Abstract
Public participation and access to justice are key elements in this thesis. These elements can be found in the Aarhus Convention, along with the right to environmental information. The aim of the Convention is to ensure that a transparent legal framework is established with the intent to protect the environment. The Aarhus Convention Compliance Committee (ACCC) is the body of the Convention that considers whether the Contracted Parties have correctly implemented the provisions. The ACCC is mainly concerned with the communications that the public can send to it: it is on the basis of these communications that the Committee makes recommendations in the form of issuing a report. This research focuses on the reports of the ACCC regarding both public participation and access to justice. These analyses provide insight into the ACCC’s view on the most desirable methods of implementation of the public participation and access to justice provisions of the Convention. In addition, these elements are considered with a particular focus on the compliance situation of the Netherlands.

Conducting the research has created results from which the following conclusions can be drawn. Article 6 gives the public the opportunity to participate in a decision-making procedure of an activity that is potentially harmful to the environment. In its reports, the ACCC mainly considers the importance of a correct implementation of the public participation conditions to ensure the effectiveness of the Article. The effectiveness is subject to different elements that are mentioned in the text of Article 6, but the ACCC also stresses the importance of the size, impact and complexity of a proposed project. The importance of effectiveness is also emphasized by the ACCC when it expresses its opinion on the correct implementation of Article 9(2). Article 9(2) creates the ability to challenge Article 6 decisions specifically. The ACCC noted that it is especially important that the public concerned has the means to appeal against Article 6 decision. The expectation was that an incorrect implementation of Article 6 would also immediately cause an incorrect implementation of Article 9(2). However, this research has not been able to prove this, nor can it refute it, because the question has not yet been dealt with by the ACCC. The advice for follow-up research is to examine whether new reports from the ACCC do provide an answer to this. In addition, it is recommended to carry out a similar investigation that establishes whether the opinion of scholars is different from that of the ACCC. Since this research is aimed at only giving its opinion on the correct implementation of the Aarhus public participation and access to justice provisions.
Acknowledgement

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### Abbreviations

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<td>ACP</td>
<td>Armenian Copper Programme</td>
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<td>AIG</td>
<td>Aarhus Implementation Guide</td>
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<td>EC</td>
<td>European Commission</td>
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<td>EIA</td>
<td>environmental impact assessment</td>
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<td>EU</td>
<td>European Union/European Community</td>
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<td>GALA</td>
<td>General Administrative Law Act</td>
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<tr>
<td>GMO</td>
<td>genetically modified organism</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>IPPC</td>
<td>Integrated Pollution Prevention and Control</td>
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<tr>
<td>MoP</td>
<td>Meeting of the Parties</td>
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<tr>
<td>NGO</td>
<td>non-governmental organization</td>
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<tr>
<td>NLVOW</td>
<td>Nederlandse Vereniging van Omwonenden Windturbines [Netherlands Association of People Living in the Direct Vicinity of Wind Turbines]</td>
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<tr>
<td>NPP</td>
<td>nuclear power plant</td>
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<tr>
<td>SEA</td>
<td>strategic environmental assessment</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNECE</td>
<td>United Nations Economic Commission for Europe</td>
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1. Introduction

1.1 General Introduction

1.1.1 History of Environmental Policy and Public Participation

The first international environmental agreements had the purpose of protecting animals with a commercial value. They came into force at the beginning of the twentieth century and relate to specific species, for example: migratory birds, birds that are useful for agriculture and fur seals.\(^1\) Between 1930 and 1950, States also began negotiating international agreements in relation to fauna and flora and marine fisheries: an example is the 1931 International Convention for the Regulation of Whaling.\(^2\) Nevertheless, agreements during this period were still tailored to cover specific species that required protection, rather than comprehensive environmental protection measures.\(^3\) Decades later, the 1968 African Convention on the Conservation of Nature and Natural Resources\(^4\) and the 1971 Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat\(^5\) were signed and ratified, with the purpose of protecting and conserving national resources. These conventions were the first to have a more general scope covering the protection of the environment.\(^6\)

Around the same time that the Conservation Convention and Ramsar Convention were signed, an increasing focus on public participation at an international level was introduced into environmental legislation. Before the substance of these laws can be considered in depth, it is important to examine the nature of public participation and what the term ‘public participation’ entails. The ‘public’ element can be defined as either natural or legal persons.\(^7\) This means that public participation allows individuals and non-governmental actors to participate in governmental processes.\(^8\) Both the government and the public benefit from effective public participation in decision-making because it gives both parties the opportunity

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\(^3\) Brown Weiss (n 1) 2-3.


\(^5\) Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 [Ramsar Convention].


\(^8\) Beyerlin and Marauhn (n 6) 234.
to learn about the issues at hand. This is a time-consuming process; however, it decreases the chances of a violation of national legislation or public discontent, since the issues in dispute have been given due diligence.\(^9\) According to Umberto Sconfienza, one of the earliest examples of environmental public participation can be found in the United Kingdom’s Town and Country Planning Act 1968.\(^10\) His rationale is that public decision-making makes the government more democratic and provides for stronger standards of environmental protection.\(^11\)

In 1972, the United Nations Conference on the Human Environment\(^12\) was held in Stockholm. The Stockholm Conference discussed environmental impact at a global level and the UN stated that the Conference was the starting point for environmental law to develop.\(^13\) The Stockholm Conference and its Convention recognized the right to a healthy environment for the first time, which led to the Stockholm Declaration.\(^14\) The Declaration sought to achieve its goal by taking necessary measures of environmental protection on a global level.\(^15\) This meant that the geographical element was no longer restricted to a certain region or species.\(^16\)

The first multilateral environmental agreement that included procedural rights for the public was the Nordic Convention on the Protection of the Environment of 1974.\(^17\) Procedural rights are defined as the legal rights that the public is granted and the Convention provides that any person who is or might be affected by activities that can possibly harm the


environment, can bring the issue to a court or administrative authority.\textsuperscript{18} However, only four countries are bound by these provisions.\textsuperscript{19} Nearly twenty years later, in 1991, the Convention on Environmental Impact Assessment in a Transboundary Context, known as the Espoo Convention\textsuperscript{20}, was concluded. The Convention obliges the Contracting Parties to perform an environmental impact assessment (EIA) for certain transboundary activities.\textsuperscript{21} An EIA involves mapping out the environmental consequences of a decision before the actual decision is taken.\textsuperscript{22} The EIA guarantees that the Parties can take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental effects of intended activities.\textsuperscript{23} The activities that are subject to an EIA include crude oil refineries and other installations in the gasification and liquefaction processes that consume a certain amount of coal or bituminous shale gas.\textsuperscript{24} The public is involved in these EIAs, when it is likely that they will be affected by the proposed activity.\textsuperscript{25}

In 1992, another global environmental conference was organized in Rio de Janeiro, the: United Nations Conference on Environment and Development.\textsuperscript{26} The Rio Conference urged States to rethink their economic development in order to seek a new approach to ensure a healthy environment for the future.\textsuperscript{27} The Rio Conference led to the issuance of the Rio Declaration, which consists of twenty-seven principles. Principle 10 focused on the participation of the public regarding the prevention of environmental damage.\textsuperscript{28} This Principle was later elaborated upon in the UNECE\textsuperscript{29} Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,\textsuperscript{30} known as the Aarhus Convention. The Convention focuses on “the need to protect, preserve and

\textsuperscript{19} Articles 1 and 3 of the Nordic Convention.
\textsuperscript{23} Article 2(1) of the Espoo Convention.
\textsuperscript{24} Appendix I of the Espoo Convention.
\textsuperscript{25} Article 2(6) of the Espoo Convention.
\textsuperscript{29} United Nations Economic Commission for Europe.
improve the state of the environment and to ensure sustainable and environmentally sound development”. The substance of the Aarhus Convention awards the public with procedural rights to question environmental related matters that would not be sustainable. According to Jonas Ebbesson, the establishing of the Aarhus Convention provided for the means to achieve the goals of the Rio Conference.

1.1.2 The Content of the Aarhus Convention
The Aarhus Convention is a multilateral agreement based upon Principle 10 of the Rio Declaration. It aims to enable public participation in decisions and processes concerning environmental protection made at all levels of government. The principle reads as follows:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

This principle reflects the three-pillar structure, based upon the rights that the public should enjoy: Access to information, public participation in environmental decision-making and access to justice. These three pillar rights are the key elements of the Aarhus Convention. Currently 46 States and the European Union (EU) are Parties to the Aarhus Convention. In addition, the Convention currently has two signatory States, Liechtenstein and Monaco.

1.1.2.1 The Aarhus Convention in relation to International Human Rights
According to Article 1 of the Aarhus Convention, the objective of the Convention is to contribute to the protection of the environment in such a manner that the people, both now and in the future, can live in an environment that is adequate to sustain their health and well-being. This is implemented through the three pillars to ensure the objective is met, since it aims to not only enforce procedural rights, but also enable the public to live in an environment

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31 Preamble of the Aarhus Convention.
32 Ebbesson 1997 (n 7) 53.
that is adequate to their well-being. The well-being of people as referred to in the Aarhus Convention has been associated with human rights agreements.

Human rights in relation to environmental protection contains a two-fold approach. On one hand, there are human rights that are dependent upon a certain level of environmental quality and on the other hand, there are human rights that give individuals the opportunity to take part in legal and administrative procedures that relate to environmental issues. These procedural rights are realized within the Aarhus Convention and its three pillars. The Secretariat of the Aarhus Convention states that its provisions are related to four freedoms that are recognized in human rights. These rights are: the right to life, the right to information, the right to a fair trial and the right of political participation. Below, the abstract elements of these human rights in relation to the three pillars of the Aarhus Convention will be explained.

1.1.2.1.1 Right to Political Participation

The right to participate in the conduct of public affairs is defined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). It entails that every citizen may participate in public affairs. The Human Rights Committee (HRC) is a UN body that governs the implementation of the ICCPR. The HRC has interpreted the term ‘public affairs’ as follows:

The conduct of public affairs, [...] is a broad concept which relates to the exercise of political power and in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.

This interpretation refers to legislative, executive and administrative powers they deem subject to political participation by citizens. The political participation element of this definition is addressed in the second pillar of the Aarhus Convention, which gives the public the right to take part in the decision-making. The HRC furthermore underlines that this right

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37 Article 1 of the Aarhus Convention.
39 Ebbesson 1997 (n 7) 69.
40 UNECE Aarhus Convention Secretariat, ‘Provided as input to the report on: The role of good governance in the promotion and protection of human rights’ (September 2012) para 5.
41 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR].
43 UNHRC, ‘General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)’ (1996) CCPR/C/21/Rev.1/Add.7, para 5.
cannot be enjoyed without a full realization of Articles 19, 21 and 22 of the ICCPR. These Articles include the freedom of expression, the freedom of assembly and the freedom of association. Below, the freedom of expression is discussed in relation to the first pillar of the Aarhus Convention.

1.1.3.1.2 Right to Information

The freedom of expression is laid down in Article 19 of the ICCPR. Its objective is to guarantee citizens the right to seek, receive, and impart information and ideas. This includes the right of individuals to express and receive information regarding public affairs. These issues reflect the objectives of the first pillar of the Aarhus Convention, which is concerned with the access to information.

Although the provisions in the ICCPR are clear and state that a person shall have access to information in light of the freedom of expression, the provisions of the Article do not include the obligation of the State to make information available upon request of the public, nor does it include the obligation for States to obtain information from the actors that want to perform the activity. However in the Aarhus Convention, the duty of the States to guarantee this right is clear. Conversely, certain derogations from this right are possible. For instance, matters that concern confidential commercial information and draft materials or the internal communications of public authorities may be exempt from this right. In these cases, States may decide not to provide the public with the information sought.

1.1.2.1.3 Right to Fair Trial

Article 14 of the ICCPR states that the right to a fair trial is a human right. A ‘fair trial’ can be defined as a trial that is decided by one or more impartial judges or a jury. This is to guarantee an effective judicial system for all citizens. The right to fair trial is furthermore also included in Article 6 of the European Convention on Human Rights. This provision is clearly set out in the Aarhus Convention in Article 9, which addresses the right of access to

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44 Ibid., para 25.
45 Lis Dhundale, *Public Participation Compliance* (The Danish Institute for Human Rights 2013) 9.
46 Ebbesson 1997 (n 7) 74-75.
justice. It is, however, questionable how successful the right to a fair trial is in relation to environment matters, as it only protects the civil rights of individuals. Environmental protection measures are thus subject to the national legislation of that individual state.

1.1.2.2 The Aarhus Convention in relation to other Relevant Legal Provisions

Another main element of the Aarhus Convention is the obligation for each Party to take legislative and regulatory measures to guarantee that it includes the provisions of the Convention in a clear, transparent and consistent framework. The Aarhus Implementation Guide (AIG) is a document from the UN that can be used to interpret the manner in which the provisions of the Aarhus Convention should be considered. The AIG also discusses the implementation of the Aarhus provisions with the use of other legislation, such as EU secondary legislation and the Espoo Convention. The EU adopted two directives in 2003 that concerned the first two pillars of the Convention and both the EU and its Member States had to implement them at the latest by 25 June 2005. This was around the same time as the EU became a Contracting Party to the Convention, which it ratified on 17 February 2005. The first directive included provisions about public access to environmental information and the second provided for provisions on public participation (Public Participation Directive). The Public Participation Directive caused amendments in the already existing directives that concern the effects of the environment in the EIA Directive, and the permitting and controlling of industrial installations in the integrated pollution prevention and control (IPPC) Directive. Both, the EIA Directive and the IPPC Directive have been used in the AIG to provide for a better understanding of the implementation of the Aarhus provisions.

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51 Ebbesson, 1997 (n 7) 74.
52 Article 3(1) of the Aarhus Convention.
53 Aarhus Implementation Guide (n 49) 9.
54 UNTS, ‘Chapter XXVII Environment’ (n 36).
The Aarhus Convention Compliance Committee (ACCC) was established under Article 15 of the Convention to consider whether the Contracting Parties have implemented the provisions of the Convention correctly. The ACCC makes recommendations if, in its opinion, the Party has failed to realize the objective of the Convention. The role and functioning of the ACCC is made clear in the Guide to the Aarhus Convention Compliance Committee (ACCC Guide).\(^\text{57}\) It is thereafter the responsibility of the Meeting of the Parties (MoP) to determine if it wants to issue binding decisions based upon the recommendations of the ACCC, since the MoP is the main governing body of the Convention.\(^\text{58}\)

**1.2 Objectives**

The provisions of the Aarhus Convention are aimed at making information available to the public, providing for public participation in decision-making, and enabling judicial or administrative review mechanisms. However, these provisions must be implemented by the Contracting Parties in such a manner that the public has effective enjoyment of these rights.

The aim of the research is to consider the functioning of Article 6 and Article 9(2) of the Aarhus Convention and to gain insight into how, according to the ACCC, proper implementation of these Articles can be achieved. Article 6 provides that a Contracting Party must ensure that the public has the opportunity to participate in decisions on whether or not to permit proposed activities listed in Annex I to the Convention, or activities involving a significant impact on the environment which are not listed in Annex I. These provisions are clarified and expounded upon in Article 9(2), which provides that a decision under Article 6 must be open for a review procedure at a national court or an impartial administrative body.

This research will demonstrate when non-compliance with Article 6 of the Convention occurs, how this may affect appeals to review these decisions in court under Article 9(2) and subsequently, it will determine if the Dutch legislature has implemented its obligations under Articles 6 and 9(2) of the Convention in a correct manner. This will be achieved by considering how violations of these obligations are assessed by the ACCC. The consideration will determine in which occasions the public can be deprived of their ability to participate in the decision-making process and a review procedure.

The ACCC has dealt with a number of cases, beginning with its first decision on 11 March 2005.\(^\text{59}\) Some of the ACCC cases concern both Articles, which are given particular

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\(^{57}\) UN, ‘Guide to the Aarhus Convention Compliance Committee’ (UNECE, 27 February 2017) [ACCC Guide].


emphasize because they reflect how the Parties have to implement the Aarhus provisions according to the ACCC, and more specifically, in relation to each other. In addition, some communications were submitted to the ACCC concerning allegations directed at a Dutch authority. Through the analyses of these cases it will be determined if the Dutch government has implemented the provisions in such a manner as to make it compliant with the provisions concerning public participation and access to justice.

1.2.1 Delimitation
This thesis is limited to consideration of only two specific Articles of the Convention, rather than the entirety of the Convention. However, other Articles and Annex I are used where they can provide clarification or insight into this focus. Consequently, this means that not all public communications concerning alleged non-compliance will be cited in order to establish what the ACCC considers to be a desirable way to implement the provisions. The reports that shall be reviewed only pertain to those that contain an alleged breach of both Articles. The cases relating to the Netherlands are examined only if there is a connection to at least one of these Articles.

1.3 Methodology
This section discusses the methods that have been used to conduct this research. The research is carried out to consider when a Party would be non-compliant regarding Articles 6 and 9(2) of the Aarhus Convention. This can be established by studying and analysing Articles 4 to 9, with an emphasis on Articles 6 and 9(2). The wording of the Articles is sometimes rather vaguely described and thus, the AIG has been used for determining its purpose. Although not all Contracting Parties are also EU Member States, the AIG uses the EIA Directive to clarify some of the wording of the Convention. In addition, use was also made of the Espoo Convention for the same reason. Although the directives stem from regulations drawn up by the European Community, this research will refer to the EU when it concerns the Community. The aim of this decision, is to make the text better understandable for the reader. The role of the ACCC and its capacity to make recommendations in cases of alleged non-compliance of a Contracting Party was also examined by using the decision I/7 Review of Compliance of the MoP that established the ACCC and the ACCC Guide that contains information about the functioning and working of the Committee.

The ACCC reports on possible non-compliance are considered in depth if they relate to Articles 6 and 9(2). The seven reports that contain allegations relating to both the Articles are examined through case studies in order to determine the correct interpretation of the
Convention provisions. Four of these reports focus solely on allegation of violations of these Articles and the other three relate not just to these Articles, but also contain allegations of violations of other Articles. These other Articles will only be discussed if the substance of the issue is of relevance for determining whether a State is compliant with the provisions focused on in this research project. The cases relating to the Netherlands will be examined, once the interpretation of the provisions of Articles 6 and 9(2) are determined in the previous case-studies, despite one of them still being under scrutiny by the ACCC. Three of the four communications that have been submitted to the ACCC after the Netherlands had implemented the Aarhus provisions contain allegations of a breach of either one or both Articles. This part differs from the previous section, because those reports all had a connection with at least both Articles. The distinction was made because of the limited amount of cases concerning the Netherlands. One of the cases was at the time of writing still under scrutiny by the ACCC and another had been declared inadmissible. The examination of these cases provides a benchmark to determine whether or not the Dutch legislation has implemented the Convention in such a manner that is compliant with the provisions concerning public participation and access to justice.

1.4 Structure
This thesis contains six components and each element can be found in a new chapter. This chapter contains the introduction to the research topic and background to the sources of law used in the Aarhus Convention. Chapter 2 provides an analysis of the three pillars of the Aarhus Convention with an emphasis on Articles 6 and 9(2). The ACCC’s role and its functioning within a procedure will be addressed in chapter 3. Chapter 4 will present an analysis of the reports of the ACCC that are of relevance to this thesis. Chapter 5 will then analyse the cases that concern the Netherlands. Chapters 2 to 5 will then be compared in chapter 6 and the resulting determinations will then form the results of this thesis. This includes the interpretation of the ACCC on the correct implementation of the provisions of public participation and access to justice. It will also answer the question of whether the Netherlands has correctly implemented these provisions. Conclusions will be drawn on this basis and the necessary recommendations will follow in chapter 7.
2. The Aarhus Convention

The objective of the Aarhus Convention is found in its Article 1. It states that everyone has the right to environmental information, the right to be involved in environmental decision-making and the right to appeal in environmental matters. These fundamental rights form the basis of the three-pillar system.

The goal of each pillar will be demonstrated below. The substance of the first pillar, the information pillar, is outlined in Articles 4 and 5. Articles 6 to 8 of the Convention constitute the second pillar, the participatory pillar. The rules relating to the third pillar are set out in Article 9, the access to justice pillar. As Articles 6 and 9(2) are the main focus of the thesis, the aim of this chapter is to provide detailed information on these specific two Articles. However, for context other Articles will be addressed to a certain extent as well. All of the Articles will be interpreted in light of the AIG and other relevant legal legislations.

