Secretary to the Aarhus Compliance Committee
United Nations
Economic Commision for Europe
Palais des Nations, Room 429-2
CH -1211 Geneva 10, Switzerland

For attention of: Fiona Marshall

Ev. No.: ACCCC/C/2014/106

In Tábor 4. 9. 2015

The Parties: V havarijní zóně jaderné elektrárny Temelín, IČ: 26529084
se sídlem Neznašov 122, 373 02 Všemyslice, spolek
Mgr. Martin Šíp, advokát

Contracting Party: Czech Republic, Ministry of the Environment of the Czech Republic

The expression V havarijní zóně jaderné elektrárny Temelín of the opinion of the Czech Republic in regard to ACCC/C/2014/106

In duplicate

Evidence:

- Judgment of the Municipal Court in Prague, ref. no. 9 Ca BB2/2008-124, dated 27 October 2010, a copy
- Judgment of the Municipal Court in Prague, ref. no. 10 Ca 126/2009-172, dated 11 May 2010, a copy
- Judgment of the Supreme Administrative Court in Prague, ref. no. 2 As 7/2011-274, dated 14 January 2013, a copy
- Resolution of the Supreme Administrative Court of the Czech Republic, ref. no. 1 As 176/2012-130, dated 19 August 2014, a copy
- Memorandum of the European Court of Human Rights dated 13 July 2011 dealing with three complaints submitted by the Association, a copy

I.

On 10 August 2015, the attorney-at-law of the V havarijní zóně jaderné elektrárny Temelín Association ("In the Temelin Nuclear Power Plant Emergency Zone" Association), Reg. No.: 26529084, Neznašov 122, Všemyslice, ("the V havarijní zóně Association"), received, by e-mail sent by Fiona Marshall, the Statement of the Czech Republic, the Ministry of the Environment, with respect to the Suggestion submitted to the Aarhus Convention Compliance Committee by the aforesaid Association.

As a legal representative of the V havarijní zóně Association, I would like to respond to the facts stated by the Ministry of the Environment in the provided Statement of the Czech Republic.

II.

First of all, I would like to emphasise that the main reason for submitting the Suggestion to the Aarhus Committee was that the V havarijní zóně Association, in performing its main activities, i.e. the conservation of the nature and landscape and the protection of the environment, had been encountering entirely insufficient and mainly ineffective protection of the public and organised public (in a so-called association or formerly unincorporated association) in the long term, regarding the access to the judicial protection in making decisions about permissions of projects (nuclear facilities) and their commissioning, a nuclear facility and its operation having significant impacts on the environment for a very long period of time, not just during the active operation of the facility. Within the permitting procedures, there is no review of safety issues and risks of a project, and no effective protection of the rights of the public is guaranteed, the current approach of the Czech courts being that the facts of objections and comments of the public concerned are not examined, and the courts consider only the exercise of procedural rights to the public access to individual proceedings.

In its Statement, the Ministry of the Environment states that the so-called "EIA process", i.e. the process of assessing environmental impacts of projects on the environment, is regulated in the Czech Republic separately and is applied prior to the commencement of a permitting procedure with respect to a project that could affect the environment. The V havarijní zóně Association believes that, with regard to the legislation regulating the EIA process and the complexity of other related procedures, it is very difficult for both the general public and the public concerned within the meaning of the Aarhus Convention to get their bearings and to find the right moment for the exercise of their rights, as the relevant Association, in performing its activities, experienced several times that administrative authorities as well as courts referred it to other procedures that would be commenced within the whole permitting procedure, or to procedures that had been terminated within the project permitting procedure already. As a result, the public does not have access to any effective protection, especially to effective judicial review of decisions.

Regarding the EIA process, the attorney-at-law would like to inform the Committee that although it is true that anyone can participate pursuant to Act No. 100/2001 Sb., as amended, and the public may comment on an assessed project, no final decision, which would reflect the comments or suggestions from the public, is made by the assessing authority in the end of the process, and the EIA process is terminated in the Czech Republic after the assessing authority gives its Statement, which, however, does not have a procedural character of a decision and cannot be reviewed by court or by any other independent and impartial authority.

