Communication, page 9, see also communicant's reply dated 24 September 2013 to Committee's questions, pages 22-23.
[53] Communication, page 1.
[54] Comments from the Party concerned dated 10 December 2014, page 3.
[55] Comments from the Party concerned dated 10 December 2014, page 3.

permitting process for the issuance of building permits for the two wind turbines in question cannot be considered a breach of the Convention.[56]

53. The Party concerned states that a construction permit or a detail plan for wind mills can be appealed by an individual if that individual is considered to be a concerned party. Concerned parties according to Swedish law are those who have a direct concern of private interest.[57] The Party concerned asserts that the Supreme Court and the Environmental Court of Appeal have applied a generous attitude regarding who may be considered to be concerned[58] and cites a 1997 decision of the Supreme Administrative Court in this regard:

> ...in principle, every person who may be harmed or exposed to other kinds of inconvenience by environmentally harmful activity in a permit decision is considered a party in interest. However, a mere theoretical or completely insignificant risk of damage or detriment is not sufficient. (RÅ 1997 ref. 38)[59]

54. The Party concerned says that owning land near planned wind turbines or other installations or activities that might be harmful to the environment qualifies an individual as a party concerned. However an individual does not have to own nearby land to qualify as a party concerned.[60] The Party concerned cites case law that individuals living within sight and at a distance of 550 metres from the location of planned wind turbines have been considered parties of concern (RA 1992 ref. 81). Likewise, an individual living approximately 800 metres from the location of a proposed wind turbine was considered as a party concerned by the court and was therefore allowed to appeal the building permit approving the turbine (case P 1574-13, 3 June 2003).[61]

55. The Party concerned states that once it is established that an applicant is allowed to appeal, the scope of review is complete, meaning that the individual can invoke all kinds of interests. No arguments are precluded, thus the appellant can plead any private or public interest in the case.[62]

56. With respect to standing of associations, the Party concerned states that also other non-governmental organisations than those with 100 members or more can be granted standing, provided they can show that they have the "support from the public". Moreover, in 2012 a proposal to remove the criteria on nationality and time for activity (though not the number of members) was circulated for referral by the Ministry of Environment. It was well-received and internal discussion on how to proceed with the proposal is ongoing.[63]

Lack of impartiality – the County Administrative Board

57. The communicant submits that the foundation of a democracy is that political power is separated from the judicial power. He submits, however, that this principle is infringed in matters of wind turbines in Sweden by the fact that the first instance in an appeal regarding a wind turbine is the County Administrative Board. He submits that the Board is not a court, but the organis~~z~~ation through which political power, through Government directives, is exerted. When officers of the County Administrative Board, who have to obey Government directives, deliver decisions, these are the foundations for the entire subsequent legal proceedings. This disregards the right of citizens to independent and impartial justice in matters relating to their environment.[64]

[56] Comments from the Party concerned dated 10 December 2014, page 5.
[57] Party concerned's response to the communication dated 26 September 2013, page 5.
[58] Party concerned's response to the communication dated 26 September 2013, page 5-6.
[59] Reiterated in comments from the Party concerned 10 December 2014, page 4.
[60] Comments from the Party concerned 10 December 2014, page 4.
[61] Comments from the Party concerned 10 December 2014, page 4-5.
[62] Comments from the Party concerned 10 December 2014, page 5.
[63] Party concerned's response to the communication dated 26 September 2013, page 13-14.
[64] Communication, page 8.

58. The Party concerned refutes the communicant's allegation. It contends that County Administrative Boards handle and decide administrative cases quite independently from the Government and central agencies. ~~As a general rule, the~~A ministry or a superior authority cannot intervene in an individual administrative procedure. Due administrative procedure means, among other things, that the authority has to communicate the developments of the case with concerned parties (section 17, Administrative Procedure Act~~Code~~), to provide a reasoned decision (section 20), and access to the materials (section 16).