2.1 First Pillar

Access to information is the first pillar of the Aarhus Convention, and contains two main elements. It includes both passive and reactive obligation of the authority. These obligations are dealt with in two separate articles. Article 4 of the Aarhus Convention deals with the right to obtain access to existing information on request and is the passive aspect of the right to information. Article 5 concerns the collection and dissemination of environmental information. It contains the active duty that is placed on the authorities of a State Party to gather information and distribute it on its own initiative.60 The purpose of the right to environmental information is to ensure that the public understands what developments are being made in their environmental surroundings. In addition, it gives them the opportunity to participate informally in the environmental decision-making process.61

The above Articles refer to the term ‘environmental information’ which Article 2(3) of the Convention defines as information on the state of the environment and its elements, including the air, the water, the soil, the biological diversity, etc. Also, it includes information on factors that can affect the environment, like certain substances, energy, noise and radiation and related activities and measures, etc. The state of health and safety of people and the state

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61 Aarhus Implementation Guide (n 49) 75.
of the cultural sites and structures that can be affected are also covered by the state of the environment.62

2.1.1 Article 4 of the Aarhus Convention

Article 4 of the Convention obliges the Parties to create legislation that contains procedural processes for obtaining information by the public.63 This Article does not contain a requirement for the persons requesting the information to prove either interest or standing. The Article then states that the authority should present citizens with the requested documentation in the form of copies of the original documents that have been prepared, unless another form of documentation is more reasonable or the information is already available to the public.64 The second paragraph of Article 4 clarifies the procedure of a request, including the deadlines before which the request must be handled. The Convention states that the information must be communicated as soon as possible and within one month of the request. However, this period can be extended to two months if the request relates to complex information.65

Article 4(3) of the Aarhus Convention outlines the reasons that the authority can use for rejecting a request. The first justification occurs when the addressed authority does not have the requested information. Second, a manifestly unreasonable or overly general formulation of a request can be grounds for refusing the application. However, the size and complexity of a request cannot lead to a refusal of the request. Finally, environmental information may be refused if the request concerns incomplete material or the internal communications of a public authority.66 In addition to the grounds previously mentioned, Article 4(4) of the Convention contains further justifications for declining the application. These justifications are all rather substantive in nature but have in common that the disclosure of the information can adversely affect the interests of the Parties to the undertaking.67

Although not having the requested information at hand can be a reason for rejection, it cannot be the reason for a refusal if the request was addressed to the incorrect authority. According to Article 4(5) of the Convention, the addressed authority has the responsibility to redirect the applicant to the authority that holds the information or to inform the applicant that

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62 Article 2(3) of the Aarhus Convention.
63 Aarhus Implementation Guide (n 49) 78.
64 Article 4(1) of the Aarhus Convention and the Aarhus Implementation Guide (n 49) 79-81.
65 Aarhus Implementation Guide (n 49) 82-83.
66 See further Aarhus Implementation Guide (n 49) 83-85.
67 Ibid., 86.
the request must be sent to another authority.\textsuperscript{68} Article 4(6) of the Convention must be considered in light of the preceding paragraphs which contain the grounds for exceptions. This paragraph entails that the government cannot refuse to submit an entire document on the basis that a certain area of the document contains information that the Party cannot disclose, for reasons of confidentiality. The relevant authority has the obligation to notify the public in the event that the authority cannot disclose the information. The Contracting Parties to the Convention have the obligation to implement legislation defining the form, motivation, time-frames and notification of such a refusal.\textsuperscript{69}

Article 4(8) of the Convention contains the rules relating to the cost of access to environmental information. The cost of access to that information must be reasonable in order to establish a real right to environmental information. If that cost is too high, it brings into doubt the effectiveness of the national process by which information is disseminated.\textsuperscript{70}

\textbf{2.1.2 Article 5 of the Aarhus Convention}

Article 5 of the Convention deals with the right to environmental information and the authority’s duty to collect and disseminate it. Accordingly, Article 5(1) obliges the Party to strive for a regular flow of environmental information, for example by setting up suitable systems to supply the information. The public authority is then responsible for the effective operation of that mechanism.\textsuperscript{71} These obligations are subject to accessibility and transparency standards as listed under Article 5(2). Although the Parties are free to determine the means by which they provide the public with environmental information, the Convention encourages the Parties to provide the information electronically.\textsuperscript{72}

Furthermore, the Convention obliges the Parties to provide the public with several kinds of information and encourages the authorities to actively inform the public, also preferably electronically.\textsuperscript{73} Article 5(4) of the Convention obliges the Parties to issue a national report on the state of the environment every three or four years, particularly on the quality of, and the threats to, the environment.\textsuperscript{74} In addition, the public should be provided with information on legislation and policy documents, international treaties and agreements and other important issues related to the environment. Moreover, the Parties are required to

\textsuperscript{68} \textit{Ibid.}, 91.
\textsuperscript{69} \textit{Article 4(7) of the Aarhus Convention and the Aarhus Implementation Guide (n 49) 92-93.}
\textsuperscript{70} \textit{Ibid.}, 97-100.
\textsuperscript{71} \textit{Article 5(2) of the Aarhus Convention and the Aarhus Implementation Guide (n 49) 105.}
\textsuperscript{72} \textit{Article 5(6) of the Aarhus Convention.}
\textsuperscript{73} \textit{Aarhus Implementation Guide (n 49) 108.}
\textsuperscript{74} \textit{Ibid.}, 94.
create a national pollution register.\textsuperscript{75} A pollution register is a database that includes information about potential environmental emissions to air, water and soil and wastes that are transferred off-site for treatment or disposal.\textsuperscript{76} Furthermore, Parties are required to communicate the factual background to their environmental decisions, to monitor the implementation of the Convention on a national level and to provide information on the government management of the environment. The purpose of this obligation is to protect and support the public’s interest in environmental issues.\textsuperscript{77}

All of the principles above are subject to one central exception: if the protection of a particular interest, such as national security, is of greater importance than the public interest, the request may be refused.\textsuperscript{78}

\textbf{2.2 Second Pillar}

Articles 6 to 8 of the Aarhus Convention cover the second pillar: the participatory pillar. This pillar is inspired by Principle 10 of the Rio Declaration, which states: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level”. The pillar is an important and essential part of international environmental policy, because it provides everyone the opportunity to have their opinions considered and it provides for transparency in environmental decision-making.\textsuperscript{79} The active participation of citizens strengthens the choices that are made in the decision-making process, because the intensity of the participation might detect harmful environmental activities at this stage, rather than while the project is carried out.\textsuperscript{80}

The basic obligations that Articles 6 to 8 of the Convention impose upon the Parties pertain to notifying the public concerned about environmental undertakings that require government approval at any and all levels. The public must be given sufficient time to familiarize themselves with the information to enable public involvement in the decision-making process.\textsuperscript{81} Moreover, the authority must take the results of the public consultation into account in its decision-making. The objectives of Articles 6, 7 and 8 are, however, not identical. Each Article concerns a different form of a government action. Article 6 is concerned with concrete decisions regarding specific activities, Article 7 deals with the

\begin{flushright}
\textsuperscript{75} Articles 5(5) and 5(9) of the Aarhus Convention.
\textsuperscript{76} Aarhus Implementation Guide (n 49) 114.
\textsuperscript{77} Article 5(8) of the Aarhus Convention.
\textsuperscript{78} See further Article 5(10) of the Aarhus Convention.
\textsuperscript{79} Elena Petkova and Peter Veit, Environmental accountability beyond the nation-state: The implications of the Aarhus Convention (World Resources Institute 2000) 4.
\textsuperscript{80} Wouters and others (n 9) 17.
\textsuperscript{81} Aarhus Implementation Guide (n 49) 119.
\end{flushright}
development of plans, programmes and policies and Article 8 contains provisions about the preparation of regulations and legally binding normative instruments. In line with the objectives of this thesis, the sections below will mainly be concerned with an analysis of Article 6 of the Convention, but the other Articles will shortly be addressed as well, because the case studies showed that the provisions of Article 6 sometimes are applicable to these Articles.82

2.2.1 Article 6 of the Aarhus Convention

Article 6 of the Convention contains the rules relating to public participation in decision-making of specific activities. Below, the content of each paragraph of the Article will be discussed, both on the basis of the Article itself and the explanations that the AIG provides. The text of Article 6 can be found in Appendix 1 of this thesis.

Before considering the objectives and provisions of Article 6, it is important to establish who has the ability to participate. The Article makes a distinction between the ‘public’ and the ‘public concerned’ and states that as a minimum the Party must ensure that the public concerned may participate in the decision-making process. Article 2(5) of the Aarhus Convention defines the ‘public concerned’ as the public affected, the public that is likely to be affected, or the public that has an interest in the decision-making process, as well as non-nationals.83 This differentiates from the term ‘public’ used in Articles 4 to 5 and 7 to 8, since everyone can enjoy the right of access to environmental information and public participation in plans, programmes and policies, and acts. Moreover, NGOs may potentially be considered as the public concerned if they can establish that they have a certain interest in the matter. The interest is determined by considering whether the NGO promotes environmental protection and falls within the scope of the Party’s national laws.

2.2.1.1 Proposed Activities, Paragraph 1

Article 6(1) sets out the rules relating to the type of activities that need to be open for public participation. The public has the opportunity to participate in the decision-making and they have the capacity to consider the effects of a ‘proposed activity’.

According to Article 6(1)(a) of the Convention proposed activities are the activities that are listed in Annex I of the Convention. They include activities in the energy sector, the production and processing of metals, the mineral industry, the chemical industry and waste management. These specific activities are expected to pose a potential hazard to the

82 Ibid., 120.
83 Ibid., 135.
environment. Special notice should be given to paragraph 20 of Annex I. This paragraph enables the public participation procedure also for activities that are not listed in paragraphs 1 to 19 of Annex I, as long as the national legislation requires an EIA procedure.

Article 6(1)(b) of the Convention stipulates that an activity may still be defined as a ‘proposed activity’ even if it is not listed in Annex I. The Convention obliges the authorities to consider if the activity can cause a significant harmful effect on the environment. The AIG refers to the EIA Directive and the Espoo Convention in order to define which activities could have a significant effect on the environment. Although it is the responsibility of the Party to include provisions in its legislation that help the authority to determine if the activity can cause significant damage to the environment and thus, whether it should fall within the scope of a ‘proposed activity’ under Article 6. The descriptions the AIG uses to define significant effects, are not required to be used by the Parties but could merely be considered as an aid in implementing the provisions of Article 6(1)(b) of the Convention. Annex II of the EIA Directive contains provisions about projects that should undergo a screening to determine whether an EIA is required. These projects are related to the following sectors: agriculture, aquaculture, the energy industry and the production and processing of metals. Apart from screening, the AIG refers to the Espoo Convention for the determination of ‘significant,’ since not all of the activities in Annex II of the EIA Directive will have a significant harmful effect on the environment. According to Appendix III of the Espoo Convention, the criteria to determine the significance of an activity are the following: size, location and effects of an activity.

A Party may exclude public participation in the decision-making procedure for the purposes of the adverse effects that the public participation could cause to matters of national defence. The Party has the obligation to address this in a case-by-case situation but may also implement legislation that determines when an exemption should occur.

If it is determined that an activity falls within the scope of Article 6(1), it becomes applicable to the public participation provisions that are set out in Article 6(2) to 6(9). Apart from the purpose of knowing whether an activity is a specific activity under Article 6 of the Convention, this provision is also to subsequently determine if the provisions on access to

84 Ibid., 131.
85 Annex I (1)-(5) of the Aarhus Convention and the Aarhus Implementation Guide (n 49) 131-132.
86 Aarhus Implementation Guide (n 49) 132.
87 Ibid., 132.
88 Ibid., 132.
89 Ibid., 132-133.
90 Article 6(1)(c) of the Aarhus Convention and the Aarhus Implementation Guide (n 49) 133-134.
justice in Article 9(2) of the Convention are applicable. Due to the importance of Article 6(1), it has often been subject to disputes, as demonstrated in the communications that will be discussed in Chapters 4 and 5.

2.2.1.2 Informing the Public, Paragraph 2
According to Article 6(2) of the Convention, the public concerned shall be notified and informed at an appropriate early stage in the decision-making procedure. The notification shall be done in an adequate, timely and effective manner, either through a public notice or an individual notice. Neither the Convention nor the AIG set out strict requirements that the Party must consider when notifying the public, since the effectiveness of a notification is subject to several elements that should be considered on a case-by-case basis.91

The subjects that require early publication are, first, proposed activities as listed in Article 6(1) of the Convention.92 Second, Article 6(2)(b) states that the nature of the possible decision or draft decision in question must be presented by the public authority as part of the public participation procedure. According to the AIG, it is important that the ‘nature of a possible decision’ is decisive in determining whether there is an Article 6 decision. Furthermore, it notes that the ‘nature of possible decisions’ refers to the different wording a country can use for similar types of decisions about permits, permissions and consents.93 For example, the case in section 4.6 was concerned with an Act that, according to the ACCC should have been considered under Article 6, rather than Article 8. Even though acts and normative instruments in principle fall within the scope of Article 8.94

A proposed decision that is published by an authority cannot be a final decision, but is instead considered to be a draft decision.95 According to Article 6(2)(c), the notification shall include information on which authority will take the decision. Furthermore, Article 6(2)(d) refers to how the envisaged procedure should be constituted: this includes information such as when the procedure begins, the scope of public participation within the procedure, the location of the public hearing, from which authority information can be obtained, to which authority comments and questions can be sent and lastly, where the relevant environmental information to the case will be made available. The final requirement is stated in Article 6(2)(e) and creates the obligation for the authority to make it publicly known that an activity

91 Aarhus Implementation Guide (n 49) 135-137.
92 Article 6(2)(a) of the Aarhus Convention and the Aarhus Implementation Guide (n 49) 137.
93 Aarhus Implementation Guide (n 49) 137.
94 Ibid., 181.
95 Ibid., 137.
is subject to an EIA.96 Notably, the elements that are listed in Article (6)(2) subsections (c) and (d) have especially been addressed in the analyses of the reports.

2.2.1.3 Reasonable Time Frames, Paragraph 3
Article 6(3) of the Convention obliges Parties to provide reasonable time-frames for the public to participate in the different phases of decision-making processes. The AIG clarifies the term ‘reasonable time-frames’. It establishes that only a reasonable time-frame can be provided for, if the public can participate effectively in the different phases within the procedure.97 The phases referred to are the same phases as mentioned in Article 6(2). This means that the public should be informed about the proposed activity, the possible outcome of a decision, who is responsible to take the decision, the details of the procedure and confirmation that the activity is subject to an EIA.

However, the terms of ‘reasonable time-frames’ and ‘effectively’ are still rather broad. The EIA Directive mentions that a reasonable time-frame is established if the public concerned had sufficient time to prepare and participate in the different phases of a procedure.98 The ACCC confirmed this in one of its reports to the MoP.99 The report declared that “the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity”.100 This explains the term ‘reasonable time-frames’ succinctly, since the statement declares that the time-frame given should be in balance with the amount of information that is at hand, in order to prepare and participate in the decision-making process.101 Due to the ACCC’s case-by-case approach, the definition ‘reasonable’ has been discussed in various reports.

2.2.1.4 Early Public Participation, paragraph 4
Article 6(4) of the Convention covers the preliminary stage of an activity. To increase the effectiveness of public participation, the Parties are required to provide for input by affected persons early in the process. As long as the authorities can still be convinced by the public to change their opinion, it is considered by the AIG that the options are open when the government is still gathering information and/or is doing its research in relation to the project.

96 Ibid., 138 and 141-142.
97 Ibid., 142-143.
98 Ibid., 143.
99 Third meeting of the Meeting of the Parties, ECE/MP.PP/2008/5 (22 May 2008) 60.
101 Aarhus Implementation Guide (n 49) 142-144.
The complex cases are generally decided upon in several stages. This does not mean that the authority only has to include public participation into its consideration in solely one stage; rather, the obligation to take early public participation concerns all the different stages. Chapters 4 and 5 below elaborate further on issues relating to early public participation.

**2.2.1.5 Encourage Discussions, Paragraph 5**

Article 6(5) of the Convention demands several actions from the actor that initiates a proposed activity as discussed in paragraph 1. According to the AIG, paragraph 5 contains three steps for the applicant to follow in order to fulfil its Convention obligations. First, Article 6(5) directs that the applicant shall notify the public concerned about the activities before applying for the permit. Under the terms of this provision, the term ‘public concerned’ means those who have a special relationship with the decision that will be made. Second, the applicant shall encourage discussions about the purpose of the activities it seeks to carry out. The purpose of these discussions is to increase public understanding of the end results that the applicant wants to accomplish. The last step describes that it is desirable for the applicant to supply the public with information about the objectives of the activities. The rationale behind this is that the earlier the public is involved in the decision-making process, the better the public’s responses can be taken into account. The analyses will mainly focus on to which extent the applicant is obliged to comply with Article 6(5).

**2.2.1.6 Availability of Information, Paragraph 6**

In accordance with Article 6(6) of the Convention, the public can access and examine all the available information that is relevant to the decision-making procedure, which shall be provided by the public authority. This means that the provided information is not limited to environmental matters, since the Article mentions all available information regardless of its particular area of focus and it includes at minimum the information that is listed in Article 4 of the Convention. This obligation is placed upon the authority from the start of the decision-making until the actual decision is issued, which means that the public participation provisions from Article 6, paragraphs 2 to 7 are applicable at all times. Since the Article bases the information that should be made available on the provisions of Article 4, it also uses the same rejection grounds as mentioned in Article 4(3) and 4(4).

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102 Ibid., 144-146.
103 Ibid., 146.
104 Ibid., 146-147.
105 Ibid., 147-148.
The AIG elaborates on what information the authorities should make available. First, the information shall include the location and physical and technical features of the proposed activity. Second, it shall contain the significant effects that it will have on the environment and what measures will be taken to prevent those effects. These technical documents should, however, be written in such a manner that they will be understood by everyone. To enable this, a non-technical summary of the above must be provided, along with the results of any alternatives to the proposed activity. Finally, the information should contain the main reports and advice that are issued to the public authority. The public should publish this information in accordance with the provisions of Article 6(2). The term ‘reports and advice’ includes the range of documents that have been submitted to the authority for input on the matter, such as consultations, studies and cost-benefit analyses.\textsuperscript{106}

2.2.1.7 Means of Submitting Issues, Paragraph 7
Article 6(7) of the Convention declares that the public has the ability to bring all of their relevant concerns regarding the proposed activity forward, in writing, at a public hearing or inquiry with the applicant. The possible issues that are admissible are: “any comments, information, analyses or opinions”. The text does not speak of public concerned, but simply of public. This means that there does not need to be a relationship between the proposed activity and the complainant. In this manner, anyone of the public can establish the status of public concerned and subsequently appeal to an administrative court under Article 9(2).\textsuperscript{107} Further elaboration on this will follow in chapter 4.

2.2.1.8 Due Account of the Outcome, Paragraph 8
Article 6(8) of the Convention states that Parties must give the outcome of the public participation process due regard when making its decision on the proposed project. In other words, the decision maker must consider all the arguments that have been brought forward by the public. Taking into consideration does not entail that the authority has the obligation to accept the substance of every comment.\textsuperscript{108} A procedural violation will occur in the review procedure under Article 9(2) of the Convention, in the event that the public participation is not taken into account in the outcome of a decision. Notably, Articles 7 and 8 also include this provision. However, the slightly different wording that is used causes a different objective that is less strict than the objective of 6(8). Since Article 6(8) requires the authority to ‘take

\textsuperscript{106} Ibid., 151-153.
\textsuperscript{107} Ibid., 153-155.
\textsuperscript{108} Ibid., 155.
due account’ of the outcome of public participation, while Articles 7 and 8 require the authority to ‘take into account’ of the outcome.\textsuperscript{109} Sections 2.2.2 and 2.2.3 shall address the objectives of the latter two Articles.

2.2.1.9 Prompt Information About the Decision, Paragraph 9
Once a decision has been taken, the obligation lies with the Party to inform the public promptly, and it shall make available to the public the reasoning behind the decision. The decision needs to provide the rationale for the authorities’ acceptance or refusal of the application. This includes the outcome of the public participation of Article 6(8).\textsuperscript{110} The deadline for publishing the decisions depends on various factors, including the type and size of the activity. As noted above, it must be done within a ‘reasonable time-frame’ due to the possible start of a review procedure under Article 9(2) of the Convention.\textsuperscript{111} The ACCC has elaborated on the term ‘promptly’ and has considered what ‘reasonable’ is in a case that shall be addressed in section 4.2.

2.2.1.10 Reconsideration of Activity, Paragraph 10
Under the provisions of Article 6(10), the public authority shall contemplate paragraphs 2 to 9, \textit{mutatis mutandis} and, where appropriate, when an activity under paragraph 1 is reconsidered or updated. ‘\textit{Mutatis mutandis}’ literally translates to: things being changed that have to be changed.\textsuperscript{112} This means that an authority is held responsible to apply the public participation provisions in light of the necessary changes to an update or renewal of an activity.\textsuperscript{113} An update or a renewal are the main conditions to apply Article 6(10), but these conditions can also be found in paragraph 22 of Annex I of the Convention. However, according to the AIG, paragraph 22 is applicable for activities that go through a physical change, while 6(10) is applied in cases where an administrative procedure changes.\textsuperscript{114} The applicability of Article 6(10) and the difference with paragraph 22, Annex I, is more thoroughly described in the case studies in chapters 4 and 5.

2.2.1.11 Genetically Modified Organisms, Paragraph 11
Article 6(11) of the Convention provides the Parties with legislation regarding genetically modified organisms (GMOs). In 2005, the paragraph was amended after the adoption of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{109} \textit{Ibid.}, 155-156.
\item \textsuperscript{110} \textit{Ibid.}, 157-158.
\item \textsuperscript{111} \textit{Ibid.}, 157.
\item \textsuperscript{113} Aarhus Implementation Guide (n 49) 159.
\item \textsuperscript{114} \textit{Ibid.}, 158-159.
\end{itemize}
\end{footnotesize}
Convention, through decision II/1. The original paragraph contained provisions in relation to the obligation for its Parties to include provision for decision-making and GMOs, if this was possible. The reason for the broad language of this was due to the fact that drafters of the document wanted to increase the amount of Parties that would ratify the Convention. The revised paragraph is still quite flexible in its application, but it now focuses solely on the deliberate release of GMOs. The abstract of Article 6(11) is not discussed any further in this thesis, since it only considers GMOs, rather than the environment in general.

2.2.2 Article 7 of the Aarhus Convention

Article 7 creates the obligation for the Party to include the public in the preparation of plans, programmes and policies. Article 7 is more vaguely defined than Article 6 of the Convention and it offers the Parties more flexibility to find suitable solutions for public participation, since Article 7 is applicable to the public in general and therefore exceeds the definition of ‘public concerned’ under Article 6. In addition, the Convention directly addresses the role of the authority, which is to determine who can participate in the consultation and have their comments taken into account. Moreover, a distinction must be made between the importance of public participation of plans and programmes on the one hand, and the policy on the other. The obligations of the Parties for the latter are the least extensive.

The first sentence of the Article deals with the objective concerning all plans and programmes relating to the environment, though the Convention does not define what ‘relating to the environment’ means, nor what ‘plans and programmes’ are. The AIG refers to the definition of ‘environmental information’ in Article 2(3) of the Convention, indicating that this element is similar to the standard of the information pillar. Further elaboration on this point can be seen in section 2.1, and although the Convention does not elaborate on what is considered a plan or programme, the analysis of the report mentioned in section 4.1 addresses this issue. In relation to plans and programmes, the Convention requires its Parties at least to make practical provisions for public participation. In addition, they shall also apply the provisions of Article 6, paragraphs 3, 4 and 8 during the drafting of their plans and programmes. This means that the consultation must contain the following elements: the public should be informed about the starting point of the procedure, their options for participation,

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115 Decision II/1 Genetically Modified Organisms; ECE/MP.PP/2005/2/Add.2 (20 June 2005).
116 Aarhus Implementation Guide (n 49) 160-161.
117 Ibid., 162 and Hana Müllerová, Public participation in decision-making: Implementation of the Aarhus Convention (Institute of State and Law of the Academy of Sciences of the Czech Republic 2013) 43-44.
118 Aarhus Implementation Guide (n 49) 178.
119 Ibid., 179-180.
120 Ibid., 176.
and making the relevant information accessible during the preparation of the plans and programmes.\textsuperscript{121} The final sentence of Article 7 deals with policies. This term is not defined in the Convention and the Article only elaborates on the obligation of providing the public with the opportunity to participate. Unlike Article 6, Article 7 does not mention anything about changes that may subsequently be made to plans and programmes.\textsuperscript{122} It is therefore unclear whether those changes fall outside the scope of Article 7, or if changes to a plan must be addressed in a new plan.

\subsection*{2.2.3 Article 8 of the Aarhus Convention}

Article 8 expresses the idea that members of the public also have a role in the development of laws and normative instruments that can have a significant effect on the environment. These are resource commitments placed upon the Party and it is up to the Party to make its best efforts to realize them. The objective of Article 8 is quite similar to the provisions under Article 6, paragraphs 2 to 5 and 7 to 8. The obligations under Article 8 are the following: public participation must be promoted during the preparation stage when all options are open. A Party must ensure that the public has been given sufficient time-frames to participate, draft rules have to be published and the public should have the opportunity to submit comments. Once the public participation procedure has been completed, the result must be taken into account as far as possible in the outcome.\textsuperscript{123} Article 8 of the Convention ceases to be applicable from the moment a draft legislative instrument is transferred to a legislative body.\textsuperscript{124}

\subsection*{2.3 Third Pillar}

Article 9 constitutes the third pillar of the Aarhus Convention, the access to justice pillar. The Article contains five paragraphs. For the purpose of this thesis the emphasis will be placed on paragraph 2. However, a short assessment of all the paragraphs is in the section below.