Within the EIA process, when the impact of other nuclear units (3rd and 4th unit) in the Temelin Nuclear Power Plant was assessed, the V havarijní zóně Association submitted many suggestions and comments, including comments on safety risks and the assessment of a particular type of a reactor; many other associations and representatives of the public, also from the surrounding countries, especially from Austria, Poland, Germany, had also submitted their comments, which were rejected by the assessing authority, i.e. the Ministry of the Environment, very briefly; many of them have not been handled at all, and the Ministry of the Environment of

the Czech Republic, without considering those comments, provided the Statement approving the project of developing other nuclear facilities.

The public concerned can enter the whole long and much complicated permitting process only at some marginal stages, during which no key issues concerning the operation of a nuclear facility, are decided, and, moreover, stages, which either are not subject to judicial review or such judicial review is entirely ineffective and inefficient.

The participation of the public concerned in procedures following the EIA process is not as natural and automatic as stated by the Ministry of the Environment in its Statement. First of all, according to the current legislation, the public concerned is entitled to participate in the so-called application for a planning permission procedure, in which it is decided whether a permission to locate a building will be given. **However, the participation of the public concerned is often insufficient in the application for a planning permission procedure, because, as stated also by the Ministry of the Environment, no suspensory effect is generally awarded to actions in the Czech Republic, although the provisions of Section 9(4) of the Aarhus Convention stipulate that: "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."** So even if the Association submits an application for a judicial review of an application for a planning permission procedure, the following procedure – i.e. the application for a building permit procedure, continues, and the building permit may be granted independently of the judicial review which leads to the commencement of the development of the project. Another related factor of the effectivity of judicial reviews is that court proceedings in the Czech Republic usually last for more than 5 years in the first instance of judicial decision-making.

In order to illustrate how the stated legal protection of the public in the process of decision-making with respect to projects, which can affect the environment, is provided, I would like to give my client´s experience from the practice. The V havarijní zóně jaderné elektrárny Temelín Association participated in the application for a planning permission procedure and the application for a building permission procedure (i.e. procedures following the EIA process under the Building Act) with respect to the construction of a spent nuclear fuel storage facility, which is now in operation already and has been built on the premises of the Temelin Nuclear Power Plant. Within the application for a planning permission procedure, the Association had submitted many objections and comments, but the issued planning permission concerning the location of the building did not consider and settle those objections at all. The permission to locate the spent nuclear fuel storage facility was issued by the Regional Authority of the South Bohemian Region, the Department of Regional Development, Planning, Building Code and Investments, on 14 April 2008. The Association appealed against the permission; the appeal was dismissed on 18 July 2008 by the Ministry of Regional Development by decision no. 18129/2008-83/1076. The Association lodged an action against the dismissal of the appeal in the application for a planning permission procedure, asking for a suspensory effect with respect to the action; however, this had not been admitted and the so-called application for a building permit procedure continued.

On 27 October 2010, judgment no. 9 Ca 332/2008-124 awarded by the Municipal Court in Prague reversed the decision of the Ministry of Regional Development, because the court agreed with the Association that the appellate authority had not handled the objections submitted by the Association with respect to the project, had not dealt with the facts of the objections, and imposed on the Ministry to deal with the Association´s appeal and decide on the appeal again. The judgment of the Municipal Court in Prague became final and conclusive on 10 January 2011; however, in the meantime, the building permit for the construction of the spent nuclear fuel storage facility had been issued and the development was commenced, as the building permit was issued on 11 November 2008. According to the applicable Czech legislation, a planning permission is a prerequisite for the issuance of a building permit. **Any legal or judicial protection, however, is absolutely ineffective if no suspensory effect is awarded to the action lodged against the application for a planning permission procedure, and the building permit is issued prior to the settlement of the action lodged, and the construction is commenced.**

The V havarijní zóně Association actively participated also in the following application for a building permit procedure, and lodged an action against the issued building permit, because, regarding the fact that its objections had not been settled properly and factually within the application for a planning permission procedure, it demanded consideration thereof in the application for a building permit procedure. With respect to the action lodged, the Municipal Court in Prague, in its judgment no. 10 Ca 126/2009-172, of 11 May 2010, provided legal interpretation stating that, according to the applicable Czech legislation, an unincorporated association (now the association) is not a regular participant in the application for a building permit procedure, where participants in the application for a building permit procedure differ from participants in the application for a planning permission procedure and are enumerated by the Building Act (Act No. 183/2006 Sb., as amended), this limited list of participants in the proceedings not containing an unincorporated association and/or association. **According to the interpretation of the Municipal Court in Prague, the application for a planning permission procedure is the only procedure following the EIA process, which the Association may participate in as a participant in the proceedings.**