Access to effective remedies – the Parliamentary Ombudsman

59. The communicant alleges that the Parliamentary Ombudsmen cannot give access to effective remedies as required under article 9 of the Convention. The communicant also alleges that the Ombudsman has not investigated his network's complaints of bias by officials[65] nor helped to get the information he had requested on how the safety regulations in the Machinery Directive should be applied.[66]

60. The Party concerned submits that inadequate or improper administrative procedure may be brought to the attention of the Parliamentary Ombudsman, who may criticise the authority, and also bring charges for misuse of office according to chapter~~Section~~ 20, section~~:~~1 of the Penal Code. Generally, the Ombudsman's decision will stay at criticism. Such criticism carries much authority. However, it does not provide any remedy for the individual. The Ombudsman cannot make the authority to provide access to the information in the relevant individual case.[67] Similarly, the ombudsmen have disciplinary functions, and act through opinions. They have the competence to prosecute civil servants for misuse of office. They cannot intervene in an individual case, and only scrutinize the administrative handling of the case.[68]

D. Domestic remedies and admissibility

61. The communicant's recourse to domestic remedies regarding his requests for access to information is summarized in paragraph 33 above.

62. The communicant's recourse to domestic remedies with respect to the building permit for the Helgarö/Strängnäs wind turbines is summarized in paragraphs 17-23 above.

63. In this case the communication was received before domestic remedies were exhausted. Nevertheless, domestic remedies were exhausted before the Committee finalized its findings so the Committee does not, therefore, decide that non-exhaustion of domestic remedies is a bar to the admissibility of the communication in this case.

64. The substance of the ~~Svea~~ Land and Environment Court of Appeal's judgment of 9 March 2015 was broadly favourable to the communicant: The court found that building permit~~s~~, to which the communicant was opposed, should not be granted. But the communicant alleges that there were a number of acts by the Swedish authorities that demonstrated a breach of provisions of the Convention by the Party concerned.

Commented [LO25]: Chapter 12, section 2 (the independence of administration) of the The Instrument of Government (which is one of four fundamental laws of the Swedish constitution) may be added. It reads as follows:
"No public authority, including the Riksdag, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law."

[65] Communicant's reply dated 24 September 2013 to Committee's questions, page 24.
[66] Communicant's reply dated 24 September 2013 to Committee's questions, page 25 (full stops added).
[67] Party concerned's response to communication dated 26 September 2013, page 9.
[68] Party concerned's response to communication dated 26 September 2013, page 13.

III. Consideration and evaluation by the Committee

65. Sweden ratified the Convention on 20 May 2005. The Convention entered into force for Sweden on 18 August 2005, being ninety days after the deposit of Sweden's instrument of ratification.

66. The Committee will not consider the EU secondary legislation relating to machinery because it has received no evidence that such legislation is relevant to any alleged breach of the Convention by the Party concerned. Nor will the Committee consider the Swedish Courts' decisions except in so far as those decisions relate to alleged breaches of the Convention.

The **identity of the communicant**

67. As a preliminary point, since the original communication was submitted in the name of Mr. Bernd Stümer only, the Committee considers Mr. Stümer to be the sole communicant in this case, while the organisz~~z~~ation Formningen Landskapsskydd i Strängnäs (FLIS), which supports Mr. Stümer has acted as an observer.

68. With respect to the communicant's subsequent assertion that FLIS should also be considered a communicant,[69] the Committee emphasizes that the following findings would not have differed in any way had FLIS been a communicant, and that it has noted the support of FLIS for the communicant.

Commented [LO26]: The meaning/effect of this statement is not clear to Sweden. Does this mean that the Committee has considered the matter as if FLIS had also alleged that Sweden fails to comply with articles 4, 5, 6, 7, 8 and 9 both in relation to the permitting process for the issuance of permits for two wind turbines near the town of Strängnäs, Sweden (Helgarö/Strängnäs wind turbines), and in general?