\subsection*{2.3.1 Article 9 of the Aarhus Convention}

Articles 9(1) and 9(2) create the terms to appeal to a court of law or other impartial and independent body. The concrete terms concern denials and/or poor handling of requests for environmental information or decisions regarding specific activities where the participation requirements are not complied with. Furthermore, Article 9(3) of the Convention provides for

\begin{flushleft}
\textsuperscript{121} Ibid., 179.
\textsuperscript{122} Ibid., 179-180.
\textsuperscript{123} Ibid., 181-185.
\textsuperscript{124} Ibid., 182.
\end{flushleft}
review possibilities of acts or omissions by private or public (legal) persons that infringe upon national environmental law.\textsuperscript{125} The third pillar considerably strengthens the position of the public, because it gives them the opportunity to appeal when they are of the opinion that violations of the Convention have occurred. Due to these provisions, the public can enforce their access rights through these regulations and rely upon the national legal rules regarding the environment.\textsuperscript{126}

Article 9(4) of the Convention sets more general requirements for the procedures under Articles 9(1) to 9(3) and forms the minimum quality requirements that the procedures must meet. The basic idea is that wide access to legal remedies must be granted to the public. The AIG declares that each of the matters that are subject to a review procedure under paragraphs 1 to 3 can be referred to judicial decision-making bodies.\textsuperscript{127} Furthermore, Article 9(4) obliges national authorities to lay out appeal procedures and emphasizes the need for the public to have adequate and effective remedies. It continues by stating that the review procedure should be independent, impartial and not overly expensive.\textsuperscript{128}

Moreover, Article 9(5) of the Convention imposes an obligation on the Parties to disclose information regarding the revision procedure. Finally, the Convention seeks to remove financial obstacles by creating an obligation to provide financial assistance formulas that eliminate or limit public access to a review procedure.\textsuperscript{129}

\textbf{2.3.1.1 Review Procedures according to Paragraph 2}

As mentioned above, Article 9 of the Convention forms the basis for the right of access to justice. Article 9(2) contains provisions on the ability of the public to appeal to a court to review decisions, acts and omissions in relation to specific activities, as defined under Article 6 of the Convention. Decisions that can be reviewed include permit decisions and acts of a State that have an adverse effect on an individual.\textsuperscript{130} An omission is the opposite of an act, since it is defined as the failure to act.\textsuperscript{131} The text of the paragraph can be seen in Appendix 2.

Article 9(2) provides two ways in which someone can have legal standing: either through an interest-based approach or a rights-based approach.\textsuperscript{132} The interest-based approach

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{125} Ibid., 196.
\item\textsuperscript{126} Ibid., 187.
\item\textsuperscript{127} Ibid., 187-188.
\item\textsuperscript{128} Ibid., 199-204.
\item\textsuperscript{129} Ibid., 205 and 207.
\item\textsuperscript{131} Ibid., 344-345.
\end{enumerate}
\end{footnotesize}
can be found in 9(2)(a) and states that the public concerned is someone who has a sufficient interest. Article 9(2)(b) determines that the public concerned can also be those whose right is impaired. The Parties must incorporate legal standing into their national law in such a manner that wide access is still guaranteed, since an overly narrow interpretation of these concepts could lead to a violation of Article 9(4). The AIG therefore suggests using a test to consider when the public has standing by considering if there is a “direct, sufficient, personal or legal interest, or of a legally protected individual right”. Furthermore, it suggests using the definition of ‘public concerned’ in Article 2(5) as a minimum standard to determine whom of the public has legal standing.

Notably, Article 9(2) itself specifically mentions that a NGO meets the criteria of sufficient interest when it meets the requirements to be the public concerned as stated in Article 2(5) of the Convention, since the sufficient interest of a NGO causes them to have a right that is capable of being impaired. However, there are States that limit the rights of NGOs in their national legislation: Swedish law, for example, required NGOs to be active in Sweden for at least three years and a NGO should have more than 2.000 members. The Court of Justice of the European Union found that the latter conflicted with the EU legislation that was designed to implement the Aarhus obligations. This decision resulted in amendments in the Swedish law in order to ensure the access of NGOs to review procedures.

Both substantive and procedural legality can be challenged by those who have legal standing. This means that the public concerned can request a review procedure to consider a possible violation of the substance of laws and a violation of the authority within the decision-making procedure. The challenge must either be conducted before a court or another independent and impartial body that is established by law. The AIG elaborates on the latter in Article 9(1). It notes that such a body must offer guarantees for a fair trial and must operate without any influence from the government or private actors. The last sentence of Article 9(2) gives the possibility for States to require administrative procedures to be exhausted before a judicial appeal can be instituted.

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133 Aarhus Implementation Guide (n 49) 194-195.
134 Ibid., 195.
135 Ibid., 194.
136 Ibid., 194.
138 Aarhus Implementation Guide (n 49) 191-192.
139 Ibid., 196.
2.3.1.2 Applicability of other Articles to Article 9(2) of the Convention

As mentioned above, in principle Article 9(2) can only be applied in cases of possible violations of Article 6 of the Convention. However, a Party may determine that apart from Article 6, other relevant provisions of the Aarhus Convention can also be reviewed under its national law. This gives the public the potential to apply the provisions of Article 9(2) to Articles of the Convention other than decisions, acts or omissions under Article 6. This section will solely focus on explaining the manner in which Articles 7 and 8 can become applicable under Article 9(2), since these Articles also contain public participation provisions that are relevant for this thesis.

The AIG states that Articles 7 and 8 in principle are subject to Article 9(3) of the Convention, rather than 9(2). However, each Party has the ability to choose to include the provisions of Article 9(2) for plans, programmes and policies under Article 7 and acts and instruments under Article 8. If a Party decides to ‘opt-in’, it shall create regulations into its own laws that determine when the public can enjoy the right of access to justice under Article 9(2), since this paragraph determines the legal standing of the public by considering whom the public concerned is and both of the Articles lack the term ‘public concerned’. The public will not have the capacity to appeal to a court if the Parties have not included enforcement obligations for the Articles. Thus, they shall only be able to enforce their rights through Article 9(3).

2.4 Main Findings of the Chapter

The Aarhus Convention is based upon the three-pillar system. Articles 4 to 5 of the Convention regulate the first pillar, which provides the public with access to environmental information that is available to the government. This right has two elements and contains both passive access and reactive access rights. The passive access right gives the public the ability to request information about issues related to the environment. Conversely, the reactive access right puts the responsibility on the government to actively provide the public with information, for example by publishing reports or making databases accessible.

Public participation in environmental matters is the second pillar of the Convention and can be found in Articles 6 to 8. The possibility of public participation refers to specific activities under Article 6, to plans, programmes and policies relating to Article 7, and to regulations relating to the environment under Article 8. The public concerned has the possibility of participating in the decision-making procedure of a specific activity under

\[140\] Ibid., 193.
Article 6. Several factors must be considered to ensure a correct public participation. In general, these factors concern the information that is made available to the public about the procedure and the data that may be subject to their scrutiny. This information should be provided for at an early stage in the process in order to be effective. Furthermore, the outcome of the public participation process should be taken into account in the final decision. The provisions of Articles 7 and 8 of the Convention are in principle the same but impose less stringent obligations upon the Parties.

The regulations relating to the third pillar can be found in Article 9, which provides for access to justice in environmental matters. In general, the Convention provides for the ability of the public to bring possible violations of its provisions to a national court. Article 9(2) in particular discusses the review procedure for decisions made under Article 6. The elaboration of Articles 6 and 9(2) are especially important for handling and analysing the information that is presented in the following chapters.
3. Aarhus Convention Compliance Committee

This chapter will review the institution that has the authority to determine if a Contracting Party is in compliance with the Convention. The ACCC is the main body empowered by the MoP to review if States are in compliance with the rules the Aarhus Convention sets out.\textsuperscript{141} Due to its central role, the ACCC is a primary focus of this thesis.

3.1 Background

The MoP is the main governing body of the Convention and all the Parties to the Convention are also MoP members.\textsuperscript{142} The MoP was given the responsibility of ensuring that the Aarhus provisions would correctly be implemented according to Article 10(2). Furthermore, it is granted the ability to establish subsidiary bodies in the event that the MoP deems them to be necessary.\textsuperscript{143} The MoP receives help with the execution of its duty from the Secretariat. The Secretariat helps by preparing the meetings, sending the reports of the discussions to Parties and other tasks the Secretariat gets assigned.\textsuperscript{144}

During the negotiating and drafting of the Convention, consensus could not be reached on how effective implementation of its provisions should be carried out and whether this should be done through the establishment of an international body for compliance control.\textsuperscript{145} Accordingly, the MoP adopted a decision establishing one such subsidiary body during its first meeting: the compliance mechanism known as the ACCC.

The establishment of the ACCC was in line with Article 15 of the Aarhus Convention that empowers the MoP to create “optional arrangements of a non-confrontational, non-judicial and consultative nature” for the purpose of reviewing compliance of the Parties towards the Convention. Hence, it had the authority to take measures for the purpose of examining the Contracting States’ compliance in accordance with the aforementioned provisions.

3.2 Establishment of the ACCC

Decision I/7 on review of compliance mandated the ACCC to discuss and decide whether possible violations of the Convention had occurred, in addition to providing for the structure

\textsuperscript{141} ACCC Guide (n 57) 6.
\textsuperscript{142} UNECE, 'Meeting of the Parties' (n 58).
\textsuperscript{143} Article 10(2)(h) of the Aarhus Convention.
\textsuperscript{144} Article 12 of the Aarhus Convention.
\textsuperscript{145} Ebbesson 1997 (n 7) 60-61.
and functioning of the Committee.\textsuperscript{146} The selection process for a seat on the ACCC is as follows: members are nominated by the Parties, Signatories and NGOs. The Parties referred to are the Contracting Parties, and the Signatories are the States of Liechtenstein and Monaco. NGOs who aim to protect the environment are able to inform the MoP about their interest to be included in one of its meetings.\textsuperscript{147} The MoP then selects members out of these nominees.\textsuperscript{148} The ACCC formerly had eight members in accordance with decision I/7, but now the MoP elects nine members every four years.\textsuperscript{149} Meetings between the members are held at least once a year and the Secretariat is responsible for the organisation of the meetings.\textsuperscript{150}

The ACCC has two main functions: first, it has the responsibility of analysing the procedural process as described in the section below, create reports upon the request of the MoP and evaluate the national implementation reports of the Parties. Second, the ACCC can determine if there are any compliance issues and provide recommendations without the request of a Party.\textsuperscript{151} The ACCC receives assistance from the Secretariat when it carries out its tasks. The functions of the Secretariat are similar as its functions regarding the MoP. It assists in the preparation of meetings and the documentation afterwards. In addition, issues about non-compliance are addressed to the Secretariat and it considers if any documentation is missing before sending it to the ACCC. However, it can also refer issues of non-compliance itself. This will be discussed below, along with the other mechanisms that trigger an ACCC review procedure. Followed by a description of the processes of a procedure.\textsuperscript{152}

\textbf{3.3 Procedural Rules of the ACCC}

The procedural process within the ACCC contains several steps: first, it considers the standing of the Parties and the admissibility of their claims, then it organizes meetings of the Committee and deliberares on the matter and finally it provides recommendations on the basis of these meetings. The entire process usually takes about one year.\textsuperscript{153}

\textsuperscript{146} Decision I/7 Review of Compliance; ECE/MP.PP/2/Add.8 (2 April 2004).
\textsuperscript{147} Article 10(5) of the Aarhus Convention.
\textsuperscript{148} Annex I paragraphs 4 and 6 of Decision I/7 Review of Compliance.
\textsuperscript{150} Annex II paragraph 12 Decision I/7 Review of Compliance.
\textsuperscript{151} Annex II paragraph 13-14 Decision I/7 Review of Compliance.
\textsuperscript{152} ACCC Guide (n 57) 18.
3.3.1 Trigger Mechanisms

There are four possible ways for a Party to engage in a procedural process of the ACCC: Contracting Parties can submit a complaint, the Secretariat can refer complaint on its own initiative, the public can communicate their complaint directly to the Committee and finally the MoP can request that the ACCC start a procedure.\(^{154}\)

Contracting Parties may send their submission to the Secretariat, which will then send the submission to the ACCC. There are two instances in which a Party may make a submission: first, a submission can be made when the Contracting Party is of the opinion that another Party to the Convention is non-compliant and second, a Party can request the ACCC to provide advice on its own legislation and whether it is in compliance with the Convention.\(^{155}\) In the former instance, the Secretariat will send a notification to the accused Party and the Party has, in principle, three months to respond to the accusation.\(^{156}\)

Furthermore, the Secretariat can ask a Party to respond to an instance of possible non-compliance that it has detected. The Secretariat will send any cases of non-compliance to the ACCC if the matter remains unresolved or if the response of the State is not satisfactory to the demands of the Secretariat.\(^{157}\)

Any natural or legal resident of a Contracting Party may submit its communication after the disputed national resolution has been enforced at least one year in their country.\(^{158}\) An individual or group, including non-governmental organizations (NGOs) that meet the criteria, has the ability to act as a lower-case party in ACCC proceedings. There is no further requirement for legal standing, because there is an obligation upon the State to uphold the rules of the Convention.\(^{159}\)

In practice, communications by the public are the most commonly used method of an ACCC procedure. So far there have been 158 communications submitted, while there has not


\(^{156}\) Annex IV paragraphs 15-16 Decision I/7 Review of Compliance.


\(^{158}\) Annex VI paragraphs 18-19 Decision I/7 Review of Compliance.


\subsection*{3.3.2 Admissibility of the Report}
After the submissions, referrals or communications have been received by the ACCC, the Chair, Vice-Chair of the Committee and the Secretariat will jointly decide on the admissibility of the report.\footnote{ACCC Guide (n 57) 20-21.} The Committee can respond to the requests in four possible ways. First, the ACCC may determine that the legislation of a Party is compatible with the Convention. Second, the ACCC may indicate that the legislation of a Party is not compatible with the requirements of the Convention in a specific matter. Third, the ACCC can also rule that the Party is in an alleged systematic non-compliance situation with the Convention. Finally, the ACCC has the power to draft a report and/or recommendation for consideration by the highest power in the compliance procedure, the MoP.\footnote{Ibid., 19-20.} The Parties will be informed if the claims are declared admissible and they have five months to respond.\footnote{Aarhus Implementation Guide (n 49) 18.} Furthermore, the ACCC shall communicate to the public when a Party is in a state of non-compliance. The compliance mechanism is a unique system in international law, because the public has the capacity to directly speak to the members of the ACCC.\footnote{ACCC Guide (n 57) 6.}

\subsection*{3.3.3 ACCC Meeting with the Concerned Parties}
Concerned Parties can participate in the meetings and the debates relating to the alleged noncompliance.\footnote{Annex IX paragraph 32 Decision I/7 Review of Compliance.} In addition, the ACCC may request further information from the interested parties.\footnote{Ibid.} Challenging matters are generally discussed over the course of several meetings.\footnote{UN, ‘Guidance document on the Aarhus Convention Compliance Committee’ (UNECE) 19-20 [Guidance Document].} This is the last stage in which the Parties can still give their opinion.

\subsection*{3.3.4 Recommendations of ACCC to the Parties Concerned}
Upon conclusion of its meetings, the ACCC will prepare a draft of its recommendations and communicate it to the Parties. The ACCC is mandated to provide its findings and non-binding
recommendations based on paragraph 35 of decision I/7 of the MoP. These recommendations are non-binding; nevertheless, the ACCC promotes compliance under general international environmental law.\textsuperscript{168} The draft version of the recommendations is presented to the Party and the communicant. Afterwards they are given the opportunity to comment on the document.\textsuperscript{169} Although there is no deadline set for responses, they should be given quickly after the draft has been presented.\textsuperscript{170} The recommendations will be adopted and included in the final report if the ACCC does not receive a response. However, if the Parties do decide to give comments, the ACCC may alter the draft accordingly. The report is finalized by a majority of Committee members and then presented to the Parties and the MoP.\textsuperscript{171} Since the ACCC may only give its opinion on compliance, it is up to the MoP to make binding decisions. The MoP sessions are usually held every three years and during these sessions the findings of the ACCC are discussed and determinations are made as to what action, if any, should be taken. To make these determinations, the MoP relies on both the elements of the findings of the ACCC, and also the national implementation report of the Party in question.\textsuperscript{172}

\textbf{3.4 Main Findings of the Chapter}

This chapter provides an explanation of the functioning of the ACCC to indicate its importance and to clarify who can appeal to it. The MoP is the main governing body of the Convention and is mandated to monitor the implementation of the Convention by its Parties. Through decision I/7 Review of Compliance, it established the ACCC to ensure compliance with the Convention. The following tasks were assigned to the ACCC: to deal with cases that are brought before them, to draw up compliance reports at the request of the MoP and to supervise, evaluate and facilitate the implementation of the compliance with the reporting obligations of the Parties. In addition, the ACCC examines compliance issues and makes recommendations, where and if necessary.

There are four different ways in which a case can be brought before the ACCC. A Party can make a submission about the non-compliance of another Party, or about its own non-compliance. In addition, the Secretariat can make a referral and finally, members of the public can also submit their communications about an alleged breach. The Party concerned is

\textsuperscript{169} Annex IX paragraph 34 Decision I/7 Review of Compliance.
\textsuperscript{170} Guidance Document (n 166) 42.
\textsuperscript{171} \textit{Ibid.}, 9.
\textsuperscript{172} UNECE, 'Meeting of the Parties' (n 58).
informed about the allegations after the ACCC finds the claim admissible. The reports prepared by the ACCC include its findings and its recommendations, but the report itself is non-binding for the State, since the MoP has the task to finalize the decision.
4. Cases of the ACCC

At the time of writing, 158 communications have been submitted to the ACCC since its establishment in 2002. However, in some cases no findings have yet been made and in other instances the communications have been declared inadmissible by the ACCC. According to the UNECE in January 2014, approximately half of the reports published by the ACCC relate to Article 6 of the Aarhus Convention and only a handful relate to Article 9(2).\(^{173}\)

This chapter contains analyses of seven cases in total. The area of focus has been narrowed by emphasizing cases that contain allegations of non-compliance in relation to Articles 6 and 9(2) of the Convention. Three of these reports also contained allegations regarding other Articles; however, these Articles are left out of the analyses. The cases have been addressed in chronological order according to the publishing date of the reports.

4.1 Armenia Dalma Orchards Case

On 20 September 2004, the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society (the NGOs) submitted their communications to the ACCC alleging an instance of non-compliance by Armenia. They claimed that the Armenian authorities failed to notify the public about changes to the decision-making procedure relating to the use of land and the leasing of plots in the region of Dalma Orchards, as required under Article 6 of the Aarhus Convention. Furthermore, they argued that the public did not have the effective means to challenge the decisions under Article 9(2) of the Convention.\(^{174}\)

4.1.1 Background of the Case

The Mayor of Armenia’s capital, Yerevan, approved the 1991 Plan for Preservation and Use of Historical and Cultural Monuments. This plan designated the Dalma Orchards area as an “agricultural area of historical, cultural and environmental value”. Thus, developments in the Dalma Orchards area were subject to this plan in the future. However, the plan was annulled in 2000.\(^{175}\)

In 2003, the tenants of the Dalma Orchards sought to renew their leases, but their applications were rejected by the municipality of Yerevan, because it had already earmarked


\(^{174}\) Armenia, ACCC/C/2004/08; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, paras 1-2 [Armenia Dalma Orchards case].

\(^{175}\) Ibid., para 8.
the land for development. The new plan consisted of six decrees that had been adopted by the Armenian Government as stand-alone acts between March 2003 and October 2004 and were no longer subject to changes. The NGOs argued that the decrees should not be considered as stand-alone acts, because the decrees regulated a defined piece or pieces of land and thus should fall under the normative regulations of land use under Article 7 of the Armenian Land Code. The normative regulations of Armenia create several obligations, such as requiring public participation in relation to EIAs. The NGOs therefore submitted their complaint at the first-instance district court of Yerevan and claimed that the procedure of the first five decrees showed flaws and the authorities had been in breach with several Armenian laws. The court declared that the NGOs did not have the jurisdiction to challenge the decrees but recommended that the issue should be reviewed by the Constitutional Court of Armenia instead, since the Armenian Government had adopted the decrees, and they were thus government decisions. Only three institutions in Armenia can appeal to the Constitutional Court to challenge such decisions: the National Assembly, the Government and the President. Thus, NGOs reached out to these institutions requesting them to appeal to the Constitutional Court. The NGOs received two responses, and both recommended that they should bring their claim to the first instance district court.

4.1.2 Evaluations of Breaches under Article 6
The ACCC first discussed the applicability of Article 7 of the Convention. The ACCC ruled that the first four decrees should be considered as a plan under Article 7 and that subsequently Article 6, paragraphs 3, 4 and 8 were applicable accordingly. The lack of public participation therefore constituted non-compliance by Armenian authorities in relation to the preparation of the decrees. Moreover, the ACCC determined that the government had failed to follow its own legislation in relation to the EIA procedure, which requires public participation. In the opinion of the ACCC, the Armenian legal framework was not the source of the non-compliance. It stated that the problems lie with the incorrect implementation and enforcement of this framework.

Although the decrees fell under the provisions of Article 7 of the Convention, the ACCC stated that some of the decrees also contained elements that could be associated with

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176 Ibid., para 9.
177 Ibid., paras 9-11.
178 Ibid., para 14.
179 Ibid., para 15.
180 Ibid., paras 23-26.
181 Ibid., para 27.
specific activities and thus should have fallen under all the provisions of Article 6 of the Convention.\textsuperscript{182} The ACCC’s reasoning was that the Armenian legislation contained provisions for an EIA for some of the decisions in the decrees and thus they could be considered as proposed activities within the scope of paragraph 20 of Annex I and fell under the scope of Article 6(1)(a). Subsequently, the ACCC concluded that some of the other decrees concerned matters that also fell within the definition of an activity under Article 6(1)(b) of the Convention, since Armenian law obliged the State to consider the potential environmental impact of the activity.\textsuperscript{183}

Due to the applicability of the entirety of Article 6, the ACCC stated that Armenia showed non-compliance in relation to the public participation provisions, since not all options of public participation were available to the public concerned. It also specifically noted that Armenia failed to comply with Article 6(9) of the Convention, due to its failure to promptly inform the public about the decisions that had been made. The ACCC therefore generally advised Armenia to create regulations relating to decision-making procedures of specific activities, since the Armenian legal system lacked any such provisions.\textsuperscript{184}

4.1.3 Evaluation of Breach of Article 9(2)

In the opinion of the NGOs, the public should have been provided with the opportunity to challenge the legality of the decrees, since the objectives of them fell within the scope of Article 6. The ACCC found that decrees in principle fall under Article 7. However, it confirmed the believes of the NGOs and it found that they contained Article 6 elements. Accordingly, it found that the provisions of Article 9(2) of the Convention should have been applied and therefore, the NGOs should have been given the right to challenge both the substantive and procedural legality of the decrees at the first-instance district court of Yerevan.\textsuperscript{185}

The ACCC also stated that the review procedure to challenge government decisions at the Constitutional Court did not ensure that the public could make use of their access rights, since this Court cannot grant a NGO with standing.\textsuperscript{186} The ACCC took into consideration that Parties have the ability to protect acts from a review procedure at a court, but it emphasized that the Party should not misuse this power for activities that are actually regulated through

\textsuperscript{182} Ibid., paras 28-29.
\textsuperscript{183} Ibid., para 30.
\textsuperscript{184} Ibid., paras 31-33.
\textsuperscript{185} Ibid., para 35.
\textsuperscript{186} Ibid., para 37.
the provisions of Article 6 and 7. Although the ACCC considered that Armenia was non-compliant with Article 9(2) of the Convention, it noted that the changes Armenia intended to implement in its Constitution, would ensure Armenia’s compliance in relation to providing legal standing to the public.

4.1.4 Main Findings of the ACCC and its Recommendations
The ACCC concluded that Armenia failed to comply with Article 6, paragraphs 1(a), 2 to 5 and 7 to 9 of the Convention, because it had failed to ensure effective public participation. It noted that the authority even would have been non-compliant in relation to Article 6(4) if public participation was ensured, since participation possibilities were not provided for in an early stage. Furthermore, the ACCC found Armenia in non-compliance of Article 9(2) on the basis that the public was not given the chance to challenge the decisions and thus the authorities did not provide adequate and effective remedies.