The V havarijní zóně Association lodged an appeal in cassation against this legal interpretation of the participation of the public concerned in the following proceedings (i.e. an extraordinary relief, which is decided by the Supreme Administrative Court, whose task is, inter alia, to harmonise judicial decisions of the Czech administrative courts). **The Supreme Administrative Court of the Czech Republic, in its decision no. 2 As 7/2011-274 of 14 January 2013, decided to dismiss the appeal in cassation and approved the legal interpretation that an association, as a unit of the organised public, cannot be considered a regular participant in the application for a building permit procedure, as no such status is awarded to it by the Czech legal order.** However, my client is aware of a fact that follows from a public source of judicial decisions of the Supreme Administrative Court of the Czech Republic, that the Supreme Administrative Court of the Czech Republic awarded the status of a regular participant in an application for a building permit procedure to an association as the organised public, e.g. in the proceedings concerning the construction of traffic structures, roads or motorways.

In order to harmonise legal interpretation of the participation of the organised public in the application for a building permit procedure, the Supreme Administrative Court of the Czech Republic adopted resolution no. 1 As 176/2012-130 on 19 August 2014, providing legal interpretation, which says that an unincorporated association, whose main role is to protect the nature and landscape, was entitled to participate in the application for a building permit procedure regarding the relevant development project. This resolution providing the legal interpretation, which the V havarijní zóně Association included in its filings from the very beginning of the application for a building permit procedure regarding the construction of a spent nuclear fuel storage facility, referring to, inter alia, to the Aarhus Convention, is adopted incredible 6 years after the issuance of the building permit for the construction of the spent nuclear fuel storage facility. At that time, the storage facility has been finished in full and put into operation.

It follows from the above that the **legal protection of the public and/or the public concerned, in its access to a judicial review of the decisions that may have impact on the environment, is entirely insufficient and ineffective, because even if the court agrees with the public concerned that the duly submitted objections had not been handled by the decision-making state authority in the relevant proceedings, it is done so only after the development project has been implemented and even put into operation.** The Supreme Administrative Court of the Czech Republic refused to hear the action of the public concerned against the building permit groundlessly, explaining that the Association was not entitled to lodge the action although in other cases, which do not concern decisions made on the use of nuclear facilities, the actions filed by associations were heard. The variation of the legal interpretation of the Supreme Administrative Court of the Czech Republic concerning the interpretation of who may be a participant in an application for a building permit procedure and is thus entitled to lodge an action against an issued building permit, which had taken place almost two years after the dismissal of the action against the issued building permit for the construction of the spent nuclear fuel storage facility, did not affect the procedure as it had been finished already, and the new decision is not possible regarding the legal regulation of the review of administrative decisions in the Czech Republic.

In the Czech Republic, the legal protection of the rights guaranteed in Article 9 of the Aarhus Convention is thus provided neither in terms of the legislative guarantee of the right of access to the legal protection nor in terms of the practical access to judicial protection, when the Supreme Administrative Court of the Czech Republic, as a decision-making and supreme component of the administrative justice in the Czech Republic interprets the access to legal protection of the public concerned, stating that it is not entitled to lodge an action against an issued building permit for the construction of a project under consideration, and does not award a suspensory effect to an action against an issued planning permission. At the same time, the duration of court proceedings in the Czech administrative justice is very long, frequently lasting for more than 1 or 2 years before a court conducts at least the first act in the case and orders a trial. The public concerned thus has no chance to seek protection of its rights guaranteed in Article 9(2,3) of the Aarhus Convention effectively.

The legal protection of the public concerned in the case of a judicial review of issued permits that may affect the environment is entirely ineffective also before the European Court of Human Rights, which was addressed by the Association in the past; the court, without considering the facts of the complaints submitted, united the three complaints with entirely different causes submitted by the Association into one memorandum incomprehensibly and scandalously, where it decided by this memorandum on the inadmissibility of all the three submitted complaints without giving any detailed reasons for such action, and advised the Association that the decision was final and conclusive and the Association should not ask the court to provide more detailed reasons for such a course of action in the case of the complaints submitted.