Article 4

69. The communicant made a number of requests for information to the Municipality of Strängnäs. The Parliamentary Ombudsman's decision of 11 March 2009 held that there had been a number of failures by the m~~M~~unicipality to process those requests in accordance with the law. With respect to the communicant's request for information filed on 17 November 2008, the Ombudsman's decision assumes that was subsequently correctly dealt with; the Committee has been given no evidence that contradicts the Ombudsman's assumption.

70. To the extent, therefore, that the communicant considers that the Parliamentary Ombudsman in its decision of 11 March 2009 upheld his concerns regarding the authorities' inadequate response to his requests for access to information, the Committee finds the Ombudsman's decision criticizing the authorities' various failures has already addressed the communicant's concerns at the domestic level.

71. However, to the extent that the communicant considers that any of his complaints regarding access to information under article 4 were not, or were not adequately, addressed by the Ombudsman, the communicant should have exercised his rights to go to court with respect to those information requests. As he did not do so, the Committee finds that his remaining allegations under article 4 are inadmissible in accordance with paragraph 21 of the annex to decision I/7 for failure to exhaust available domestic remedies.

Article 5

72. The communicant alleges that specific categories of information should have been disseminated by the Party concerned under article 5 of the Convention, and in particular in accordance with paragraphs 1(a), 1(b), 1(c), 2, 2(b)(ii), 3, 3(a), 3(b), 4, 5, 7(a), 7(b) and 7(c) of that article. The Committee has on a number of occasions[70] stressed that article 5,

[69] Communicant's reply dated 24 September 2013 to Committee's questions.
[70] See, for example, the findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland, ECE/MP .PP/C.1/2014/5, para.88. See also the findings and

paragraph 1 (a), of the Convention requires each Party to ensure that "public authorities possess and update environmental information which is relevant to their functions". However, with respect to the communicant's allegations under the provisions of article 5 in the current case, the Committee finds that whilst the communicant made many allegations of non-compliance with that article, he has not substantiated any allegation with sufficiently detailed, clear and specific arguments that would convince the Committee that those provisions of article 5 of the Convention have indeed been breached in this case. The Committee will thus not consider the allegations under article 5 further

Article 6

73. The communicant alleges a number of breaches of article 6. The Committee, however, has received no evidence that establishes that the Party concerned was obliged to apply article 6 to the decisions on the wind turbines in question. In particular, the Committee has been provided with no legal basis to find that the decisions to permit the wind turbines falls within the scope of either subparagraph (a) or (b) of paragraph 1 of article 6.

74. As far as paragraph 1 (a) of article 6 is concerned, the Committee notes that wind turbines are not expressly mentioned in annex I to the Convention. It follows that the only way in which the wind turbines in this case would fall within paragraph 1 (a) would be if the construction of the turbines were an activity referred to in paragraph 20 of annex I to the Convention where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation; but the communicant has not sought to argue, or present any evidence, that paragraph 20 of annex I applies.

75. What is more, there is no evidence before the Committee to suggest that it has been determined by the Party concerned that the construction of the wind turbines in question is an activity that may have a significant effect on the environment as provided for by article 6, paragraph 1 (b).

Commented [LO27]: Sweden would prefer a reference to the wind turbines in question generally in the text (compare paragraph 73 and 80 below)

76. The Committee therefore finds that article 6 did not apply to the decision-making on the building permits for the two wind turbines and thus there was no breach of the provisions of article 6 in this case.

Articles 7 and 8

77. The communicant alleges general breaches of article 7 but has not provided the Committee with any evidence regarding the preparation of any specific plan, programme or policy that would engage that article. The Committee thus finds his allegations regarding article 7 to be unsubstantiated.

78. The communicant also alleges general breaches of article 8 but has likewise not put before the Committee evidence of the preparation of any executive regulations and/or generally applicable legally binding normative instruments to which that article would apply. In this regard, the Committee notes the communicant's refers briefly to media reports in 2012 regarding a possible amendment to the Environmental Code, but since the communicant did not elaborate on this further, the Committee understands that an amendment process did not in fact take place. The Committee thus finds the allegations regarding article 8 to be unsubstantiated also.

recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, ECE/MP.PP/C.1/2012/12, para. 90.