The recommendations directed towards Armenia concerned better implementation of Articles 6(1), 6(7) and 9(2) of the Convention. The proposed EIA legislation should regulate detailed procedures for decision-making in relation to public participation. The ACCC also recommended that Armenia should ensure that the authorities ensure that the correct forms of decisions were used in its consideration. Thereafter, it emphasised that measures must be taken to ensure effective access to justice. The ACCC urged Armenia to publicly disseminate information on the availability of its remedies to challenge the legality of decisions in order to ensure effective access to justice. Furthermore, it advised Armenia to take its recommendations into consideration in Armenia’s revision of the Constitution and its EIA Law.

4.2 Kazokiskes Lithuania Case
In 2006, the Association Kazokiskes Community (Kazokiskes), a NGO, communicated two complaints to the ACCC. The first case alleged the non-compliance of Lithuania. The second case alleged the non-compliance of the European Community (EU). Both complaints related to the authorisation of construction plans for a landfill site near the village

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187 Ibid., paras 4 and 38.
188 Ibid., paras 38-39.
189 Ibid., paras 42 and 44.
190 Ibid., para 45.
191 Lithuania, ACCC/C/2006/16; ECE/MP.PP/C.1/2008/5/Add.6, 4 April 2008, paras 1-2 [Kazokiskes Lithuania case].
Kazokiskes in Lithuania. Notably, there was already a landfill at the same location, but this served only for the waste management of the town of Kazokiskes. The proposed new landfill would have expanded its capacity and handled the waste management for the region of Vilnius.\(^{193}\) The next section will address the alleged breaches in the Lithuanian case and section 4.3 will discuss the issues relating to the EU case.

### 4.2.1 Background of the Case

On 13 March 2006, Kazokiskes submitted the alleged breaches to the ACCC, stating that the Lithuanian authorities failed to comply with the provisions of the decision-making procedure for establishing a landfill. Under Lithuanian law, the approval of the construction of a landfill is subject to several procedures.\(^{194}\)

First, a waste management plan must already have been issued by an authority. The Vilnius County Council approved the Vilnius County Waste Management Plan on 31 May 2002.\(^{195}\) The second procedure is the drafting of a detailed plan. A detailed plan contains the functioning of a project and on 5 April 2002, the detailed plan for the landfill was approved by the Elektrenai Municipality Council. According to Kazokiskes, the notification about the participation possibilities in the drafting of the plan was insufficient and the information of the notification was misleading.\(^{196}\) The third requirement for the approval of a landfill is an EIA decision. This decision was taken by the Ministry of Environment on 12 June 2002. Kazokiskes was of the opinion that the notification of the decision-making was done incorrectly, and that the outcome of the report was inadequate.\(^{197}\) The fourth obligation was to obtain a technical project and construction permit. This permit was issued on 13 May 2005, by the regional authorities. These authorities however, did not provide for public participation possibilities.\(^{198}\) The last requirement was the issuance of an Integrated Pollution Prevention and Control (IPPC) permit once the landfill was constructed. Kazokiskes stated that the IPPC permit would lose its effectiveness if it was executed after the construction of the landfill was completed.\(^{199}\) Kazokiskes claimed that Lithuania had been non-compliant throughout all these procedures and alleged several breaches under Articles 6 and 9(2) of the Aarhus Convention. Later, Kazokiskes added an allegation of non-compliance of Article 7 of the Convention.\(^{200}\)

\(^{193}\) Kazokiskes Lithuania case (n 191) paras 17-18.
\(^{194}\) Ibid., para 19.
\(^{195}\) Ibid., para 22.
\(^{196}\) Ibid., paras 23-25.
\(^{197}\) Ibid., paras 27-28.
\(^{198}\) Ibid., paras 30-31.
\(^{199}\) Ibid., paras 34-35.
\(^{200}\) Ibid., para 11.
The ACCC stated that it would only consider the activities that had occurred after the Aarhus Convention entered into force. Lithuania became a Party to the Aarhus Convention in January 2002, and its legislation entered into force on 28 April 2002.\textsuperscript{201} This meant that the ACCC would evaluate the EIA and the IPPC procedures in light of Article 6 and the ACCC therefore did not address the detailed plan, since the permit was provided on 5 April 2002. In addition, the ACCC did not debate the technical project and its construction under Article 6, but instead addressed the possible non-compliance of general features of the Lithuanian legal framework in relation to a technical project and construction permit.\textsuperscript{202} The allegations of the communicant were thus not considered in relation to the detailed plan and the specific features of the technical project and construction permit.

\textbf{4.2.2 Breaches and Evaluations under Article 6}

\textbf{4.2.2.1 Paragraph 2}
Article 6(2) of the Aarhus Convention mandates Parties to provide adequate information about proposed activity at an early stage. Kazokiskes claimed that the public was excluded from the drafting of the EIA programme and did not communicate clearly that the activity concerned a “major landfill in their neighbourhood.”\textsuperscript{203} Furthermore, Kazokiskes stated that the chosen method of notification was poor, because the EIA report was presented in a weekly journal instead of a daily newspaper.\textsuperscript{204}

The ACCC could not conclude that the public was properly notified, but it still concluded that Lithuania was non-compliant in relation to Article 6(2) of the Convention. Its reasoning was that the public was not well enough informed about their participation options for the designing of the EIA programme because the wording of the notification was too broad. Furthermore, the authority had the obligation to inform the public in such a manner that they would see the notification. An official weekly journal that had fewer readers than the local newspaper was not considered to be sufficient to reach the public.\textsuperscript{205}

\textbf{4.2.2.2 Paragraph 3}
Article 6(3) of the Aarhus Convention creates the obligation to provide the public with a reasonable period of time to become familiar with the given documentation. Kazokiskes was

\begin{itemize}
  \item \textsuperscript{201} \textit{Ibid.}, paras 54 and 56.
  \item \textsuperscript{202} \textit{Ibid.}, paras 58-59.
  \item \textsuperscript{203} \textit{Ibid.}, paras 36-37.
  \item \textsuperscript{204} \textit{Ibid.}, para 38.
  \item \textsuperscript{205} \textit{Ibid.}, paras 66-68.
\end{itemize}
of the opinion that the 10 working days prescribed under Lithuanian law was not enough to discern a clear idea of the meaning of the documents and prepare any responses.\textsuperscript{206}

The ACCC confirmed this and concluded that Lithuania was non-compliant under the terms of Article 6(3). Although the Convention does not include a definition of a ‘reasonable time frame’, the ACCC stated that the 10 working day period was not sufficient in light of the “nature, complexity and size of the proposed activity”. However, it did not consider if the fixed period under Lithuanian law was in general an unreasonable time frame.\textsuperscript{207}

### 4.2.2.3 Paragraph 4

Article 6(4) of the Aarhus Convention encourages participation at an early stage of the process, when all options are open. Kazokiskes held that not all options were open for public participation, since it had already been determined that a landfill was the only option. Furthermore, the IPPC permit did not provide for early public participation, because the landfill would already have been constructed by that time and the public would have no other option to choose from.\textsuperscript{208}

The ACCC responded to this and described several instances where the authority has discretion in determining the scope of early participation. It stated that an authority has the ability to limit the location of a specific activity, its technical design and its technical details. Thus, Lithuania was able to select the method of waste management and consider only two possible locations for it.\textsuperscript{209} Although the ACCC did not have sufficient information to consider if the notification element of the EIA programme was non-compliant with the Convention, the ACCC declared that allowing the public to help scope the programme was a favourable means of early public participation.\textsuperscript{210} Furthermore, the lack of an IPPC permit did not necessarily mean that construction could not start, so long as early participation in the other decision-making procedures had been guaranteed. In sum, the ACCC concluded that the public must be informed of their options when it comes to the different decision-making stages.\textsuperscript{211}

### 4.2.2.4 Paragraph 5

Under Lithuanian law, it is the sole responsibility of the applicant seeking authorisation of a project to promote public participation through discussion. Kazokiskes argued that the

\textsuperscript{206} Ibid., para 41.
\textsuperscript{207} Ibid., paras 69-70.
\textsuperscript{208} Ibid., para 43.
\textsuperscript{209} Ibid., paras 71-72.
\textsuperscript{210} Ibid., para 73.
\textsuperscript{211} Ibid., paras 74-76.
developer had not made any attempts to initiate a public consultation and that the developer therefore failed to comply with Article 6(5) of the Convention. The ACCC said, however, that Lithuanian law cannot delegate this responsibility on the developer and stressed that the authority should also be held accountable.

4.2.2.5 Paragraph 6

Article 6(6) of the Aarhus Convention obliges authorities to present the public with all the relevant information that is available. According to Kazokiskes, Lithuania was non-compliant due to the fact that it had not provided the public with sufficient data. Kazokiskes argued that the data supplied lacked sufficient information about the technical design, alternative methods and detailed data of the landfill, especially in relation to its impact on human health.

The ACCC determined that paragraph 6 is designed to ensure that data is made available. However, the Committee was unable to determine the accuracy of this data. Thus, the issue of whether the data supplied was sufficient could not be resolved by the ACCC satisfactorily.

4.2.2.6 Paragraph 7

Although neither one of the Parties had brought Article 6(7) of the Aarhus Convention forward, the ACCC decided to incorporate this paragraph into its decision. The ACCC had the capacity to do so under the provisions of paragraph 37(a) of the decision I/7 on the review of compliance. Under Article 6(7) of the Aarhus Convention, the public concerned can submit any comments, information, analyses or opinions to the relevant authority. The Lithuanian legislation limited this right by only providing this opportunity to motivated proposals, which resulted in Lithuania being non-compliant with this provision.

4.2.2.7 Paragraph 9

Under the terms of Article 6(9) of the Aarhus Convention, the authority should inform the public about a decision that has been made. In this case, the public was informed about the EIA decision in an official publication. It took 15 days before the public was notified and the

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212 Ibid., paras 45 and 77.
213 Ibid., para 78.
214 Ibid., para 46.
215 Ibid., para 79.
216 Ibid., para 80.
217 Ibid., para 80.
publication did not include the decision itself, nor did it include a statement listing the reasons behind the action of the authority.\textsuperscript{218}

The ACCC reviewed the issues and concluded that Lithuania had complied with its obligation to notify once a decision had been made and it did not see the need for the authority to publish the decision itself.\textsuperscript{219} The ACCC could not, however, answer the question of whether the publication of the EIA decision was prompt, because it described the term ‘prompt’ as one that is subject to the legal system and the appropriate measures in that country. Furthermore, the ACCC indicated that it was not responsible for ensuring that the reasoning behind, and considerations of the decision of the authority are accurate.\textsuperscript{220} Nonetheless, it outlined in its report in paragraph 84 that any time frame for informing the public about any decision should be reasonable to ensure that no problems can arise during a possible review procedure under Article 9(2) of the Aarhus Convention.

\textbf{4.2.3 Breach and Evaluation of Article 9 Paragraph 2}

In accordance with Article 9(2) of the Convention, the public should be provided with sufficient time to challenge a decision. According to Kazokiskes, the notification procedure for the EIA procedure was inadequate and resulted in the public not having enough time to challenge the decision before a court.\textsuperscript{221} Despite the fact that the ACCC recognized the failures in respect of the timing and notification of the decision, the review procedure was deemed to have not been compromised, since Kazokiskes had not pursued remedy immediately after it observed that the decision had been made.\textsuperscript{222}

\textbf{4.2.4 Main Findings of the ACCC and its Recommendations}

The ACCC stated that Lithuania had been non-compliant with Articles 6(2), 6(3) and 6(7) of the Aarhus Convention. The findings were that Lithuania failed in its obligation to inform the public about the possibility of their participation regarding the EIA decision and that 10 working days to review the information was too short for the public to familiarise themselves with the information. Furthermore, the ACCC stated that all comments are admissible for public participation purposes and Lithuanian law could not require the public to submit motivated comments.\textsuperscript{223}

\textsuperscript{218} Ibid., para 48.
\textsuperscript{219} Ibid., para 81.
\textsuperscript{220} Ibid., paras 81-83.
\textsuperscript{221} Ibid., para 52.
\textsuperscript{222} Ibid., para 87.
\textsuperscript{223} Ibid., paras 89-90.
The ACCC recommended that the Lithuanian government should make changes in its legislation, regulations and administration to ensure compliance with the Aarhus Convention. These changes related to: the notification process, the determination of the time frames for each stage, making sure that the information available is made public promptly and granting the public the opportunity to submit comments. The comments must be derogated to a specific authority and environmental related plans and programmes are subject to public participation, especially at early stages. The ACCC noted that the correct implementation of these recommendations would lead to a compliance with Article 9(2).224

4.3 Kazokiskes EU Case
On 12 June 2006, Kazokiskes submitted its second communication to the ACCC. The communication contained allegations of breaches by the EU of Articles 6(2), 6(4) and 9(2). Kazokiskes claimed that the EU had not correctly implemented the provisions of the Convention in two of its directives. The directives it concerned were the EIA Directive and IPPC Directive.225

4.3.1 Background of the Case
Kazokiskes stated that the landfill was listed as a project under Annex I of the EIA Directive and as an installation under Annex I of the IPPC Directive. As stated in the first chapter, these directives were both amended by the Public Participation Directive and this specific directive provided for public participation regarding the drafting of environmental plans and programmes.226

The case addressed two main issues that Kazokiskes brought forward. The first issue related to the partial financing of the landfill project by the European Commission (EC) and the second, the allegation of a general failure of the functioning of the IPPC Directive and EIA Directive, because they would not be compatible with the proposed landfill project.227 These allegations were brought in relation to Articles 6(2), 6(4) and 9(2) of the Aarhus Convention. The ACCC decided that it would mainly focus on these alleged breaches put forward by Kazokiskes. However, the ACCC did not limit itself to just these breaches, but also highlighted a number of other general implementation problems relating to landfill sites in the EU.228

224 Ibid., para 91.
225 Kazokiskes EU case (n 192) paras 1-2.
226 Ibid., paras 15-16.
227 Ibid., para 2.
228 Ibid., para 36.
4.3.2 Article 6 In Relation to the Financing Decision

The co-financing role of the EC in the Kazokiskes project began before the EU became a Contracting Party to the Convention on 17 February 2005. However, the EC continued to finance the undertaking after this. Kazokiskes argued that the EU had the responsibility to check and guarantee that a Member State complied with the Aarhus obligations, although it did not consider the co-financing to be a decision on whether to allow a proposed activity.  

The ACCC stated that it would not examine the co-financing decision in its agreement under Article 6 of the Aarhus Convention, because this was already under examination in another communication. This other communication concerned the European Investment Bank case, which related to a dispute about the financing of a project by the European Investment Bank before the Convention entered into force. The outcome of this decision was that the ACCC did not consider financial support a decision that ‘permits’ an activity under Article 6 of the Aarhus Convention, and rather it is the obligation of the authority to make sure that the public participation obligations are upheld by the developer. The ACCC concluded in this case that the European Investment Bank could not be held responsible for the public participation obligations, because the decision to finance a project is not a decision on its own.

4.3.3 Article 6 In Relation to Multiple Permits

Kazokiskes furthermore argued that Article 6 of the Convention should have been applied when permits relating to the activities in Annex I of the Convention were discussed, and thus public participation should have been initiated in relation to the EIA and IPPC permits. Kazokiskes argued that the implementation of the second pillar by the EU, with the adoption of the Public Participation Directive and the amendments that were made thereafter to the EIA and IPPC Directives, were insufficient, because they only provided for two phases that include public consultation throughout the project. In addition, the NGO asserted that the scope of the directives did not correspond to that of the Convention.

The ACCC narrowed down the first claim by stating that the Convention is solely designed for environmentally related issues and that even if this criterion is met, the merits of the issue must be taken into account. There is no need for full public participation under the

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229 Ibid., paras 17-18.
230 Ibid., para 39.
232 Ibid., para 36 and 38.
233 Kazokiskes EU case (n 192) para 20.
234 Ibid., paras 21-22.
Aarhus Convention if the matter concerned is of minor relevance to the environment.\textsuperscript{235} The ACCC indicated that permits must pertain to a project with a certain significant environmental impact in order to comply with the Aarhus obligations regarding public participation. In this case, it was the duty of the Member States to correctly convert the EIA and IPPC Directives into their national legislation and the ACCC considered the EU legal framework to have achieved the goals of the Convention.\textsuperscript{236} The next section covers the conformity of the implementation of the directives in relation to the provisions of Article 6 of the Aarhus Convention.

\textbf{4.3.4 Breaches and Evaluations of Article 6 Paragraphs 2 and 4}

Article 6(2) of the Convention entails that the public should be informed about the proposed activities as listed in Article 6(1). According to Article 6(4) of the Convention the authority has the obligation to notify the public as early as possible, to allow the public the possibility to effectively participate in the decision-making procedure. The IPPC Directive describes the need to notify the concerned public and requires early participation when all options are open. Kazokiskes believed that the notification was not done in a timely and effective manner, since consultation on the IPPC licence application could only be obtained after the construction of the landfill. In Kazokiskes’s opinion, the participation could thus not be labelled as “early public participation, when all options are open and effective public participation can take place”. The same argument was presented by Kazokiskes regarding the EIA Directive. The Directive does not include any requirement of informing the public before the construction had begun, and thus it did not fulfil its Aarhus obligation of early public participation.\textsuperscript{237}

The ACCC considered whether the two directives were limiting proper notification and public participation possibilities in landfill-related activities. Both the IPPC and the EIA Directives state that Member States must provide early and effective notification.\textsuperscript{238} Although the wording in the directives did not literally copy the wording of the Convention, the ACCC felt that the mere fact that these terms were not literally in the directives did not result in non-compliance.\textsuperscript{239} Account had to be taken of the fact that the EU is a special kind of Contracting Party and that there was a division of competencies between the EU and its Member States.\textsuperscript{240} Member States have the obligation to implement EU legislation but must remain compliant

\textsuperscript{235} \textit{Ibid.}, para 41.
\textsuperscript{236} \textit{Ibid.}, para 42 and 46.
\textsuperscript{237} \textit{Ibid.}, paras 24-26 and 29.
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with their international agreement obligations, such as the Aarhus Convention. The ACCC therefore advised the EU to use similar wording as is used in the Convention. In the ACCC’s opinion this would be the most favourable way to accomplish the simplification of the implementation process for States, because there is a risk that Member States will not completely implement the Convention correctly if the language of the EU legislation differs slightly from the Aarhus text. However, the ACCC did not come to the conclusion that different wording in directives and/or regulations would immediately cause a violation of the Aarhus Convention by the EU. The ACCC stated that both directives require Member States to provide for public participation procedures when dealing with landfill decisions. The regulatory framework created by the EU therefore was not inadequate with its obligations, because it ensured the early participation obligation of the Convention.

In addition, the ACCC also had to decide whether the options for participation were offered at an early stage when all options were still open, as described in Article 6(4). According to the ACCC, this requirement had to be seen in the light of multi-phased decision-making. In each phase, consultation must have been provided for, but the Parties have a certain margin with regard to which options are open for discussion. To make its determination, the ACCC again took into account the specificities of the EU. The EIA Directive determines that for all activities involving construction work, the public consultation procedure must be held before the start of construction. This is not the case in the IPPC Directive: the IPPC licensing procedure, and therefore the public participation procedure, can also be held after the construction has been established. This is not in itself contrary to the Convention, as long as a discussion about the technical choices had taken place in one of the earlier phases, at a time when the construction has not yet eliminated all alternatives. The ACCC points out that this should reduce pressure from political and commercial parties. The ACCC believed that both Directives met the conditions of the Convention and therefore decided that there was no non-compliance in this respect.

4.3.5 Breach and Evaluation of Article 9 Paragraph 2
Kazokiskes thereafter described the supposed lack of access to justice for the public. The possibility of starting a procedure after the construction of a project had started, would in their

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241 Ibid., para 59.
242 Ibid., paras 47-49.
243 Ibid., para 50.
244 Ibid., para 51.
245 Ibid., para 53.
246 Ibid., para 52-54.
247 Ibid., para 55.
belief be rendered meaningless.\textsuperscript{248} Moreover, Kazokiskes stated that the Public Participation Directive lacked provisions that require Member States to provide the public with effective remedies, including injunctive relief, when the authorities are non-compliant with the EIA and IPPC Directives.\textsuperscript{249}

The ACCC confirmed that access to justice needs to be provided at a stage where it is possible for the public to effectively challenge a decision.\textsuperscript{250} However, the ACCC was not convinced that the EIA Directive contained provisions that would allow an EIA only after the start of the construction of a project. Furthermore, it stated that it is not necessarily meaningless to start a procedure after the construction has started, considering that there were opportunities for the public to be involved in other permit procedures. The ACCC believed that the EIA, Public Participation and IPPC Directives all included several opportunities of public participation, and not just for the technological choices as stated by Kazokiskes, it therefore came to the conclusion that the Directives did not fail to correctly implement Article 9(2) of the Convention.\textsuperscript{251}

According to the ACCC, the existence of effective remedies, including injunctive relief, as stated in Article 9(2), are essential to the right of access to justice and should be read in line with the provisions of Article 9(4). The fact that both the EIA and the IPPC Directives lack provisions relating to those remedies might entail non-compliance with the Aarhus obligations by the EU.\textsuperscript{252} However, the ACCC could not determine if the procedural issue was within the competence of the EU. Thus, it could not rule on the issue of non-compliance by the EU in relation to the ability to review a decision. Nevertheless, the ACCC emphasized the importance of having remedies, through national legislation that was subsidiary through the EU law.\textsuperscript{253}

4.3.6 General Issues of Transposition

The ACCC also discussed a number of general problems in relation to the transposition of the Convention. It stressed that these findings were limited to the EIA and IPPC Directives in relation to landfill activities.\textsuperscript{254} The ACCC noted that the Convention has precedence over directives and secondary EU legislation. However, this does not mean that the EU legislation do not have to be interpreted and transposed in a clear, transparent and constant framework as

\textsuperscript{248} Ibid., para 31.
\textsuperscript{249} Ibid., para 32.
\textsuperscript{250} Ibid., para 57.
\textsuperscript{251} Ibid., para 56.
\textsuperscript{252} Ibid., para 57.
\textsuperscript{253} Ibid., para 57.
\textsuperscript{254} Ibid., para 59.
is stated in Article 3 of the Convention. In addition, the ACCC expressed its concern about certain phrasing, since the wording of the Convention was not explicitly included in the Directives. It pointed out that these general problems may affect the correct implementation of Article 6 and accordingly also fail in the implementation of Article 9(2).

4.3.7 Main Findings of the ACCC and its Recommendations
The ACCC had to consider whether the EC had the duty to examine if the Member State was compliant with its Convention obligation, since it was co-financing the landfill project. It also determined if the Public Participation Directive amendments to the EIA and IPPC Directives had created a general failure of compliance. Although the ACCC restricted itself from considering the financing issue, it addressed a similar issue in the European Investment Bank case. In this case it established that a decision of the EC to co-finance a project was not a decision to allow a project and the Member State was the party responsible for complying with its Aarhus obligations. Moreover, the ACCC noted that the EIA Directive and the IPPC Directives contained provisions which were in line with the provisions of the Convention. As long as the public has the opportunity to participate in other decision-making phases when all options are still open.

4.4 Armenia Deposits Case
On 23 September 2009, the Armenian NGO Transparency International Anti-corruption Centre, along with the associations Ecodar and the Helsinki Citizens’ Assembly of Vanadzor (henceforth, the communicant), submitted a communication to the ACCC. The communicant issued its complaint over concern of the issuance and renewal of a licence to a developer that was exploiting copper and molybdenum deposits (henceforth, deposits) in the region Lori, near the settlements of Teghout and Shnogh.