The participation of the public concerned is not ensured properly in the EIA process either, where, as stated above, the EIA procedure is conducted separately in the Czech Republic, before a decision on the implementation of a construction project is made; in the Czech Republic, the EIA process results in the issuance of the Statement which is either affirmative and recommends the implementation of the project, or dissenting and recommends not to implement the project. According to the Czech legislation (Act No. 100/2001 Sb., concerning the assessment of impacts on the environment), the statement as such is not an administrative decision and thus is not subject to a judicial review.

The relevant legal interpretation of judicial non-reviewability of the Statement issued within the EIA process is supported again by the interpretation of the Supreme Administrative Court of the Czech Republic, ref. no. 2 As 37/2013-85, dated 4 June 2013, whereby the V havarijní zóně Association sought a judicial review of the issued affirmative Statement with respect to the "New nuclear source in the Temelín locality, including the output to the Kočín distribution point" project, by which the Ministry of the Environment of the Czech Republic provided an affirmative statement with respect to the construction of the 3rd and 4th unit of the Temelin Nuclear Power Plant. The Supreme Administrative Court of the Czech Republic states that: "the purpose of the Aarhus Convention is not to extend the review powers of administrative courts for its own sake and/or to extend the active legitimation, but to ensure the enforceability and compliance with the substantive and procedural law adopted by the contracting parties in order to protect the environment. The national legislation, which does not enable to examine individual partial acts within the process of permitting projects in a separate administrative action, but it enables to review them within the review of a decision to permit a project, it thus meets the requirements of the Convention provided that the conditions of Article 9(4) of the Aarhus Convention have been met." The interpretation of the Supreme Administrative Court of the Czech Republic could be acceptable on condition of the actual fulfilment of Article 9(4) of the Aarhus Convention, which, however, cannot be taken into consideration regarding the facts above, because the V havarijní zóně jaderné elektrárny Temelín Association has encountered the failure of the Czech courts to comply with the Aarhus Convention as well as the national legislation that implements the Aarhus Convention.

III.

For all the reasons specified above, the submitter insists that the Czech courts and administrative authorities do not interpret the Aarhus Convention in accordance with the wording of the Aarhus Convention, when the submitter considers its part guaranteeing the access to judicial protection as the biggest shortcoming of the implementation of the Convention. The public concerned has a very limited access to judicial protection, as it is excluded from some types of administrative procedures and cannot participate in such procedures. Moreover, the minimum judicial protection is ineffective and inefficient, as the Czech courts do not award a suspensory effect to actions and projects are implemented usually before any action is decided.

The Aarhus Convention stipulates that each party shall, within the framework of its national legislation, ensure that members of the public concerned having a sufficient interest in decision-making (non-profitmaking organisations always have an interest) have access to a review of the substantive and procedural legality of any decision, act or omission (Art. 9(2)). The existing legislation (provisions of the second sentence of Section 14(1) of Act No. 18/1997 Sb., as amended), administrative and judicial practice excludes the participation of the public from proceedings pursuant to Act No. 18/1997 Sb., as amended, concerning the peace use of nuclear power. The Aarhus Convention and EIA Directive grants rights to the so-called "public concerned" regarding the assessment of projects, including nuclear facilities, where, inter alia, it is stipulated that the public must be enabled to participate in proceedings during the initial stages of the decision-making process, when all options are open. The current situation is that each member state of the European Union has a different approach to the Aarhus Convention. **The approach of the Czech Republic must be seen as insufficient, as the main purpose and goal of the Aarhus Convention, i.e. that the public and its representatives are free to express their opinions with respect to the environment, that they can participate in decision-making processes and can seek judicial reviews of administrative environmental decisions, is not fulfilled.**

The Czech Republic, as experienced by the V havarijní zóně jaderné elektrárny Temelín Association, breaches Article 6(3, 8) of the Aarhus Convention, and Article 9(2, 3, 4) of the Aarhus Convention, for the reasons described above.

V havarijní zóně jaderné elektrárny Temelín, the Association

Evidence:

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