Article 9, paragraph 2

79. Article 9, paragraph 2 of the Convention requires Parties to ensure members of the public concerned have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law of other relevant provisions of this Convention.

80. The Committee has found that the wind turbines in question are not subject to the provisions of article 6 and there is no evidence that the Party concerned's law provides for article 9, paragraph 2 to apply to other provisions of the Convention. The Committee thus finds that there is no breach of article 9, paragraph 2, in this case.

Article 9, paragraph 3

81. Article 9, paragraph 3 of the Convention provides that each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

82. The Committee has previously found that the Convention is intended to allow a great deal of flexibility in defining which environmental organisations have access to justice.[71] Parties are not obliged to establish a system of popular action in their national laws so that anyone can challenge any decision, act or omission relating to the environment, but on the other hand Parties may not use the flexibility provided for in article 9, paragraph 3 as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations or other members of the public from challenging acts or omissions that contravene national law relating to the environment.[72]

83. The Committee has not been given any evidence that suggests that the criteria laid down in the national law with respect to environmental associations are outside the margin of discretion allowed to Parties when implementing article 9, paragraph 3. In this regard, the Committee notes that associations with less than 100 members are entitled to standing so long as they can show they have the "support from the public" and have been active at least three years (see para. 29 above).

84. As for the criteria for individuals, according to the applicable legislation, section 22 of the ~~1986~~ Administrative Procedure Act provides:

> A person whom the decision concerns may appeal against it, provided that the decision affects him adversely and is subject to appeal.

85. Under the jurisprudence of the Supreme Administrative Court "...in principle, every individual who may be harmed, or exposed to other kinds of inconvenience by an environmentally harmful activity allowed by a permit decision is considered as a concerned party. However, a mere theoretical or completely insignificant risk of damage or detriment is not sufficient."[73] With respect to building permits, the Supreme Administrative Court has ruled "such decisions are deemed to concern – in addition to the applicant – owners of the properties bordering directly on the property that the building permit applies to and, in addition owners of properties in close neighbourhood that are particularly affected on account

[71] ECE/MP.PP/C.1/2006/4/Add.2, para. 35; and ECE/MP.PP/2008/5/Add.4, para 29.
[72] ECE/MP.PP/C.1/2006/4/Add.2, para. 35; and ECE/MP.PP/2008/5/Add.4, para 29.
[73] See paragraph 53 above.

of the nature and scope of the measure covered by the building permit, natural conditions at site, etc". [74]

86. The Committee considers that in the abstract there is nothing to suggest that the described criteria for standing to appeal building permits, as set out in legislation and developed in jurisprudence, violate article 9, paragraph 3, of the Convention.

87. The next question for the Committee is to consider whether the reviewing bodies in the present case applied the established criteria for standing in a way that ran beyond the scope permitted by article 9, paragraph 3, of the Convention.

88. In its decision of 15 December 2011, the County Administrative Board of Södermanland made a decision on the appeal of the decision of the Planning and Building Committee of the Municipality of Strängnäs on a building permit for two wind turbines - Näs 1:4 and Knutsberg 1:2. The Board said:

> Under case law building permit decisions are considered to concern owners of the properties bordering directly on the property that the building permit applies to and, as previously mentioned, also owners of properties in a close neighbourhood that are particularly affected on account of the nature and scope of the measure that the building permit refers to, natural conditions at the site, etc. None of the properties with the designation Björsund, Helgaro, Helgarö-Väla (with the exception of Helgarö-Väla 1:1), Helgarö-Åsby, Rällinge or Stenstavik is a neighbour sharing a border with either Knutsberg 1:2 or Näs 1:4, and they are, in addition, located between 1.5 and more than 3 km from the closest wind turbine. Nor do Knutsberg 1:16 (with a distance of about 1 km from the closest wind turbine) or Knutsberg 1:6, 1:13 or 1:14 meet this requirement. The latter three properties are located between 1.2 and 1.3 km from Näs 1:4. In view of this, the owners of/residents on these properties cannot be considered to be affected by the intended activities in such a way that they have a right to appeal the decision of the Committee under Section 22 of the Administrative Procedure Act. Their appeals shall therefore be rejected.[75]

89. The communicant lives on the property Helgarö-Väla 1:2, so he is one of the persons whose appeal was dismissed in this case.