4.4.1 Background of the Case
On 8 April 2001, a deposits licence was awarded to the developer the Armenian Copper Programme (ACP) (previously called Manex & Vallex CJSC) for 25 years in the Lori region. Due to changes in national legislation, the developer had to renew its licence from

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255 Ibid., para 58.
256 Ibid., paras 58-59.
257 Ibid., para 61 and European Investment Bank case (n 231) paras 36 and 38.
258 Kazokiskes EU case (n 192) para 61.
260 Ibid., para 23.
its original permit to a special licence in 2004. The new 2002 Law on Concessions regulated the exploitation of minerals and outlines the application process of a permit through a multiphase process.\textsuperscript{261} The requirements of the process were the obligation to include a licence for mining, a licence agreement between the authority and the applicant and a project document that included an EIA procedure and the issuing of a positive expertise document.\textsuperscript{262}

The Prime Minister decided to mandate an inter-agency commission to consider and coordinate activities that would support the Teghout development programme and on 30 September 2005, it approved the ACP proposal of exploitation of deposits.\textsuperscript{263} Thereafter followed the EIA procedure and within it two public hearings that were held on the EIA documentation and the review of the project-working document. On 3 April 2006, the positive expertise conclusion was issued regarding the EIA procedure and on 7 November 2006, the positive expertise conclusion relating the project working document was announced.\textsuperscript{264}

After this, the Armenian Government provided the ACP with a licence agreement on 8 October 2007 and on 1 November 2007, the Government decided to allocate 735 hectares of land to the ACP for a term of 50 years.\textsuperscript{265}

\textbf{4.4.2 Decisions Brought Before National Courts}

The communicant challenged four of the decisions before the administrative court. The decisions that were challenged were the positive expertise conclusion of the EIA study of 3 April 2006, the positive expertise conclusion of the project working document of 7 November 2006, the decision of the allocation of land to the developer of 1 November 2007 and the licence contract of 8 October 2007.\textsuperscript{266} These decisions that were brought forward were alleged to have violated several national legislative rules. All of the claims made by the communicant were rejected and were deemed inadmissible by the administrative court on 9 July 2009, on the basis that the communicants did not have legal standing.\textsuperscript{267}

Subsequently, the communicant appealed against the decisions for a second opinion. However, the second instance resulted in the confirmation of the first instance decision to not grant the NGOs with the status of legal standing. The Armenian NGO and Ecodar then filed a complaint at the Court of Cassation, which referred the case back to the administrative court,

\textsuperscript{261} Ibid., para 12.
\textsuperscript{262} Ibid., paras 12 and 23.
\textsuperscript{263} Ibid., para 24
\textsuperscript{264} Ibid., para 25.
\textsuperscript{265} Ibid., para 26.
\textsuperscript{266} Ibid., para 27.
\textsuperscript{267} Ibid., paras 28.
but only gave Ecodar, and not the Armenian NGO the option to appeal. Ecodar was waiting for its hearing in the administrative court at the time the ACCC was meeting.\textsuperscript{268}

### 4.4.3 Breaches and Evaluations under Article 6

The communicant claimed that Armenia was in breach with Article 6 of the Convention on seven occasions and claimed that there had been little progress in the updating of the Armenian EIA legislation after the ACCC had presented its recommendations in the Armenia Dalma Orchards case.\textsuperscript{269} In light of this, the ACCC decided that it would examine the decisions relating to:

(a) the licence of February 2001; (b) the renewal of the licence in 2004, further to formal amendment of the law; (c) the approval of the concept for exploitation by the inter-agency commission on 30 September 2006; (d) the positive expertise conclusion of 3 April 2006 concerning the EIA documentation for the mining activities; (e) the positive conclusion of 7 November 2006 concerning the project working document; (f) the licence agreement of 8 October 2007; and (g) the decision for allocation of land on 1 November 2007.\textsuperscript{270}

The ACCC argued that this allowed it to examine the impact of the Armenia Dalma Orchards case and the decision III/6b, that was prepared by the MoP.\textsuperscript{271} The ACCC restricted itself from examining the case with Ecodar as a Party, because the administrative court had not handed down its judgement yet.\textsuperscript{272} It also excluded from its consideration, the decision on the concept of 30 September 2006, because the ACCC was not able to define the issue as an activity under Article 6 of the Aarhus Convention or as a plan or programme under Article 7.\textsuperscript{273}

#### 4.4.3.1 General Applicability of Article 6

The ACCC began by discussing the admissibility of the licence that was issued in 2001, since the licence was granted to the ACP before the Aarhus Convention had entered into force in Armenia.\textsuperscript{274} Its reasoning was that the 2004 licence had influenced the substance of the original licence completely, because the impact of the activity effected the operational conditions. The new conditions had an effect on the duration and the liability of the ACP in relation to environmental matters, which were made less strict.\textsuperscript{275} Thus, the ACCC considered

\begin{flushright}
\textsuperscript{268} Ibid., paras 29-30.  
\textsuperscript{269} Ibid., paras 31-37.  
\textsuperscript{270} Ibid., para 57.  
\textsuperscript{271} Ibid., para 48.  
\textsuperscript{272} Ibid., paras 47-48.  
\textsuperscript{273} Ibid., para 47.  
\textsuperscript{274} Ibid., para 47.  
\textsuperscript{275} Ibid., para 58.
\end{flushright}
the decision to fall under Article 6(10) of the Convention due to the renewal element. The applicability of Article 6(10) created the obligation for the Party to apply the provisions of Article 6(2) to 6(9) of the Convention, mutatis mutandis, and where appropriate.276

Furthermore, the activity fell under Article 6(1) of the Aarhus Convention because the Armenian EIA Law created a threshold for the activities that were subject to an EIA procedure and mining is listed as an activity in Annex I of the Convention when the site exceeds 25 hectares in size.277 The Armenian EIA Law referred to is the same legislation as was previously disputed in the Armenia Dalma Orchards case, section 4.1.

4.4.3.2 Paragraph 2
The communicant claimed a violation of Article 6(2) of the Convention, since the given information was not comprehensive in the scope of the Article, because the public was not given the opportunity to participate in the decision-making procedure regarding the land allocation.278 The communicant argued that the public was not provided with information early enough to prepare for the public hearings on the EIA documentation and the project working document.279 The notification for the EIA documentation hearing was issued only six days prior to it and the notification of the project working document hearing was published two weeks prior to the hearing.280 Moreover, the special licence was already distributed to the developer at the time of the EIA documentation hearing.281

The Party held two public hearings in 2006, in relation to the EIA. The first hearing was organized by the authority on the basis of Article 8 of the Armenian EIA Law. This Article did not define the timing of the notice and thus, the public notice that was presented six days in advance to the hearing, was in line with its Law.282 The notification of the second hearing was based upon Article 10 of the Armenian EIA Law and defined that public notice should be given at least seven days in prior to the hearing. Since the notice was given two weeks in advance, it also complied with this obligation.283

The ACCC stated that the number of days between the notification and the first hearing was insufficient.284 The ACCC discussed the issue of notifications along with Article 6(4) of the Convention, since it concerns the need of early participation and referred to the

276 Ibid., para 58.
277 Ibid., paras 61-62.
278 Ibid., para 33.
279 Ibid., para 33.
280 Ibid., paras 25 and 33.
281 Ibid., paras 23 and 33.
282 Ibid., para 64.
283 Ibid., para 64.
284 Ibid., para 68.
**Kazokiskes Lithuania** case, where it emphasized on the necessity on informing in an effective manner. It stated that early notification is required in order for the public participation to be effective, because the public needs to have reasonable time to get acquainted with the relevant information that is at hand.\(^{285}\) The ACCC considered that the public was not given a reasonable time frame to familiarize themselves with the project-related materials for either hearing. In principle two weeks should be enough to prepare for a second hearing, however, the substance of data should stay approximately the same as to the previous hearing.\(^{286}\) The ACCC thus found that Armenia was non-compliant with Article 6(2) of the Aarhus Convention, because it did not notify the public in a timely manner. Furthermore, the ACCC declared a systemic failure in the Armenian EIA Law by not including a time frame for notification in its first hearing.\(^{287}\)

The ACCC concluded that the Armenia failed to correctly implement the early participation provisions of Article 6(2).\(^{288}\) The ACCC provided in its recommendation for some general advice on the means of notification. It stated that the relevant authority should take the size of the population in the area into account when notification takes place. Although the internet is a good medium for publishing notifications, this would not reach the public living in an area that cannot receive internet and different methods of notification were thus required.\(^{289}\)

**4.4.3.3 Paragraph 3**

Even though the communicant did not mention a possible breach of Article 6(3), the ACCC pointed out that the requirement of reasonable time frames must be met at all times and is subject to the nature, complexity and size of the activity. This is a direct reference to the **Kazokiskes Lithuania** case.\(^{290}\)

**4.4.3.4 Paragraph 4**

The communicant claimed an alleged breach of Article 6(4) of the Convention, because the public was not given the opportunity to effectively participate in the EIA decision-making procedure, which consisted of the two public hearings in 2006 since the authority had already ruled in favour of the developer in 2004 and 2005.\(^{291}\)


\(^{287}\) *Ibid.*, paras 65 and 68.


\(^{289}\) *Ibid.*, para 70.

\(^{290}\) *Ibid.*, paras 73-74 referring to the **Kazokiskes Lithuania** case (n 191) paras 69-70.

\(^{291}\) *Ibid.*, para 34.
The ACCC confirmed that Armenia was non-compliant in relation to Article 6(4) of the Convention. Armenia failed to provide the public with an early participation opportunity when all options were still open, since the licence to exploit deposits had already been granted and the public could only participate in the EIA procedure to reduce any damages that might be caused through mining.292

4.4.3.5 Paragraphs 8 and 9
Finally, the communicant asserted that Armenia failed to comply with Articles 6(8) and 6(9) of the Convention. The communicant claimed that the authorities failed to demonstrate that it had taken the arguments of the public into account in their decision-making process.293

The ACCC could not come to the conclusion that Armenia failed to comply with Article 6(8), since the arguments during the public hearing did not contain resistance from the public and the evidence showed that the authority had taken the issues into consideration in the outcome.294 However, the hearings were not published nor were the interested Parties notified. The ACCC stated that this created a violation by Armenian authorities under their own legislation, as well as Article 6(9) of the Convention.295

4.4.4 Breach and Evaluation of Article 9 Paragraph 2
The communicant declared that the administrative court and the Court of Cassation were non-compliant with Article 9(2) of the Convention in relation to its application and the complaint from Transparency International. Both courts rejected the applications on the basis that the applicant was not defined as the ‘public concerned’.296

The ACCC did not consider the arguments in relation to the application directed to the administrative court, since it was currently under appeal.297 In relation to the claim of Transparency International, the ACCC outlined that Article 9(2) of the Convention contains provisions that any NGO has sufficient interest if they promote the protection of the environment and meet any requirement of national law. The determination of this status includes whether the promotion of environmental protection can be found in the NGOs’ statutes, but is not limited to these sources.298 Nevertheless, the ACCC could not conclude that the Party was non-compliant, because Transparency International was not able to provide

292 Ibid., paras 74 and 76.
293 Ibid., para 35.
294 Ibid., para 77.
295 Ibid., para 78.
296 Ibid., para 36.
297 Ibid., para 48.
298 Ibid., para 81.
the ACCC with information that its standing was solely rejected on the basis of environmental protection.299

4.4.5 Main Findings of the ACCC and its Recommendations
In the view of the ACCC, Armenia failed to comply with Articles 6(2), 6(4) and 6(9) of the Aarhus Convention. In addition, Armenia had not yet fully implemented the recommendations of the Armenia Dalma Orchards case and the MoP’s decision III6/b. It stated that Armenian law failed to implement a clear, transparent and consistent framework as required under Article 3(1) of the Convention. Overall, the ACCC determined that the Armenian EIA Law lacked these components when it came to the implementation of the public participation provisions.300 The absence of a time frame in relation to the notification about a public hearing was an example of this. The ACCC indicated that, despite progress in the Armenian regulations since its assessment in the Dalma Orchards case, the regulations did not yet meet the requirements of Article 3 of the Convention.301

In general, the ACCC came to the conclusion that Armenia had made progress in amending their laws, but practice still showed flaws. The ACCC therefore recommended that the EIA procedure needed a more precise legal framework on the accessibility of public participation.302 Furthermore, Armenia needed to set reasonable time-frames to allow the public to react to project-related materials and that it had to be clear to which actor these reactions should be addressed. Finally, all decisions needed to be promptly published on the website of the Ministry of Nature Protection.303

4.5 Czech Republic Case
On 14 June 2009, the Czech organization Environmental Law Service (the communicant) submitted its communication to the ACCC alleging a breach made by the Czech Republic.304 The communicant claimed that the Party had limited the legal standing of citizens in EIA procedures in relation to land-use and building permits. Furthermore, the communicant pleaded that NGOs had limited rights to challenge the substantive and procedural legality of permits relating to specific activities. The communicant thus alleged non-compliance by the Czech Republic under Articles 6(3), 6(8) and 9(2) of the Aarhus Convention.305

299 Ibid., paras 79-81.
300 Ibid., para 83.
301 Ibid., paras 54 and 83.
302 Ibid., para 84.
303 Ibid., para 84.
304 Czech Republic, ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 October 2012, para 1 [Czech Republic case].
305 Ibid., para 2.
4.5.1 Legal Background of the Case
The Czech Constitution states that international agreements have precedence over national legislation. Nonetheless, Czech courts ruled that the provisions of the Aarhus Convention were not directly applicable for their citizens, because they are not specific enough nor can they be executed on their own. The permitting procedure thus falls under the legislation of the Czech Republic concerning which parties could have legal standing in an administrative procedure. It states that legal standing is only given to those who have experienced a violation of their own rights in relation to the procedure.306

The Czech EIA Act regulated that the EIA procedure was defined as a ‘self-contained’ process.307 This determination meant that the findings of an EIA procedure would only be used in the EIA phase and no other stages of the decision-making process. Moreover, the findings were considered as opinions rather than as binding decisions. Since 2009, the EIA Act has included the right of NGOs to initiate a review procedure of an EIA decision.308

4.5.2 Breaches and Evaluations of Article 6 Paragraphs 3 and 8
The communicant claimed that land-use permits and building permits contained multi-phased procedures, such as an EIA procedure, and it held that the permits fell under the public participation provisions of Article 6. This meant that all the procedures, as well as the EIA process, should be subject to public participation. Although the national EIA Act allowed the public to participate in the EIA procedure, the Building Act regulated the permitting process. This Act limited the participation possibilities by defining the public as the persons that have a direct link to the property rights or rights of neighbouring lands that can be affected.309 A decision from a national court had already excluded tenants of flats and non-residential places as a party that cannot participate.310 Moreover, the communicant argued that the public could only participate in the EIA procedure, since it was considered self-contained. In addition, the communicant submitted that these findings were not necessarily taken into account during the following phases of the process.311 The communicant stated that these issues restricted the public from effectively participating in the EIA procedure, since their arguments were not taken into account during the entire decision-making procedure. It claimed that the Party was

306 Ibid., paras 13-14.
307 Ibid., para 25.
308 Ibid., para 25-27.
309 Ibid., para 33.
310 Referring to Czech Republic (Case No. 2 As I/2005–62) (2 March 2005) Decision Supreme Administrative Court.
311 Czech Republic case (n 304) para 33.
therefore non-compliant with Articles 6(3) and 6(8) of the Aarhus Convention in relation to land-use permits and building permits.\textsuperscript{312}

The Party already considered in one of the meetings that the building permits, and within it the land-use permits, contained elements of Article 6 of the Convention and thus, were subject to its provisions.\textsuperscript{313} The ACCC addressed the allegations of the communicant and first determined the non-compliance of the Czech Republic in relation to the breach of effective public participation under Article 6(3) of the Convention. According to this report and its previous report in the \textit{Kazokiskes Lithuania} case, effective public participation can be established when the public is awarded reasonable time-frames, in order for them to participate in each decision-making phase. In its opinion, the Party failed to show that the participation options were sufficient, since the EIA procedure was the only phase the public could participate in.\textsuperscript{314} Nevertheless, the ACCC outlined that the public should only be guaranteed the possibility to participate in the decision processes that had a real connection to environmental matters. The ACCC concluded that the Czech EIA Act showed systematic non-compliance with the provisions of Article 6 of the Convention, since the Czech legislation limited citizens and NGOs more strictly than the term ‘public concerned’ of the Convention initiates. Thus, the possibility to participate in the EIA procedure was not open for everyone.\textsuperscript{315} Subsequently, the ACCC confirmed the non-compliance of the Czech law with Article 6(8) of the Convention, due to the lack of public participation in all the phases in the decision-making procedure. It also established that the EIA findings should be binding to ensure that the arguments of the participation phase are taken into account in the outcome of the decision.\textsuperscript{316}

\textbf{4.5.3 Breach and Evaluation of Article 9 Paragraph 2}
The communicant submitted three reasons for the non-compliance of the Czech Republic under Article 9(2) of the Convention.\textsuperscript{317} First, the Czech legislation restricted the public from challenging a decision within the scope of Article 6 of the Convention if they were a tenant or owned a non-residential premise.\textsuperscript{318} Second, the legislation limited the access rights of NGOs to appeal for a review procedure.\textsuperscript{319} Lastly, the communicant claimed that there were no

\textsuperscript{312} Ibid., para 34.
\textsuperscript{313} Ibid., para 68.
\textsuperscript{314} Ibid., para 69.
\textsuperscript{315} Ibid., para 70.
\textsuperscript{316} Ibid., para 71.
\textsuperscript{317} Ibid., para 36.
\textsuperscript{318} Ibid., paras 37-39.
\textsuperscript{319} Ibid., paras 40-42.
review possibilities for the omissions under Annex I of the Convention.\textsuperscript{320} The ACCC began with discussing the legal standing of individuals and the legal standing of NGOs, followed by considering the scope of review in procedures that relate to public participation under Article 6 of the Convention.\textsuperscript{321}

In principle, the ACCC allows restrictions upon whom has legal standing, but it also stated as a minimum that legal standing should always be granted to the public concerned.\textsuperscript{322} The ACCC could not conclude in this case if the individuals should have been granted legal standing. However, it noted that the Czech legislation could be non-compliant in the event the administrative courts limit an individual’s right to challenge a decision in cases other than just property rights issues.\textsuperscript{323}

The ACCC concluded in general that the legal standing of NGOs should at least be based upon their position in some of the decision-making phases. It stated that a NGO should at least be granted standing if the NGO submitted comments in any of the procedures in the decision-making.\textsuperscript{324} This is in line with the Czech EIA Act, which grants legal standing to NGOs when they have participated in an EIA procedure.\textsuperscript{325}

Any decision in relation to an activity under Article 6 of the Convention can be reviewed by an administrative court according to Article 9(2). Article 6(1)(b) provides that a Party can decide to exclude activities from this review obligation, if the activity is not listed in Annex I and does not have the likelihood of causing environmental damages. The ACCC found that the Party failed to ensure that the public could review a decision of an activity that is subject to the EIA process. This failure caused the Czech Republic to be in a state of non-compliance with Article 9(2) of the Convention in light of Article 6(1)(b).\textsuperscript{326}

\textbf{4.5.4 Main Findings of the ACCC and its Recommendations}

The ACCC found that the legislation of the Czech Republic contained a too narrow view on who the public concerned was. Subsequently it was non-compliant with Article 6(3) of the Convention, because the public was limited in the ability to effectively participate in the decision-making procedure of the EIA. The lack of effective public participation and the fact that the authority thus did not take a decision ‘due account’ of the outcome of public participation, led to the non-compliance of Article 6(8). Furthermore, the Party was non-

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\textsuperscript{320} Ibid., paras 43-45.
\textsuperscript{321} Ibid., paras 75 and 79.
\textsuperscript{322} Ibid., para 75.
\textsuperscript{323} Ibid., paras 73 and 76.
\textsuperscript{324} Ibid., paras 77-78.
\textsuperscript{325} Ibid., para 78.
\textsuperscript{326} Ibid., para 82.
compliant with Article 9(2) of the Convention, because the EIA procedure fell under Article 6(1) and thus the public should have been granted the possibility of challenging the decision.\textsuperscript{327} Therefore, the ACCC recommended that the EIA Act should be adapted and take into account the elements mentioned above, in order to meet the Aarhus requirements.\textsuperscript{328}

4.6 United Kingdom Crossrail Case

On 21 August 2011, Mr. Terence Ewing (the communicant) submitted the alleged breach of the United Kingdom (UK).\textsuperscript{329} The matter concerned the planning and construction of the Crossrail project in London. The Crossrail project connects several areas of London from east to west and its construction meant that several metro stations needed to be built or rebuilt. This led to the demolition or dismantling of several buildings, in particular the Astoria Theatre.\textsuperscript{330} According to the communicant, the destruction of the buildings was subject to the requirement to obtain licences under the Conservation Area Consents and the Listed Building Consents. Both licencing procedures allow for public participation and require consent in relation to the conservation of areas and listed buildings.\textsuperscript{331} The communicant claimed that the failure of the UK authorities to include public participation in its decision-making was a breach under Article 6(7) of the Convention and subsequently caused a breach of the public’s right of access to justice under Article 9(2).\textsuperscript{332}

4.6.1 Background of the Case

The Crossrail project followed the parliamentary procedures of a hybrid bill, which is a public bill that contains private elements.\textsuperscript{333} The public in general can be affected by such a bill, but it can also significantly affect individuals or groups in particular. Both of these parties can submit petitions to consider the interests of individuals, groups of individuals and/or entities.\textsuperscript{334} In relation to the Crossrail Bill, the developments of the process of the project were published online, in the press and in the Crossrail Project Bulletin and the public had the opportunity to submit their petitions to a Select Committee of the House of Commons.\textsuperscript{335}

\textsuperscript{327} Ibid., para 89.
\textsuperscript{328} Ibid., para 90.
\textsuperscript{329} United Kingdom of Great Britain and Northern Ireland, ACCC/C/2011/61; ECE/MP.PP/C.1/2013/13, 23 October 2013, para 1 [UK Crossrail case].
\textsuperscript{330} Ibid., paras 28-31.
\textsuperscript{331} Ibid., paras 2 and 14.
\textsuperscript{332} Ibid., para 2.
\textsuperscript{333} Ibid., para 20.
\textsuperscript{334} Ibid., para 20 and 22.
\textsuperscript{335} Ibid., para 21.
public submitted 466 petitions, which led to 205 hearings.\textsuperscript{336} Three of the petitions related specifically to the Astoria Theatre and the hearings caused amendments to be made in the Crossrail Bill in relation to the theatre.\textsuperscript{337} There followed two more procedures after the House of Commons had made its amendments. First, the House of Lords held its first reading in December 2007 and following this hearing, the public had the opportunity to submit once more their petitions.\textsuperscript{338} Second, an EIA procedure was conducted, and the results were submitted to the Parliament. The EIA procedure provided for information that led to additional amendments of the Bill.\textsuperscript{339} Once the consultation process was conducted, the House of Lords passed the Bill on 22 July 2008, and it became an Act of Parliament following the subsequent grant of Royal Assent.\textsuperscript{340}

4.6.2 Breaches and Evaluations of Article 6

The communicant submitted that the demolition of buildings was listed as a proposed activity under Article 6(1)(b) of the Convention, since the development site would have an effect on the spatial planning of the area.\textsuperscript{341} Thus, the provisions of public participation should have been applied. According to the communicant, the Party failed to provide the public with the opportunity to present their comments in relation to the demolition of the buildings, which was in breach of Article 6(7).\textsuperscript{342} The incorrect public notice under Article 6(2) was subsequently added to the accusations of the communicant in one of the meetings with the ACCC. According to the communicant, he was incapable of participating in the drafting process, because he was unaware of the procedure.\textsuperscript{343} However, the ACCC decided not to consider the allegations specifically directed towards the non-compliance of the UK in relation to the demolition of specific buildings and the lack of public participation. Instead, the ACCC decided to consider if the UK applied the Convention provisions in such a manner that the hybrid bill procedures were compliant with them.\textsuperscript{344} The findings therefore, did not include an elaboration on the allegation of the communicant in relation to Article 6(7).

In order to determine if the UK was compliant, the ACCC had to determine whether the Crossrail Act would be considered as a specific activity under Article 6 of the Convention

\textsuperscript{336} Ibid., para 32.
\textsuperscript{337} Ibid., paras 32.
\textsuperscript{338} Ibid., para 33.
\textsuperscript{339} Ibid., paras 34.
\textsuperscript{340} Ibid., para 24.
\textsuperscript{341} Ibid., para 35.
\textsuperscript{342} Ibid., para 36.
\textsuperscript{343} Ibid., para 36.
\textsuperscript{344} Ibid., para 49.
or as a preparation of an executive regulation or binding normative instrument under Article 8. Kazokiskes EU case had previously established that the wording of legal procedures under domestic law, such as an ‘act’ or a ‘bill’, cannot be decisive for the determination on whether or not the definition has the same legal effects as is presumed under the Convention.\(^{345}\) According to the ACCC, the legal effect of the Crossrail Act concerned the authorization of a project that would not create changes in the national legislation and thus could not be considered by the ACCC under Article 8, but rather under Article 6. Its reasoning was that the act “ultimately permits a specific activity”, even though it passed through Parliament.\(^{346}\)

The ACCC came to the conclusion that the Act was not a proposed activity under Article 6(1)(b) of the Convention. However, it established that it was an activity under Article 6(1)(a), because it concerned a project within the scope of paragraph 20 of Annex I.\(^{347}\) Paragraph 20 considers that activities have a potential harmful effect on the environment if national law requires an EIA procedure for such an activity. Due to this, the ACCC established that the Act was an activity under Article 6(1)(a), because UK law required an EIA procedure during the Parliament procedures.\(^{348}\) In general, the ACCC was of the opinion that hybrid bill projects should be considered by the Parties as a “specific legislative act” that obliges them to take the public participation provision of Article 6 of the Convention into account during the drafting process.\(^{349}\)

Subsequently, the public participation provisions of Article 6 were applicable and according to the ACCC.\(^{350}\) The communicant claimed not to be notified about the participation possibilities, however, the ACCC stated that the sources of notification had proved to be sufficient.\(^{351}\) The ACCC came to this conclusion by considering the high number of petitions that were submitted to the Select Committee during the drafting of the Crossrail Act. The ACCC therefore decided that the UK complied with its obligations of public notice under Article 6(2).\(^{352}\)

4.6.3 Breaches and Evaluations of Article 9 Paragraph 2
The communicant alleged that the UK was in breach of Article 9(2) of the Convention, because an Act of Parliament cannot be legally challenged, unless a violation of the 1998

\(^{345}\) Ibid., para 52 and the Kazokiskes EU case (n 192) para 42.
\(^{346}\) UK Crossrail case (n 329) para 53.
\(^{347}\) Ibid., para 55.
\(^{348}\) Ibid., para 55.
\(^{349}\) Ibid., para 56.
\(^{350}\) Ibid., para 57.
\(^{351}\) Ibid., para 58.
\(^{352}\) Ibid., para 59.
Human Rights Act occurs. Thus, claiming a breach of ‘convention right’ or ‘declaration of incompatibility’. The ACCC could not consider if the actions of the UK were in breach of Article 9(2), since no case had been brought to any court relating to the Crossrail project. Nevertheless, the ACCC provided its general opinion on the communicants’ view of the Article and confirmed that any act that was created through a hybrid bill procedure for a specific activity should be open to a review procedure.

4.6.4 Main Findings of the ACCC
According to the ACCC, the UK was compliant with the provisions of public participation under Article 6(2) in relation to the hybrid bill process. However, the ACCC was incapable of determining whether the UK was non-compliant in relation to the ability of the public to challenge an Act of Parliament, since it did not possess enough information about the practice of legal remedies in relation to hybrid bills. As a result, the ACCC did not make any recommendations in this case.

4.7 Spain Uniland Case
On 20 January 2014, the NGO Fons de Defensa Ambiental (the communicant) submitted its communication to the ACCC. The claim alleged non-compliance of Spain after authorities awarded a different permit to a private company than the notification of the permitting procedure implied. The private company in question was the company Uniland Cementera (Uniland) that operated a cement plant that produced cement and rock aggregates in a city in the region of Catalonia.

4.7.1 Background of the Case
Uniland could operate its plant by using the permit that was granted to it on 19 January 2007. On 24 November 2009, Uniland requested an environmental permit to use urban solid waste and dried sewage sludge at its plant. The permit to widen the scope of waste use was issued on 3 June 2010. The communicant argued that this alteration was a significant modification to the permit and the public should have been notified about these substantial changes under

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353 Ibid., para 42 and 44.
354 Ibid., paras 60-61.
355 Ibid., para 62.
357 Ibid., para 34.
358 Ibid., para 35.
359 Ibid., para 40.
the provisions of Article 6 of the Convention. Since, the operator replaced one third of petroleum coke with urban solid waste and dried sewage sludge.\(^{360}\)

On 17 and 25 May 2012, a NGO, Col.lectiu Ecologista Bosc Verd, requested a review procedure against the decisions that permitted the substantial modification of Uniland.\(^{361}\) The Minister of Territory and Sustainability of the Government of Catalonia denied it access to the review procedure on the legal grounds of lack of standing, because it had no national right nor interest in the environment.\(^{362}\) On 5 November 2012, Col.lectiu Ecologista Bosc Verd submitted a request of reconsideration to the Minister.\(^{363}\) However, the Minister rejected this appeal on the same grounds as before. In the communicant’s opinion this was a violation of Article 9(2), because Col.lectiu Ecologista Bosc Verd should not have been denied access to a review procedure.\(^{364}\)

**4.7.2 Breaches and Evaluations under Article 6**

**4.7.2.1 Paragraph 1 and Annex I**

The communicant argued that the use of urban solid waste and dried sewage sludge falls under the burning of waste which is within the scope of an activity in Article 6(1)(a) of the Convention.\(^{365}\) In accordance with paragraph 3 of Annex I of the Convention, the communicant claimed non-compliance of the total allowable production of cement clinker in rotary kilns. Paragraph 3 allows the production of a maximum of 500 tons a day. The plant however, produced 5,000 tons of cement clinkers a day.\(^{366}\) Its last argument was that the changes of the activity of the plant should have triggered the provisions of paragraph 22 of Annex I and that the activity would still be a proposed activity under Article 6(1)(a), since paragraph 22 states that any changes to or extensions of activities are still considered as an activity under Article 6(1) if the activity meets the threshold of paragraph 1(a) of Article 6.\(^{367}\)

The ACCC believed that the activity itself fell within the scope of paragraph 3 of Annex I, and confirmed that the environmental permit caused a change or extension of the activity as stated in paragraph 22 of Annex I.\(^{368}\) Nevertheless, the ACCC could not conclude that the activity should have been handled as an activity under Article 6(1)(a). It decided to

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\(^{360}\) *Ibid.*, paras 2 and 35.

\(^{361}\) *Ibid.*, para 42.

\(^{362}\) *Ibid.*, para 43.

\(^{363}\) *Ibid.*, para 44.

\(^{364}\) *Ibid.*, paras 2 and 45.


\(^{368}\) *Ibid.*, para 82.
treat the activity as one under Article 6(1)(b), since the change or extension did not cause the plant to produce more cement clinkers a day and thus, it did not meet the criteria set out in Article 6(1)(a). In the ACCC’s opinion, the Party knew that changes could cause environmental damage because an EIA procedure was carried out. This made the activity applicable to Article 6(1)(b) of the Convention.\textsuperscript{369}

Apart from establishing that the activity was an activity under Article 6(1), the ACCC also referred to Article 6(10) of the Convention.\textsuperscript{370} The ACCC indicated that the activity was subject to Article 6, paragraphs 2 to 9, because the permit of the activity was updated.\textsuperscript{371} Thus, the public participation provisions were applicable ‘mutatis mutandis’ and where appropriate. The term appropriate is not defined in the Convention, but the ACCC declared that it would be appropriate to demand more public participation if the update can severely affect the environment.\textsuperscript{372}

\textbf{4.7.2.2 Paragraph 2}

The communicant claimed a violation of Article 6(2) of the Convention.\textsuperscript{373} Its first argument contained the allegation that the public was not presented with the correct information in a notice that was published in the Official Journal of the Government of Catalonia (Official Journal). The public therefore had not been able to effectively participate in the decision-making procedure.\textsuperscript{374}

The ACCC confirmed that Spain was non-compliant in its notification, because the notification lacked adequate information about the proposed activity and the notification was misleading, since the Official Journal did not refer to the use of urban solid waste and dried sewage sludge as fuel for the factory.\textsuperscript{375} This is in accordance with the \textit{Kazokiskes Lithuania} case, where it had been established that the public cannot effectively participate in the proceedings when the notification has been inaccurate.\textsuperscript{376} Moreover, it was not made clear which authority the public could submit their comments to, which made it impossible for them to effectively be involved in the decision-making procedure.\textsuperscript{377}

\begin{flushright}
\textsuperscript{369} \textit{Ibid.}, para 82.
\textsuperscript{370} \textit{Ibid.} paras 82 and 84.
\textsuperscript{371} \textit{Ibid.}, para 84.
\textsuperscript{372} \textit{Ibid.}, para 85.
\textsuperscript{373} \textit{Ibid.}, para 52.
\textsuperscript{374} \textit{Ibid.}, para 36.
\textsuperscript{375} \textit{Ibid.}, paras 87-88.
\textsuperscript{376} \textit{Ibid.}, para 92.
\textsuperscript{377} \textit{Ibid.}, para 93.
\end{flushright}
4.7.2.3 Paragraphs 3, 4 and 8
Subsequently, the communicant alleged that Spain did not provide the public with sufficient
time when informing them, nor was the public given the opportunity of early participation
under the provisions of Articles 6(3) and 6(4) of the Aarhus Convention.\textsuperscript{378} The communicant
gave as a reason that the permit was already authorized before the public was even given
access to the information that would make public participation possible.\textsuperscript{379} The communicant
stated that as a result of the previous breach, the arguments of the public were not taken into
account when the decision was taken and accordingly this also resulted in non-compliance of
Article 6(8) by Spain.\textsuperscript{380}

The ACCC confirmed the allegations of the communicant. However, it did not
conclude that this was a violation of Article 6, paragraphs 3, 4 and 8, because it considered
that the incorrect implementation was caused by Spain as a result of its non-compliance with
Article 6(2).\textsuperscript{381}

4.7.2.4 Paragraph 9
The last claim of the communicant related to Article 6(9) of the Aarhus Convention and
referred to the obligation of a State to inform the public about the correct decision-making
procedure when a permit has not been authorized yet.\textsuperscript{382} Moreover, it concerned the way in
which the decision was presented. In this case, the decision was solely published on the
website of the Ministry.\textsuperscript{383}

The ACCC referred in its conclusion to the \textit{Kazokiskes Lithuania} case. This report
stated that it is very common to publish a decision on a website of the Ministry. However, the
authority has the responsibility to inform the public promptly and in accordance with the
appropriate measures it could take to ensure that the public had the possibility to start a
review process.\textsuperscript{384} According to paragraph 9, and in line with the view of the ACCC, the
requirement of informing was not limited to the public concerned but applied in general to the
whole public. The ACCC stated that Article 6(2) of the Convention should have been used as
a minimum standard of the public that has the right to be informed.\textsuperscript{385} The ACCC therefore
concluded that Spain was non-compliant because a decision should not exclusively be

\textsuperscript{378} Ibid., paras 53-54.
\textsuperscript{379} Ibid., para 55.
\textsuperscript{380} Ibid., para 56.
\textsuperscript{381} Ibid., paras 99-100.
\textsuperscript{382} Ibid., para 56.
\textsuperscript{383} Ibid., para 59.
\textsuperscript{384} Ibid., para 103.
\textsuperscript{385} Ibid., para 103 and \textit{Kazokiskes Lithuania} case (n 191) paras 81 and 84.
published on the Internet, since the public cannot be expected to check a governmental website on a daily basis.\textsuperscript{386}

4.7.3 Breach and Evaluation of Article 9 Paragraph 2
The communicant claimed that the NGO Collectiu Ecologista Bosc Verd should have been awarded legal standing when the NGO brought its case to the Minister of Territory and Sustainability of the Government of Catalonia in relation to the permit that was issued in 2007.\textsuperscript{387} Although the communicant provided several reasons why the NGO should have been awarded legal standing, the ACCC did not consider these factors and focused only on the permit of 3 June 2010.\textsuperscript{388} Moreover, the ACCC stated that it was incapable of determining whether Spain was non-compliant with Article 9(2), since the public had never challenged the permit in any court or other independent body.\textsuperscript{389}

4.7.4 Main Findings of the ACCC and its Recommendations
The ACCC’s findings were that Spain was non-compliant with Articles 6(2) and 6(9) of the Convention. In relation to paragraph 2, the relevant authority failed to properly inform the public about: the change of the activity, whom the authority was that was making the decision, what information was available and in providing the correct information relating to the EIA.\textsuperscript{390} Furthermore, the authority did not comply with paragraph 9 that requires that the means to inform the public about a decision should be sufficient. The ACCC did not consider that the publication of the decision solely online was sufficient.\textsuperscript{391}

The ACCC therefore, recommended that Spain should publish the decision in more than one way in order to reach the public.\textsuperscript{392} It refrained from recommending any changes in its legislation or regulations in relation to paragraph 2, because it stated that the non-compliance was not caused by a systematic error in Spain’s legal system.\textsuperscript{393}

4.8 Main Findings of the Chapter
This chapter discussed seven reports from the ACCC to determine what its general view on implementation is in relation to Articles 6 and 9(2) of the Convention. Each case has its own characteristics and therefore also its own findings. However, all cases have a connection with

\textsuperscript{386} Spain Uniland case (n 356) 104.
\textsuperscript{387} Ibid., paras 42 and 60-65.
\textsuperscript{388} Ibid., para 106
\textsuperscript{389} Ibid., para 106.
\textsuperscript{390} Ibid., para 108.
\textsuperscript{391} Ibid., para 108.
\textsuperscript{392} Ibid., para 109.
\textsuperscript{393} Ibid., paras 109-110.
Articles 6 and 9(2) in common. Furthermore, they all began by considering the applicability of Article 6(1) or Article 6(10), because otherwise the accusations would be unfounded. In addition, the ACCC addresses numerous times the importance of effective public participation and effective judicial remedies, which are subject to various factors. The Committee seeks to achieve this effectiveness through the correct implementation of Article 3(1), which provides for the implementation of the three pillars in a way that a clear legal framework is guaranteed. Article 6 makes a distinction between the effectiveness prior to the decision-making, as well as during and after this stage. Prior to it, the public should be offered the opportunity to participate in the decision-making procedure. Public participation is only possible if the public has been notified about the procedure in a proper manner and the public had sufficient time to participate. During the decision-making period, the authority can avoid causing a procedural breach when considering all the comments submitted by the public. After a decision-making process, the authority must meet certain requirements to ensure the effectiveness of Article 9(2). This effectiveness depends in part on the correct procedure that the authority has gone through when publishing the actual decision. The right of access to justice could be compromised if a decision was not published or the publication has not reached the public and thus, the public did not have the opportunity to appeal against the decision.

In addition to identifying these breaches, the ACCC makes recommendations. The ACCC may require a Party to implement the Convention provisions in its entirety more effectively or to better implement a specific Article into its national legislation. In addition, the ACCC will sometimes decide to refrain from making recommendations. This is done in cases where the ACCC is of the opinion that the non-compliance was not caused by a systemic error in the legal framework of the Party.
5. Communications Concerning the Netherlands

The Netherlands ratified the Aarhus Convention on 29 December 2004 and the Convention entered into force on 29 March 2005. The Netherlands signed the national Act on the Implementation of the Aarhus Convention on 30 September 2004 and made several changes to its existing laws in order to comply with the Aarhus provisions.

5.1 Implementation of the Aarhus Convention

Contracting Parties to the Aarhus Convention have the obligation to provide a national report every three years about the manner in which they have implemented the Convention. The Netherlands has submitted five reports since ratifying the Aarhus Convention. The first report was published in 2005 and contained all the changes that had been made in its national legislation.

The requirements of the first two pillars were met by making changes in existing acts and subsequently legislation was implemented to meet the conditions of the first pillar. In the Netherlands, the procedures for public participation in environmental decision-making and access to justice are generally regulated in the General Administrative Law Act (GALA) and the Environmental Management Act. This legislation regulates the requirements within the environmental permitting procedures and specifically concern the connection between the government and the individual citizens and companies. For example, section 3.4 of the GALA describes the uniform general preparation procedure, which includes, among other things, the possibility of consultation for decisions. According to the Dutch legislature, no further legal measures were required for the implementation of the third pillar, because it deemed the regulations in the GALA and the Environmental Management Act sufficient.

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394 UNTS, ‘Chapter XXVII Environment’ (n 36).
395 The Netherlands, ‘Wet van 30 september 2004 tot wijziging van de Wet milieubeheer, de Wet openbaarheid van bestuur en enige andere wetten’ (Staatsblad 2014/519).
396 Article 10(2) of the Aarhus Convention.
401 Implementation Report 2005 (n 397) paras 1-3.
5.1.1 Implementing Public Participation in Decision-Making Procedures

It becomes clear that some developments have occurred in Dutch legislation when analysing the annual national implementation reports of the Netherlands. In accordance with the Aarhus provisions, activities listed in Annex I and potential environmental harmful activities are subject to a decision-making procedure. The Dutch legislature has laid down these activities in the General Provisions on Environmental Law Act (Environmental Provisions Act) and the Environmental Law Decree. A permit is granted by means of only one decision relating to the spatial planning of construction and environmental activities.\(^{402}\) In addition, the Environmental Provisions Act stipulates that the public should be informed about the decision-making procedure and gives them the opportunity to comment on various aspects.\(^{403}\)

The Environmental Management Act regulates which procedures are required to carry out an EIA and the Dutch EIA Decree determines, in parts C and D, which activities require such an assessment.\(^{404}\) The EIA Decree was drafted after the first European EIA Directive was implemented in 1985.\(^{405}\) Thereafter, some amendments have been made, but these changes were based on the changes to the European regulation.\(^{406}\)

The GALA contains guidelines on what a timely public announcement of a draft decision should be. The content of such an announcement is also regulated and determines what type of relevant information should be made available to the public. In addition, it establishes that the final decision requires reasoning and that the decision must be published in a way that will reach the public that can be affected by it.\(^{407}\)

Although the Dutch legislation has gone through some slight changes in order to implement the provisions of Article 6, paragraphs 2 to 11 of the Convention, those changes have hardly been criticized. This was, however, not the case for the implementation of Article 6(1).\(^{408}\) Before 2008, the Netherlands used to issue permits on an individual basis. However, from 2008 onwards, in principle it started to apply general rules to examine and determine an application. The Netherlands would only make an exception if the activity was listed under

\(^{402}\) Articles 1.1(3) and 2.1(1) of the General Provisions on Environmental Law Act 2008 [Environmental Provisions Act].
\(^{403}\) Articles 3.10(4) and 3.12(5) of the Environmental Provisions Act.
\(^{407}\) Articles 3.12, 3:41-3:42 and 3:46-3:47 of the GALA.
\(^{408}\) C.B.F. Kuipers on behalf of the Netherlands, ‘Implementation Report Aarhus Convention: The following report is submitted on behalf of the Netherlands in accordance with decision I/8’ (December 2013) para 15 [Implementation Report 2014].
Annex I or of the Convention or if the activity could potentially significantly affect the environment. A NGO made comments in the consultation period of the national report about these developments in the permitting procedure.\textsuperscript{409} The 2017 edition of the report showed that by that time, 95\% of the establishments only had to comply with these general rules.\textsuperscript{410} The NGO stated that this proved that the Netherlands uses the general rules rather than the permitting procedure, which would then be subject to public participation.\textsuperscript{411} Moreover, this would mean that the decision cannot be challenged under the provisions of Article 9(2) of the Convention.

The Netherlands responded to this claim by stating that it does indeed favour the general rules, because the application process is easier for the companies.\textsuperscript{412} However, it also mentioned that this procedure is not in conflict with the Aarhus Convention, since the possibility of environmental damages is still examined, even when the general rules are applicable. It stated that the permits that have been issued through the general procedure usually concern activities that are less likely to cause harm to the environment.\textsuperscript{413}

\subsection*{5.1.2 Implementing Review Procedures}

Although the Netherlands had not made any changes in its national legislation to comply with the provisions of the third pillar, some of the legislation has been altered. The latest regulation that amended the GALA and other laws was the Adjustment of Administrative Procedural Law Act.\textsuperscript{414} The Act aimed at improving and simplifying the administrative process laws to ensure an adequate final dispute settlement mechanism.\textsuperscript{415} The Annex of the GALA now provides for the possibility to challenge the substantive and procedural legality of a decision on a proposed activity. Chapter 20 of the Environmental Management Act creates the ability for the public to specifically appeal to the Council of State, the highest general administrative court of the Netherlands to challenge a decision under Article 6 of the Convention.\textsuperscript{416}

The review procedure in the Aarhus Convention is only concerned with the ability to appeal to the court and does not refer to the preliminary procedure of which the objections

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\textsuperscript{409} Ibid., para 15.
\textsuperscript{410} R.P. Lapperre on behalf of the Netherlands, ‘Implementation Report Aarhus Convention: The following report is submitted on behalf of the Netherlands in accordance with decision I/8’ (July 2018) para 15.
\textsuperscript{411} Implementation Report 2014 (408) para 15.
\textsuperscript{412} Ibid., para 29.
\textsuperscript{413} Ibid., para 29.
\textsuperscript{414} Adjustment of Administrative Procedural Law Act 2013.
\textsuperscript{415} Implementation report 2014 (n 408) para 28.
\textsuperscript{416} Edwin Koning on behalf of the Netherlands, ‘Implementation Report Aarhus Convention: The following report is submitted on behalf of the Netherlands in accordance with decision I/8’ (March 2011) para 28 and Section 16a and 30 of the Council of State Act 2009.
\end{flushleft}
and administrative appeals are part of. This is, however, the case in the Dutch legal system. The Dutch legislation requires that someone asking for a review must have participated in the preliminary procedure in order to have the right of access to justice. This means that the public with ‘sufficient interest’ or the public whose ‘rights might be impaired’, are defined by the Dutch legislator as those who have participated in the preparation procedure of the decision-making. Article 9(2) of the Convention permits this type of system in the last sentence of the paragraph.

5.1.3 Communications Submitted to the Compliance Committee

The public has submitted four communications to the ACCC regarding possible cases of non-compliance by the Netherlands. The cases are the following: ACCC/C/2014/104, ACCC/C/2014/117, ACCC/C/2014/124 and the ACCC/C/2015/133.

The first case concerns an allegation of an incorrect licensing procedure under Article 6 of the Convention in relation to the Borssele Nuclear Power Plant. The second case involves an allegation of non-compliance by the Benelux Union, an intergovernmental partnership between Belgium, the Netherlands and Luxembourg. The communicant claimed that the Union does not consider itself a Contracting Party to the Aarhus Convention and thus does not need to comply with the provisions of the three pillar rights. The third case includes non-compliance under Articles 2(3) and 4(3) of the Convention in relation to access to information for the issuing of two permits to build two power plants. The last case contains an alleged breach of all the three pillars in the process of the construction of a wind farm.