90. In its judgement of 15 May 2014 in case P129-12, the Nacka District ~~Land and Environment~~ Court considered, amongst other things, the communicant's appeal against the decision of the County and Administrative Board. With respect to the communicant's appeal, the court found as follows –

> Regarding Bernd Stümer, the ~~Land and Environment c~~Court notes that his property is not a property bordering on any of the properties on which the wind turbines are to be erected. Nor has it emerged that Bernd Stümer's property is located in a close neighbourhood that is particularly affected in view of the nature and scope of the measure covered by the building permit, the natural conditions at the site etc. The references that Bernd Stümer has made to the ECHR and a ruling of the CJEU do not alter the assessment of the Court in this part of the case. In line with the deliberations that the Court has made above, public interests cannot be cited to support standing. The Court therefore shares the assessment of the County Administrative Board that Bernd Stümer cannot be considered to have a right to appeal the decision. Bernd Stümer's appeal shall therefore be refused.[76]

91. In its decision of 21 August 2014, the Land and Environment Court of Appeal concluded that there was no reason to grant leave to appeal against the decision of the Nacka

Commented [LO28]: It is a bit unclear to SE what abstract the Committee is referring to. If it's the text in paragraph 85 above (the jurisprudence under the Supreme Administrative Court), it might be a good idea to merge the two paragraphs (to clarify the text).

[74] RÅ 1992 report 81, cited in Nacka Land and Environment Court, judgement of 15 May 2014, case P129-12.
[75] Annex 2 to the email from the Party concerned dated 5 October 2015, page 4
[76] Annex 1 to the email from the Party concerned dated 5 October 2015, page 11.

District Court ~~Land and Environment Court~~ with respect to the communicant's standing, hence the judgment by the Nacka District Court ~~Land and Environment~~ remained in force.

92. In the Committee's view, those two passages indicate that distance was the principal consideration when finding that the communicant did not have standing. The Committee notes that the Party concerned has argued that distance was not the only factor taken into account by the County Administrative Board when it determined who had standing, and that the Board referred to the case law at large (which requires an assessment of all the circumstances of the individual case) and made its decision on the basis of that case law.

93. The Committee considers that the view taken by the Party concerned is not that clear from the County Administrative Board's decision; indeed it might be inferred that the Board excluded Mr. Stümer from having a right to appeal against the decision to grant the building permits because first, his property did not share a border with the land on which the wind turbines were being built, and secondly, because his property was too far away to be not located in a close neighbourhood that would be particularly affected by the wind turbine. It is not immediately apparent that the Board, in reaching the second conclusion, took into account all the relevant circumstances; the text of the decision might be taken to imply that the Board took into account only Mr. Stümer's property's distance from the wind turbines.

94. In this regard, while not an allegation raised in this case, it is clear to the Committee that the requirement in article 9, paragraph 4, for review procedures to be "fair" should be read as a requirement to ensure that claimants are able to know the reasons for the decision of the review body, inter alia, to enable the claimants to challenge that decision where they so chose.

95. Returning to the present case, the Committee is concerned that there is little evidence in the respective decisions of the Swedish courts to show how, if at all, any factor other than distance was taken into account when considering whether Mr. Stümer should have had standing to appeal against the decision to grant the building permits.