It should be noted that the ACCC has not provided its findings in any of the cases yet. This chapter shall therefore provide an analysis of the draft findings of the first case and a substantive evaluation of the second and fourth cases. Since these cases include allegations in relation to either one or both of the Articles 6 and 9(2) of the Aarhus Convention and the third case lacks this relation.

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417 Articles 1:2, 8:1 and 6:13 of the GALA.
418 Letter from Ministry of Foreign Affairs of the Netherlands to Aarhus Convention Compliance Committee (3 July 2018).
422 Netherlands Association of People Living in the Direct Vicinity of Wind Farms, ‘Communication to the Compliance Committee of the Aarhus Convention’, ACCC/C/2015/133 (9 November 2015) paras 1-2 [Communication Wind Farms case].
5.2 Borssele Nuclear Power Plant Case

On 25 May 2018, the ACCC sent its draft findings to the Dutch organization Greenpeace (the communicant) and the Netherlands. Its findings relate to the issue of a nuclear power plant (NPP) that opened in Borssele in the south of the Netherlands in 1973. The operator of the power plant is the N.V. Elektriciteits Produktiemaatschappij Zuid-Nederland EPZ” (the NPP operator). This operator had been granted the licence to operate the plant for an indefinite period of time from the moment it opened. There is a Safety Report within this licence that is valid for 40 years. This meant that the NPP operator had to renew its Report in 2013, in order to keep operating its plant with the original licence of 1973.

5.2.1 Background

On 17 July 2006, the government concluded a Covenant (henceforth, the 2006 Covenant) with the NPP operator that ensured that the plant would be operating until 31 December 2033. In addition, the Covenant stated that the Dutch government would: “refrain from initiating international and national legislation and regulations that are intended to close the Borssele NPP before 31 December 2033” and that the government would be held financially liable if the NPP operator were to suffer losses. The Nuclear Energy Act was amended in 2010, and Section 15a read that the licence to operate the Borssele NPP would be revoked with effect from 31 December 2033.

This was not the first instance in which amendments were made to the operating licence of the Borssele NPP. In 1994, amendments were enacted that required the licence to include all previous modifications and that an EIA procedure be carried out; additionally, more EIA procedures were to be realized after each adjustment of the licence that concerned the fuel usage of the plant. Each of these EIA procedures was open for public participation. From 1993, an annual safety evaluation was carried out every ten years. This procedure was subject to public participation, if the results showed that the licence had to be altered. The safety evaluation procedure of 2013 was still ongoing during the time in which the communicant had submitted its communication. Apart from including an EIA in fuel usage

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423 The Netherlands, ‘Committee’s findings (advanced unedited version) ACCC/C/2014/104’, ACCC/C/2014/104 (4 October 2018) para 1 [Borssele NPP case].
424 Ibid., para 18.
425 Ibid., para 18.
426 Ibid., para 24.
427 Ibid., para 25.
428 Ibid., para 26.
429 Ibid., para 26.
430 Ibid., para 26.
issues and the safety evaluation, the 1973 operating licence and the Safety Report within it had been valid for almost forty years. However, in 2013, after forty years, the Safety Report had to be renewed.431

The allegations of the communicant disputed the 2006 Covenant that allowed the plant to operate until 2034 and the 2013 decision of the Minister of Economic Affairs, Agriculture and Innovation (hence forth, the Minister). In 2011, the communicant was concerned that the Minister would exclude the renewal of the Safety Report from an EIA procedure, since in 2011 the NPP operator had asked him to confirm that an EIA would not be necessary for the issuing of this Report.432 The communicant considered this to be in conflict with the Dutch Nuclear Energy Act, which established that nuclear licencing should fall within the scope of the provisions of a permitting procedure under the GALA and Environmental Management Act. These Acts contained provisions that obliged the authority to give public notice about the decision-making procedure of the Safety Report and required sufficient timeframes for public participation in order for the authority to have enough time to consider the comments that have been submitted.433

Nevertheless, on 24 October 2012, the Minister announced its preliminary decision to grant the extension of the design lifetime of the Safety Report without an EIA.434 The public had the ability to submit their comments on this decision and on 4 December 2012, the communicant sent its complaint to the Minister. The communicant emphasized that the environmental safety of the NPP would become a risk, if it were to operate for another twenty years without examining the consequences it could possibly cause to the environment in the future.435 The Minister received 638 views from the public in total but still issued the lifetime extension on 18 March 2013. The publication confirmed once more that the extension would not concern a change or update, but merely an amendment to the Safety Report.436

The communicant appealed to the Council of State against the decision of the Minister on 18 March 2013. The Council of State ruled that the communicant failed to sufficiently demonstrate that the safety of the plant was inadequately regulated, and it allowed the plant to remain open until 2034.437

431 Ibid., para 26.
432 Ibid., paras 27 and 29-31.
433 Ibid., para 17.
434 Ibid., para 29.
435 Ibid., para 29-30.
436 Annex 1(f) to the communicant’s reply to questions case ACCC/C/2014/104 (19 September 2014).
437 Borssele NPP case (n 423) para 33.
5.2.2 Applicability of Article 6

The communicant brought this case to the attention of the ACCC because it believed that the Netherlands was in breach of the provisions of public participation under Article 6 of the Convention. In order for the public participation provisions to have an effect in this case, the communicant submitted that the decision concerned an activity under Article 6(1) or at least was an extension of the already existing licence under 6(10).\textsuperscript{438} Primarily, the communicant submitted that the decision constituted an extension of the activities and thus should be considered a new activity under Article 6(1)(a) and Annex I, paragraphs 1 and/or 22.\textsuperscript{439} Secondarily, the communicant argued that the public participation provisions of Article 6 were still applicable, since the decision of the Minister was an extension of the initial 1973 licence, and it concerned an update of the operating conditions under Article 6(10). According to the communicant this was an extension of the licence, because the original operational lifetime of the plant was forty years.\textsuperscript{440} This was determined by the Party in 1973 and the public could not assume that the plant would be operating after 2014.\textsuperscript{441} However, due to the decision of the Minister, the NPP operator did not have to cease its operation and could proceed as if nothing had changed.\textsuperscript{442}

The communicant continued by stating that the EIA procedure should have been open to public participation since this would have contributed to reducing the risk of malfunctioning of the NPP, and it had already operated for forty years by that time.\textsuperscript{443} Due to the older techniques employed in its construction, it was considered more susceptible to a malfunctioning that could cause severe damages to the environment.\textsuperscript{444}

The ACCC confirmed that the NPP operator should be awarded a new licence by 2014, in order for it to operate the plant.\textsuperscript{445} However, it did not consider that this licence permit was a new activity, but rather confirmed that the change of the duration of the activity should be seen in line with Article 6(10) of the Convention. Although the 1973 licence was issued for an indefinite period, the ACCC confirmed that the licence amendments were a change in the NPP’s operating conditions.\textsuperscript{446}

\textsuperscript{438} Ibid., para 37.
\textsuperscript{439} Ibid., para 37.
\textsuperscript{440} Ibid., para 38.
\textsuperscript{441} Ibid., para 38.
\textsuperscript{442} Ibid., para 38.
\textsuperscript{443} Ibid., para 39.
\textsuperscript{444} Ibid., paras 39-40.
\textsuperscript{445} Ibid., para 65.
\textsuperscript{446} Ibid., paras 64-65.
The applicability of Article 6(10) obliged the Party to include the public participation provisions of paragraphs 2 to 9 in its decision-making procedure. The ACCC emphasized that these provisions should be applied *mutatis mutandis* and where appropriate.447 As is established in chapter 2, *mutatis mutandis* means that the authority should apply the provisions with the necessary changes to the update of the operating conditions.448 It referred to the *Spain Uniland* case to explain that it would be ‘appropriate’ to apply the provisions of public participation in a decision that relates to an update and could cause significant damages to the environment.449 In its opinion, it would it be inappropriate to operate a nuclear power plant for such a long time - sixty years - without any form of review on the risks it could cause to the environment.450

5.2.3 Breaches and evaluations under Article 6
The ACCC established that the permit is subject to the provisions under Article 6 of the Aarhus Convention and it thus considered the allegation of the communicant in relation to Article 6, paragraphs 4, 6 and 8.451

5.2.3.1 Paragraph 4
The communicant submitted that there were not any public participation procedures that considered the environmental effects of the Borssele NPP beyond 2013, nor was the public in general given the opportunity to comment on the 2006 Covenant and the amendment of the Nuclear Energy Act.452 Although the 2006 Covenant included public participation for specific stakeholders that the Parliament had invited, the communicant claimed that the procedure should have been open to everyone, because it concerned a decision that eventually led to the life-time extension of the NPP.453 Moreover, in the opinion of the communicant, the Party concerned was obliged to extend the lifetime of the NPP, otherwise the Netherlands had to pay compensation to the operator.454 According to the communicant, this was a breach of Article 6(4) of the Convention, since the outcome of any public participation would not have an effect since the authority was limited in its decision-making possibilities.455

452 Nuclear Energy Act 1963.
453 *Borssele NPP* case (n 423) paras 56-57.
The ACCC confirmed that the Netherlands had failed to comply with the provisions of Article 6(4), in conjunction with Article 6(10). It stated that the Netherlands failed to provide for public participation at any stage when all options were open.\textsuperscript{456} First, the ACCC discussed the financial liability of the government and the issue that the government could not interfere with the date the NPP should close.\textsuperscript{457} According to the ACCC, the 2006 Covenant constituted an enforceable contractual obligation on the public authorities. It prohibited the authorities from interfering with the duration of the NPP operation, unless the safety of the nuclear plant was at stake.\textsuperscript{458} In its opinion, the Government would not have to pay compensation; however, an authority should not base its decision only upon nuclear safety.\textsuperscript{459} Second, the ACCC stated that a closed advisory group could not be considered as falling within the scope of open public participation.\textsuperscript{460}

\textbf{5.2.3.2 Paragraphs 6 and 8}

The communicant argued that the Netherlands failed to fully comply with the provisions of Article 6(6).\textsuperscript{461} It had limited the public consultation to only the technical nuclear safety, while the Article requires a description of the main alternatives that have been studied by the applicant, of the environmental impacts and of the measures that have taken place to prevent or reduce any effects.\textsuperscript{462} However, the State Secretary for Housing, Spatial Planning and the Environment claimed in a letter to Parliament that it had assessed the potential environmental impact and it was the responsibility of the public authority to systematically share this outcome with the public.\textsuperscript{463} Moreover, the communicant argued that the data on the technical safety issues would not have been any use to the public, since the Party had already decided to base its decision extending the design lifetime on the findings of the State Secretary.\textsuperscript{464} According to the communicant, the latter is a violation of Article 6(8), since the outcome of the decision did not include the environmental concerns of the public.\textsuperscript{465}

The ACCC stated that it did not consider the Netherlands to have been non-compliant with Articles 6(6) and 6(8), since the actions of the authority were a result of the 2006 Covenant. Nevertheless, the ACCC elaborated on the issues brought forward by the

\textsuperscript{456} Ibid., paras 76-77.
\textsuperscript{457} Ibid., para 77.
\textsuperscript{458} Ibid., para 78.
\textsuperscript{459} Ibid., para 78.
\textsuperscript{460} Ibid., paras 80.
\textsuperscript{461} Ibid., para 46.
\textsuperscript{462} Ibid., para 46.
\textsuperscript{463} Ibid., para 46.
\textsuperscript{464} Ibid., para 47.
\textsuperscript{465} Ibid., para 48.
communicant.\textsuperscript{466} It confirmed that all information available should be accessible to the public concerned and, in this case, the authority failed to provide the public with its findings about the consequences concerning the continuance of the plant.\textsuperscript{467} However, the mere fact that the authority considered the environmental issues with due account in its assessment was enough, even though it meant that the information was not published.\textsuperscript{468} Furthermore, the ACCC stated that any public participation procedure at the end of a decision-making procedure results in a breach of Article 6 of the Convention.\textsuperscript{469} Notably, the ACCC valued the approach of the Dutch regulations concerning its format to take a decision and the manner in which a summary of a decision was provided for by the GALA and the Environmental Management Act.\textsuperscript{470}

\textbf{5.2.4 Main Findings of the ACCC and its Recommendations}
The main finding of the ACCC was that any reconsideration or update of a nuclear related decision falls within the scope of Article 6(10) of the Convention and thus, the provisions under paragraphs 2 to 9 should be taken into consideration.\textsuperscript{471} The ACCC confirmed that the Netherlands was non-compliant with Article 6(4), since it failed to provide for public participation in any of the stages in the 2006 Covenant. The ACCC noted that it did not consider that the Netherlands was non-compliant with Articles 6(6) and 6(8) of the Convention, since it was a result from the breach with Article 6(4). Nevertheless, the ACCC stated in general that any environmental findings from the authority should be presented to the public and not kept secret: moreover, the information that the authority did present should be delivered in a format it deemed favourable.\textsuperscript{472} The ACCC’s recommendation consisted of a direction towards a correct implementation of Article 6(10) of the Convention in relation to updates and reconsiderations of nuclear related decision-making procedure in order to ensure that the provisions of Article 6 can be applied from the start of a procedure.\textsuperscript{473}

\textbf{5.3 Benelux Union Case}
On 5 September 2014, several NGOs submitted their joint complaint concerning allegations against the Benelux Union.\textsuperscript{474} The Benelux Union is a “political, cultural, and economic

\textsuperscript{466} Ibid., para 84.
\textsuperscript{467} Ibid., para 85.
\textsuperscript{468} Ibid., para 85.
\textsuperscript{469} Ibid., para 86.
\textsuperscript{470} Ibid., paras 54 and 86.
\textsuperscript{471} Ibid., para 88.
\textsuperscript{472} Ibid., para 88.
\textsuperscript{473} Ibid., para 89.
\textsuperscript{474} Communication Coalition Nature (n 420) section V.
union” that promotes cooperation and economic integration between Belgium, the Netherlands and Luxembourg. According to the NGOs, the Benelux Union had the responsibility to comply with the Aarhus provisions even though the Union has not signed nor ratified the Convention. The NGOs argued that the duty to oblige with the Aarhus provisions arises from Article 19(2) of the Convention. This Article provides for the ability of a regional economic organization to become a Party to the Aarhus Convention and the Benelux Union is such an organization. Thus, the NGOs claimed that the lack of compliance under Benelux Law allowed the countries to individually come up with false justifications to infringe upon the Convention obligations, since the Member States of the Benelux Union are all Parties to the Convention in their own capacity. The Union refuted this and stated that the public could not enforce the provisions upon it, because it is not a Contracting Party to the Convention. The ACCC declared that the communication was inadmissible due to the lack of information that was provided by the communicant.

5.4 Wind Farms Case

On 30 June 2015, the ACCC received a submission from the Nederlandse Vereniging van Omwonenden Windturbines [Netherlands Association of People Living in the Direct Vicinity of Wind Turbines] (NLVOW). It is an association that has an interest in protecting the rights of individuals in relation to wind farm projects and it participates in debates with the relevant governments when such projects are suggested. The main allegations of the NLVOW concerned breaches in relation to access to information and the lack of public participation in the decision-making procedures and subsequently a failure to enjoy the right of access to justice.

5.4.1 Background of the Case

Three authorities are competent to take permitting decisions on wind farms in the Netherlands. Which authority competent is, dependents on the size and capacity of the wind farm; this criterion determines whether the national government, the provincial

476 Communication Coalition Nature (n 420) Annex I.
477 Ibid., section III.
478 Ibid., Annex II.
479 Letter from Secretary of the Aarhus Convention Compliance Committee to the communicant (14 April 2015).
480 Netherlands Association of People Living in the Direct Vicinity of Wind Farms, ‘Communication to the Compliance Committee of the Aarhus Convention’ (original communication) ACCC/C/2015/133 (30 June 2015).
481 Communication Wind Farms case (n 422) para 2.
482 Ibid., paras 6-7.
administrations or the local municipalities is responsible for taking these decisions. Even if the national government is responsible for the substance of the project, the provincial administrations, municipalities and other authorities still have the ability to issue licenses, permits and exemptions. Apart from the role of the government in the decision-making procedure, the government also has the duty to generate the main policy elements that establish to which extent wind power is needed to increase a sustainable energy supply and in which areas wind farms shall be allocated. It is up to the provinces and municipalities to convert these standards into regulations for their area, in order to achieve the goals created by the government.

These changes are a result of the developments that have occurred between 2001 and 2013. Prior to 2001, the provincial and municipal authorities were only liable for the decision-making procedure. However, in 2001, the government and provinces created an agreement that established that the provinces could make the choices of allocating wind farm locations. Between the years 2007 and 2013, six more national plans or programmes were drafted and each of them encouraged the construction of wind farms and gave more power to the provincial administrators and local municipalities to allocate locations for these constructions. Among these plans and programmes was the 2010 National Action Plan for Energy from Renewable Sources (National Action Plan). The National Action Plan was a requirement of the EU Directive/2009/28/EC. The plan incorporated the previously adopted plans and programmes but had not included public participation in its provisions. This changed in 2011, when the first plan was drafted that offered public participation. This was the National Policy Strategy for Infrastructure and Spatial Planning (2011 National Policy Strategy) and according to the communicant, this plan received comments from the public that the government had not taken into account when it adopted the plan. The same concerns were raised by the communicant in relation to the National Policy Strategy for Onshore Wind Power that was designed to create regulations for specific locations for large-scale wind farms.

The NLVOW argued that the Netherlands had failed to implement several aspects within the three pillar rights of the Aarhus Convention. This analysis shall focus solely on the

483 Ibid., paras 26 and 28.
484 Ibid., para 29.
485 Ibid., paras 27 and 29.
486 Ibid., para 30.
487 Ibid., paras 30-32.
488 Ibid., para 33.
489 Ibid., para 36.
490 Ibid., paras 36-39.
Article 6 and 9(2) related issues. These specifically concerned allegations that the Netherlands excluded the public from the decision-making process and the ability to participate in the determining of constructing wind farm projects. Subsequently, the NLVOW claimed that the public did not have a serious chance to appeal to the administrative court. It stated that even if the public had the possibility to participate in the decision-making procedure, the public would not have had the ability to challenge a decision, because the Dutch laws do not consider plans and programmes as legal acts under public law, and appeals are considered inadmissible. Furthermore, the regulations that determine the effects of a wind turbine are generally binding regulations, which are excluded from a review procedure by an administrative court. Thus, the NLVOW argued that the public does not have the right to challenge a decision under Article 6. The NLVOW mentioned in a statement that its reason for submitting its claims had to do with the fact that the government, and in particular the Minister of Economic Affairs, did not take its arguments seriously and that the public was still poorly informed and left out in the decision-making procedure. Its submission criticized the manner of informing the public, providing public participation possibilities in relation to specific wind farm projects and in general criticized the wind-energy and energy policy of the Netherlands. These elements are all found in the communication and shall be discussed below. First, the communicant claimed that the legislation relating to the construction of wind farms was in breach with the Aarhus Convention. Second, it argued that the plans and programmes between the years 2001 and 2013 relating to wind energy should have been subject to the provisions of Article 6, paragraphs 3, 4 and 8, because they concerned plans and programmes under Article 7 of the Convention. Finally, the NLVOW presented its allegations in relation to the failure to create effective review possibilities for the public.

5.4.2 Wind Farms are a Proposed Activity under Article 6 Paragraph 1
The communicant claimed that the provisions of Article 6 of the Convention were applicable to wind farms in general, since wind farms should fall under paragraph 20 of Annex I and are thus a specific activity under Article 6(1)(a) of the Convention. According to paragraph 20,
an activity can be a specific activity under Article 6 if the national legislation requires an EIA procedure for such a project. The Dutch EIA Decree states in Part D that a wind farm with a capacity exceeding 15 megawatts or ten turbines, should carry out an EIA and thus, is a specific activity under Article 6(1)(a) of the Convention. In relation to smaller projects, the NLVOW submitted that the EIA Decree requires a situation-specific approach that will determine the necessity of an EIA procedure.

The Party responded to the allegations and indicated that wind farms cannot automatically fall under part D of the EIA Decree, because this part should be read in line with Article 6(1)(b) of the Convention. Part D indicates that an EIA shall only be carried out if the wind farm can cause adverse effect on the environment. The Dutch regulations will assess if it is required to carry out an EIA for activities listed in part D. Furthermore, it stated that Part C of the EIA Decree is responsible for the determination of whether an EIA is required under paragraph 20 of Annex I of the Convention. According to the Netherlands, an activity cannot fall under the provisions of Article 6(1)(a) of the Convention, since Part C does not include any rules relating to wind farms.

5.4.3 Plans and Programmes under Article 7
The communicant was of the opinion that the seven plans or programmes (hence forth, plans) that were drafted between 2001 and 2013 were plans under Article 7 of the Aarhus Convention and are thus subject to Article 6, paragraphs 3, 4 and 8. The communicant submitted that the Netherlands failed to comply with these provisions, since the authorities did not include participation possibilities for the public or the authorities selected the participants whom could be involved in the decision-making procedure. In relation to the latter, the authority had only invited known supporters of wind power. It claimed that the public should have been provided with participation possibilities in an early stage when all options were open and effective for the outcome.