96. Despite the discretion given to Parties in article 9, paragraph 3, to lay down criteria for standing in their national law, if reviewing bodies, when considering whether the criteria were met in practice failed to take into account all considerations relevant to those criteria, that Party would be in non-compliance with article 9, paragraph 3. Clearly every wind turbine will be different, and have a potentially different impact. Whilst it is impossible to write a conclusive list of the possible impacts of wind turbines, the Committee considers that, depending of the circumstances, it may be necessary to take into account some of the following considerations when assessing the potential impact of wind turbines:

(a) Depending on the circumstances, a wind turbine may have an impact on an individual because of noise and vibration or shadow flicker, and due regard should be given to the safety considerations: such as proximity to roads and railways, air traffic safety, proximity to power lines and the possibility of interference with communication systems. The *construction* of turbines may also have an impact on an individual.

(b) It may be the case that national laws lay down criteria within the meaning of article 9, paragraph 3 that relate to damage to the environment at large, in which case there may be access to justice because of potential damage to habitats, plant and animal species, or architectural and cultural heritage.

97. This list is not exhaustive. There may well be other factors to take into account on a case-by-case basis.

98. In this context, the Committee notes that the law of the Party concerned lays down criteria for standing that relate to the impact of a decision or activity on an individual. The factors listed in subparagraph (a) above may therefore be among those relevant for the reviewing bodies of the Party concerned to consider when examining whether its criteria for standing are met.

Commented [LO29]: Sweden would like to reiterate what was said in its comments dated 15 June 2015, i.e. that the distance was not the only factor taken into account by the County Administrative Board when it determined who was a concerned party and therefore given standing in the case. The County Administrative Board made an overall consideration of everything that had emerged in the case before it came to its conclusions. The County Administrative Board found that no information had emerged showing that the wind turbines would cause Mr Stümer inconveniences

99. The Committee does not consider that in each and every case that a wind turbine is constructed all the considerations in subparagraph (a) will apply; but the Committee is convinced that it would not be consistent with the criteria laid down by the Party concerned, and therefore, with article 9, paragraph 3, to exclude standing to challenge an act or omission concerning a wind turbine only with reference to distance. It follows that the Committee does not consider it would be legitimate to exclude from standing everyone more than a certain distance, for example 1.2 kilometres, away from a turbine, on the basis of distance alone.

100. In the circumstances of the case before the Committee, and in particular because of the County Administrative Board of Södermanland's reference to the criteria laid down in the national law (see para. 88 above), the Committee has not found conclusive evidence that the Swedish review bodies only took distance into account. However, if the Party concerned's review bodies were indeed to take only distance into account in determining standing to challenge wind turbine decisions, this would not be consistent with the criteria it has laid down in its national law, and thus with article 9, paragraph 3 of the Convention.

101. Nevertheless, for the reason given in the paragraph above, the Committee finds that it does not have conclusive evidence to find that the Party concerned was in non-compliance with article 9, paragraph 3 in the circumstances of the present case.

Article 9, paragraph 4

102. The communicant has alleged that the County Administrative Board is an organisation through which political power is exerted and this disregards the right of citizens to independent and impartial justice in matters relating to their environment.

103. A biased review procedure would fail to deliver the fair remedies required by article 9, paragraph 4; but no evidence of bias has been put before the Committee and in any event the Board's decision was subject to appeal. The Committee therefore finds the communicant's allegation to be unsubstantiated.

104. The communicant also alleges that the Parliamentary Ombudsmen cannot give access to effective remedies; but in any event a complaint to the Parliamentary Ombudsman is one of several remedies available. No evidence has been put before the Committee to indicate that the other available remedies are ineffective; in this respect the communicant could have taken the issue to the courts, but failed to do so. So the Committee finds the communicant's allegation with respect to the availability of effective remedies to be unsubstantiated.

IV. Conclusions and recommendations

105. Having considered the above, the Committee finds that the Party concerned is not in non-compliance with articles 4, 5, 6, 7, 8 and 9 of the Convention in the circumstances of this case.

Commented [LO30]: The reader might wonder what happened with articles 7 and 8 and since the Committee finds the allegations regarding articles 7 and 8 to be unsubstantiated (paragraphs 77-78 above), Sweden wonders if it is not conclude that the Committee finds that Sweden is not in non-compliance with these articles as well?