Five of the plans were drafted by the government in coordination with a few selected and invited participants from the commercial sector and nature and environmental

500 Ibid., para 5.
501 Annex I part D 22.5 of the Dutch EIA Decree.
502 The Netherlands, ‘Statement’, ACCC/C/2015/133 (11 August 2016) para 93 [Response Wind Farms case].
503 Annex I part D 22.2 of the Dutch EIA Decree.
504 Response Wind Farms case (n 502) para 92.
505 Ibid., para 94.
506 Communication Wind Farms case (n 422) para 34.
507 Ibid., paras 34-35.
508 Ibid., para 37.
organisations.\textsuperscript{509} According to the communicant, the latest plan that was drafted gives an example of the systematic exclusion of the public by the Netherlands.\textsuperscript{510} This was the National Energy Agreement of 2013, which concerns the sustainable energy goals the Netherlands has set to meet by 2020. This document was drafted in ‘closed negotiations’, which meant that only those with an invention could participate in the negotiations.\textsuperscript{511} According to the communicant, this select group did not represent the opinion of the public and such a selection constitutes a violation of the Article 6 provisions.\textsuperscript{512} Furthermore, the communicant considered that the 2011 National Policy Strategy and the National Policy Strategy for Onshore Wind Power contained public participation elements, but that the participation was ineffective since the comments were not taken into consideration when drafting these two plans. Thus, the NLVOW considered this to be in breach with Article 6(8).\textsuperscript{513}

The Party refuted the allegations and stated that Article 7 of the Convention is not applicable to the documents it had drafted because they contained general policy developments that would not be subject to the provisions of Article 6.\textsuperscript{514} However, it also argued that if the developments were considered as a plan under Article 7, the Netherlands was still in compliance with the public participation provisions of both Articles 6 and 7.\textsuperscript{515}

The Netherlands began its statement by arguing that the authorities did not have to include public participation in the procedures where it had selected its own public actors, since these were actors that were familiar with issues in the wind power field and thus were sufficiently informed.\textsuperscript{516} It also submitted that the public is provided with proper consultation in relation to the preparation of policies, since the central government uses a website to consult with the public in relation to issues concerning policies and the environment.\textsuperscript{517} Furthermore, it stressed its compliance with Article 6(4) by indicating that commenting was possible and the Council of State had ruled that this is sufficient to meet the conditions when it comes to complying with the participation obligations in relation to plans and programmes.\textsuperscript{518} Finally, in its opinion, the authority had taken due account of the consultation

\textsuperscript{509} Ibid., paras 25 and 34.
\textsuperscript{510} Ibid., paras 25 and 39.
\textsuperscript{511} Ibid., para 49.
\textsuperscript{512} Ibid., paras 39-40.
\textsuperscript{513} Ibid., paras 41-42.
\textsuperscript{514} Response Wind Farms case (n 502) para 73.
\textsuperscript{515} Ibid., para 86.
\textsuperscript{516} Ibid., para 128.
\textsuperscript{517} Ibid., para 39.
\textsuperscript{518} Ibid., para 130.
in the outcome and was compliant with Article 6(8), since the paragraph does not create a right for the public to veto a decision, but rather creates an obligation for the authority to take the consultation into its consideration.519

5.4.4 Alleged Breach of Article 9 Paragraph 2 and the Party’s Response
The communicant claimed a systematic breach of Article 9(2) of the Aarhus Convention because the public concerned did not have the ability to review the substantive legality of a decision.520 One of the legal requirements to grant a permit is to have a report with the effects of a wind turbine. These effects include noise exposure and shadow flicker of a wind turbine.521 Experts determine to what extent the noise and shadow flicker of a wind farm are too aggravating and base their results upon this. If the expert presents a positive expertise report, the authority may issue a permit.522 When the public challenges the legality of a permit, the court should, according to Article 9(2) of the Convention, examine the substantive legality of a decision about a permit.523 The NLVOW raised the issue that legal practice showed that the Netherlands was non-compliant with this provision, since the courts showed a “high degree of judicial passiveness”, while they have the responsibility to actively approach legal issues that have been brought to them.524 The passiveness the communicant referred to relates to the fact that an authority can appoint an expert and the court does not necessarily have to consider the rightness of an authority in this matter, since the regulations of noise and shadow flicker have been standardized in statutory rules by the government in 2011.525 Due to the standardization, the expert’s report becomes generally binding and the public does not have the opportunity to challenge it.526 In the opinion of the NLVOW, the court has the responsibility to consider all the facts that are directly and indirectly at hand, specifically the facts of the expert report the authority had requested.527 Moreover, the authority is not even obligated to render a decision in relation to a permit where the noise and shadow flicker factors are considered, since these elements are regulated through statutory laws, which are generally binding laws that do not require further action or decisions.528

519 Ibid., para 131.
520 Communications Wind Farms case (n 422) para 51.
521 Ibid., paras 53-54.
522 Ibid., para 54-55.
523 Ibid., para 59.
524 Ibid., para 51.
525 Ibid., para 9.
526 Ibid., para 9.
527 Ibid., para 56.
528 Ibid., paras 68 and 75.
The Party maintained that the Netherlands legislation provided for a full judicial review mechanism, which included the substantive and procedural legality of decisions.\footnote{Response Wind Farms case (n 502) para 136.} It stated that according to Dutch legislation, a public authority has certain discretionary powers that restrict the courts from taking decision that dispute the choices an authority has made.\footnote{Ibid., para 135.} In this case, that would mean that a court may not doubt the accuracy of the reports the public authority deemed legitimate. The Party’s submission stated that the authority is awarded this power on the basis of the separation of powers, trias politica.\footnote{Ibid., para 135.} It continued by stating that the lack of an expert report from either the court or the public does not mean that the court was unwilling to take other findings into account, so long as its reasoning established that the decision contained a correct assessment that was made in accordance with the law and contains sufficient knowledge of the facts.\footnote{Ibid., paras 138-139.}

### 5.5 Main Findings of the Chapter

The Aarhus Convention entered into force in the Netherlands in 2005, when it implemented the Aarhus Convention Implementation Act to make amendments to its existing legislation and to create new legislation. The Netherlands regulates the procedures for the second and third pillar mainly through the General Administrative Law Act (GALA). The general preparation procedure is described in section 3.4 of the GALA. In addition, a number of issues have been regulated in the Environmental Provisions Act and the Environmental Management Act. These two Acts specify which procedure from the GALA must be followed when preparing an environmental decision. The Annex of the GALA makes it possible for the public to appeal to the Council of State in case a possible violation has occurred in the permitting procedure.

The ACCC has received a total of three communications alleging that the Netherlands was violating Articles 6 and/or 9(2). The main emphasis in this chapter was on the first and last cases, since they were declared admissible and thus contained more substance than the second case. Just as mentioned in chapter 4, the communicators first sought to justify their beliefs that the activities in question fell under either Article 6(1) or 6(10). Moreover, there were other similarities between the two cases. The authorities determined in both cases whom the public concerned was. In the Borssele NPP case, the ACCC determined that this is a violation of the provision in Article 2(5), because an authority does not have the power to
determine who an interested Party is in its decision-making procedure. Until now the ACCC has not made its decision in the *NLVOW* case, and thus, it is not yet clear whether the ACCC will decide on this matter in the same manner as it did for the *Borssele NPP* case. Finally, the ability of the court to render a well-thought judgement is disputed by the NLVOW. The Netherlands claimed that a passive approach from the court is justifiable, since the separation of powers is a fundamental part of its statehood.
6. Research results
The intention of this chapter is to determine the research results and with this consider whether the Dutch laws have been implemented in such a manner that they are in compliance with the provisions of the Aarhus Convention. It is therefore important to establish what the ACCC’s view on compliance is. Section 6.1 contains an analysis of the main findings of the ACCC as originally discussed in chapter 4. The section discusses the issues in relation to Articles 6 and 9(2) of the Aarhus Convention, including what its general opinion was relating to the implementation of each of these paragraphs, starting with the common view on what can be considered as a specific activity. Furthermore, it will be discussed how the ACCC looks at the manner in which the EU is most likely to be compliant when implementing the Aarhus provisions into regulations. Section 6.2 provides for an observation of the communications regarding the non-compliance of the Netherlands. The observations include the ACCC’s view as discussed in 6.1, in light of these communications.

6.1 Results of Analysing the Main Findings of the ACCC
This section will start with discussing Article 6. It will be followed by an elaboration on Article 9(2) and the applicability of Articles 6, 7 and 8 to this Article. The substance of the last issue of this section is concerned with the implementation of the Aarhus provisions by the EU.

6.1.1 Common View of Article 6
6.1.1.1 Paragraph 1
Article 6(1) regulates what a proposed activity is, as has been discussed in several cases in chapter 4. The determination of a proposed activity is important, because it decides whether the provisions of Article 6, paragraphs 2 to 9 must be applied and thus whether the Party is required to involve the public concerned in its decision-making. The term ‘public concerned’ is defined in Article 2(5) and the ACCC has stated that the Parties are restricted from interpreting the public concerned in a way that is stricter than is defined in the Article. Article 2(5) also regulates that NGOs shall fall within the scope of public concerned if they can prove to have an interest in environmental matters. This part of the Article is important for Article 9(2) and will further be elaborated on in section 6.1.2.

533 Czech Republic case (n 304) para 70.
There are two possible ways in which it is determined if an activity falls within the scope a proposed activity under Article 6(1). First, all the activities listed in Annex I of the Convention are considered to be ‘proposed activities’ under Article 6(1)(a). The second possibility is listed in Article 6(1)(b) and states that if national law has established that an activity can cause a significant harmful effect on the environment, the activity is subject to the provisions of Article 6.

There are three subdivisions created in Annex I. Paragraphs 1 to 19 of Annex I is concerned with specific activities. In addition, paragraph 20 of Annex I ensures that an activity not mentioned in its previous paragraphs can also be seen as an activity under Article 6(1)(a). This is the case when national law requires an EIA for the activity. Moreover, paragraph 22 considers that a change or extension of an activity falls within its scope. The analyses mainly focussed on issues relating to paragraphs 20 and 22 of Annex I and thus, will be further elaborated upon. The applicability of paragraph 20 has been disputed in both the Armenia Dalma Orchards and the UK Crossrail cases. The first case concerned itself with allegations in relation to decrees, which in general are considered as plans or programmes under Article 7. The ACCC stated in its findings that an Article 7 plan or programme can contain Article 6 elements. It therefore concluded that some of the decrees were a specific activity under Article 6(1)(a), since those decrees required an EIA under its national law. The UK Crossrail case contained an allegation of a lack of public participation within the drafting of an Act. The public participation provisions of Acts are normally regulated through Article 8. However, the ACCC used similar reasoning to establish that the drafting of legislation may be subject to Article 6(1)(a) if the process requires an EIA.

Paragraph 22 of Annex I is the last paragraph of the Annex and stipulates that a change or extension of an activity is also an activity under Article 6(1)(a). The ACCC pointed out in the Spain Uniland case that any change or extension to an activity must have effect on the production of a project, in order for it to fall under paragraph 22. If the production is not affected, the activity is more likely to be considered under Article 6(10). A further elaboration on this definition will follow in section 6.1.1.10.

The second manner in which an activity is a proposed activity under Article 6(1) is listed in Article 6(1)(b). This paragraph ensures that activities with the likelihood of causing environmental harm are also subject to the public participation provisions of Article 6.

534 Armenia Dalma Orchards case (n 174) paras 28 and 30.
535 UK Crossrail case (n 329) para 55.
536 Spain Uniland case (n 356) para 82.
ACCC, as well as the AIG, use the definition of a ‘significant test’, which originates from the EIA Directive. This test establishes if the environment can be affected, is done on a case-by-case basis and should consider the main environmental implications in the permitting decisions.\textsuperscript{537} The minimum criteria for an activity to be considered as concerning the environment is if the legislation of the Party provides for an EIA screening process for the activity, that this process foresees that the activity will significantly affect the environment and that the Party knew, or had to know that the activity could have an impact on the environment.\textsuperscript{538}

In principle, public authorities do not have to comply with the public participation requirements if their decisions were taken before the Convention entered into force. Furthermore, the ACCC stated that the applicant that proposes an activity may receive financial help from an EU financial institution to help finance a project. However, this does not take away the obligation of the public authority to make sure that the activity complies with the public participation obligations, since a financing decision is not a decision that permits an activity.\textsuperscript{539}

\textbf{6.1.1.2 Paragraph 2}

According to Article 6(2), the authority has the obligation to give public notice about an environmental decision-making procedure and to provide available information about the procedure.\textsuperscript{540} The Article states that a notification needs to be done as early as possible and in an adequate, timely and effective manner. The analyses of the ACCC reports showed that the lack of a precise definition of: “an adequate, timely and effective manner”, caused for allegations about the compliance of the Contracting Parties. The elements adequate, timely and effective are described below.

The Committee’s opinion in the \textit{Kazokiskes Lithuania} case expressed that a notification with a vague description of the nature of possible decisions relating to the proposed activity is inadequate under the Convention.\textsuperscript{541} The ‘timely’ element is explained together with the term ‘early’, since early public notice is also mentioned as a requirement in Article 6(2). The ACCC used Article 6(4) to describe the term early as a way of ensuring that the notification can be effective. In light of this, the ACCC argued that the time that the public

\textsuperscript{537} Aarhus Implementation Guide (n 49) 132 and \textit{Armenia Dalma Orchards} case (n 174) para 30.
\textsuperscript{538} \textit{Kazokiskes EU} case (n 192) para 43, \textit{Czech Republic} case (n 304) para 82 and \textit{Spain Uniland} case (n 356) para 82.
\textsuperscript{539} \textit{European Investment Bank} case (n 231) para. 36 and \textit{Kazokiskes EU} case (n 192) paras 17-18 and 39.
\textsuperscript{540} \textit{Spain Uniland} case (n 356) para 87.
\textsuperscript{541} \textit{Kazokiskes Lithuania} case (n 191) para 66.
should be given between the notification and the start of a decision-making procedure depends on the size, impact and complexity of the activity and the quantity of related information.542

The effective manner of a notification contains several aspects. First, there is the manner of public notice: the authority chooses in what way the public is notified, but it must take into account that the manner of notifying should ensure that the information reaches the public concerned. The ACCC indicated that some publication methods are more likely to be seen by the public. For example, the ACCC favours a publication in a well-read local newspaper, than in an official State journal.543 Furthermore, the ACCC also established that the degree of effectiveness of a notification is based on whether it is clear to the public which authority will ultimately take the decision.544 The amount of comments received by the authority can suffice as proof that the means of notifying were sufficient or not.545

6.1.1.3 Paragraph 3
According to Article 6(3) of the Convention the public should be provided with reasonable time frames for different phases of public participation. Similar reasoning as to paragraph 2 has been provided by the ACCC to determine what constitutes as a ‘reasonable’ time-frame. Sufficient time-frames are subject to the complexity and size of an activity. Therefore, the public should be provided with a greater amount of time in relation to large-scale projects then the public would be granted for a smaller project.546 Moreover, the paragraph requires that these time-frames be applied to all the different phases within the decision-making. Additionally, the ACCC stated that this provision is not solely linked to an EIA procedure, but can also be used in other permitting phases such as planning and building processes. It stipulates that the only condition to apply the public participation provision is based on whether the planned activity will have an impact on the environment.547

6.1.1.4 Paragraph 4
Early public participation is a two-fold requirement under Article 6(4) that should be provided when all options are open and when effective public participation can take place. The Convention considers that all options are open when public participation is offered at a stage where the public still has the possibility to discuss the options. Nevertheless, a Party may

542 Kazokiskes Lithuania case (n 191) para 67 and Armenia Deposits case (n 259) para 65.
543 Ibid., para 67.
544 Spain Uniland case (n 356) para 94.
545 UK Crossrail case (n 329) para 59.
546 Ibid., para 67.
547 Czech Republic case (n 304) para 70.
provide substance to the range of options open for public participation. Due to this, a Party is not automatically non-compliant if the construction of a project has already started or even has been completed. The ACCC has set a threshold for the options it considers that needs to be open to early public participation. The options that need to be open are: the location of a specific activity, the technical design and the technological details relating to specific environmental standards. This threshold ensures that the participation is effective.\textsuperscript{548}

6.1.1.5 Paragraph 5
The Convention also places an obligation on the applicant seeking a permit. Article 6(5) lists that the applicant is responsible to reach out to the public concerned, provide them with information about the proposed activity and encourage the public to discuss their issues. Although the Article puts this burden solely on the applicant of the activity, the ACCC is of the opinion that the public authority also has a certain responsibility to assure compliance with this provision.\textsuperscript{549} It is not indicated by the ACCC to what extent the applicant or authority can be held responsible for its lack of action.

6.1.1.6 Paragraph 6
Article 6(6) sets a certain threshold to which extent the authority has the obligation to provide the public with available data. The substance of this data has been disputed in some cases, but the ACCC stated in all of them that it does not have the ability to consider whether this data was accurate. Its only role was to consider if the information was accessible to the public.\textsuperscript{550}

6.1.1.7 Paragraph 7
According to Article 6(7) of the Aarhus Convention, the public may submit any of their comments, information, analyses and opinions to the relevant authority prior to the hearing. The ACCC has secured this right by restricting its Parties from imposing any obligations on these public submissions in national legislation and it forbids them to restrict the public to be the public concerned. Thus, the Parties may not require the public to submit motivated comments in order to trigger its public participation possibilities.\textsuperscript{551}

6.1.1.8 Paragraph 8
The public authority has to take due account of the public participation as mentioned in 6(7). The ACCC decided that to this extent, the comments submitted do not have to be limited to

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\textsuperscript{548} Kazokiskes Lithuania case (n 191) paras 71 and 74.
\textsuperscript{549} Ibid., paras 77-78.
\textsuperscript{550} Ibid., para 79.
\textsuperscript{551} Ibid., para 80.
\end{flushleft}
environmental issues and that the authority should consider each issue extensively. Any outcome that does not take due account of the public participation is in breach of the provision.\textsuperscript{552}

\textbf{6.1.1.9 Paragraph 9}

After a decision is made, the public shall promptly be informed about this decision and the text of the outcome and the reasoning of the authority must be accessible to the public according to Article 6(9). The Convention does not define how many days will ensure that the public was informed promptly, because it depends on which kind of decision it is and what type and size the decision relates to. Apart from this, the time between the judgement and the publishing of the decision should always be reasonable to ensure the possibility for the public to appeal to a court.\textsuperscript{553} The manner of publishing is discussed less extensively than in paragraph 2, but the provisions of this paragraph should be used as a guideline as to which publication obligations the authorities have. The ACCC stressed that a publication posted solely on a governmental website will not always be sufficient to reach the public.\textsuperscript{554}

\textbf{6.1.1.10 Paragraph 10}

Article 6(10) states that a reconsideration of an activity as listed in Article 6(1), shall apply the provisions of Article 6, paragraphs 2 to 9. These provisions are applied \textit{mutatis mutandis} and where appropriate. A reconsideration of an activity occurs when the objective of a project changes or updates. This is the case when, for instance, a licence is being renewed. The ACCC explained in the 	extit{Spain Uniland} case how to interpret the terms ‘\textit{mutatis mutandis}’ and what would be considered ‘appropriate’. The \textit{mutatis mutandis} element provides for a certain discretion for authorities to determine to which extent they have to comply with the Article 6 provisions. However, the ACCC considered it to be appropriate to apply the provisions more strictly when a renewal can significantly harm the environment.\textsuperscript{555}

\textbf{6.1.2 Common View on Article 9 Paragraph 2}

Article 9(2) Convention grants the public concerned access to justice in the form of initiating a review procedure before a court. Such a review procedure addresses both the substantive and procedural legality of decisions, acts and omissions that have been made relating to Article 6 of the Convention. Several issues have been brought to the ACCC in relation to this

\textsuperscript{552} \textit{Czech Republic} case (n 304) para 71.
\textsuperscript{553} \textit{Kazokiskes Lithuania} case (n 191) paras 82 and 84 and \textit{Armenia Dalma Orchards} case (n 174) para 31.
\textsuperscript{554} \textit{Kazokiskes Lithuania} case (n 191) para 81 and \textit{Spain Uniland} case (n 356) para 103.
\textsuperscript{555} \textit{Spain Uniland} case (n 356) para 84.
provision: first, who the public concerned is, and thus has legal standing to appeal to a court; second, to which extent the provisions of Article 9(2) are limited to solely Article 6; and finally, how a violation of Article 6 can subsequently cause a breach of Article 9(2).

According to Article 9(2), the public concerned is those with a sufficient interest or a right that is impaired. In addition, the ACCC has used Article 2(5) to create a minimum standard of who a sufficient interest has, and/or an impaired right. Article 2(5) states that a NGO has an interest if its national law establishes that the NGO promotes environmental protection. If national law has not included provisions that make it possible for a NGO to have standing in a court, it is considered a procedural breach. The public authority may use the NGO’s statutes to consider if the NGO is, in fact, promoting the environment. However, the authority is not limited to this specific source and is also required to consider the NGO’s position throughout the decision-making phases. For example, a NGO is deemed to have interest if it has participated in one of the phases in the decision-making procedure.

The paragraph expressly indicates that access to justice only applies to Article 6 decisions. Nevertheless, the analyses showed that exceptions can be made when Article 7 or 8 actions contain Article 6 elements. The ACCC determined in its report concerning the Armenia Dalma Orchards case that decrees that are normally considered under Article 7 can also be subject to the stricter public participation provisions of Article 6. Thus, it declared that decrees that require an EIA procedure should take the Article 6 obligations into account when drafting them. Furthermore, the ACCC established in the UK Crossrail case that a hybrid bill procedure can contain a specific activity that falls within the scope of Article 6, while in general a bill falls under Article 8. It based its conclusion on the fact that the legal effect of the Act that followed was related to a specific project, rather than changes to legislation that would affect the entire public.

After it is determined that Article 9(2) is applicable, the public has the possibility to review the substantive and procedural legality of a decision. This review mechanism considers whether the authority has complied with the provisions under Article 6. The outcome of the Kazokiskes Lithuania case proved that the non-compliance of Article 6 by a Party does not necessarily result in non-compliance with Article 9(2). The ACCC noted the importance of pursuing remedies after discovering a decision has been made, since a Party

556 Czech Republic case (n 304) para 75.
557 Armenia Dalma Orchards case (n 174) para 35.
558 Armenia Deposits case (n 259) paras 79-81.
559 Czech Republic case (n 304) paras 77-78.
560 Armenia Deposits case (n 259) para 35.
561 UK Crossrail case (n 329) paras 52-53 and 60-61.
cannot be in non-compliance without a decision that has been challenged.\textsuperscript{562} Furthermore, it emphasized the significance of effectively challengeable decisions, in particular, when the public should have sufficient time and opportunities to challenge a decision.\textsuperscript{563} Some cases only allow the authority to take a decision after the construction of a project has started or is completed. Those who have legal standing can request a preliminary review in relation to this, without exhausting the possibilities to also challenge the decisions in the other phases of the procedure.\textsuperscript{564}

6.1.3 View on Regulations of the EU

This section is based upon one case that was analysed in chapter 4, since the analyses contains only one case in relation to the EU. Thus, this review shall be brief and only be based upon the EIA and IPPC Directive and landfill activities.

In general, EU Member States have the duty to meet their obligations under international agreements, as well as the EU regulations. For these countries, international agreements have precedence over any EU regulations. However, the ACCC noted that it would be most convenient for its Parties to be able to base its legislation upon both sources, instead of one or the other exclusively. Momentarily, the EU bases its regulation on the provisions of the Aarhus Convention, but does not use the same wording. In response, the ACCC has stated that the same or similar phrasing should help establish uniformity. In addition, it noted that a clear and transparent legal framework is a requirement of the Convention under Article 3 and in its opinion the EU can comply with this provision if it uses the wording that is used in the Aarhus Convention. This should prevent the Member States from implementing EU regulations that are not completely in line with the Aarhus obligations.\textsuperscript{565}

6.2 Results of Analysing the Cases Relating to the Netherlands

The first section presents how the outcome of the Borssele NPP case is in line with the general view of the ACCC. The following sections consider the possible outcomes of the Benelux Union case and the Wind Farms case. This consideration will be done using the general view of the ACCC in section 6.1.

\textsuperscript{562} Kazokiskes Lithuania case (n 191) paras 52 and 87.
\textsuperscript{563} Kazokiskes EU case (n 192) para 56
\textsuperscript{564} Ibid., para 56.
\textsuperscript{565} Ibid., para 59.
6.2.1 Borssele NPP Case

The Borssele NPP case related to the non-compliance allegations directed at the Netherlands. The ACCC concluded that it was non-compliant in relation to Article 6(4), in conjunction with 6(10). Article 6(10) was applicable according to the ACCC, due to the change of the duration of the licence to operate the plant. Considering the case law found in section 6.1, the ACCC took into consideration the potential risk the plant could cause to the environment. Although the 1973 licence stated that it would be operating for an indefinite period, the effects of a malfunctioning nuclear power plant are of such severe danger to the environment, that it can only be considered appropriate to reevaluate the system’s functioning, especially considering that the plant was already operating for such a long time. Thus, the ACCC stressed it was more than appropriate to apply the public participation provisions.\(^566\)

Due to the changes to the operating conditions in the 1973 licence, the Netherlands should have complied with Article 6, paragraphs 2 to 9. Article 6(4) of the Convention provides for early public participation when all options are open and effective. The Kazokiskes Lithuania case established the threshold of the options that need to be open in order for the public participation to be effective. In that respect, the ACCC considered a new aspect of effectiveness: it discussed who should participate in a decision-making procedure. It stated that every member of the public, or at a minimum the public concerned, should have the opportunity to participate in a procedure. The ACCC concluded that the Netherlands failed to comply with this provision, since it had chosen all of the stakeholders it consulted in the procedure to renew the NPP licence. In this manner, it limited the scope of public concerned under Article 2(5), which led to the conclusion that the Netherlands had been non-compliant with Article 6(4) when issuing the licence of 18 March 2013.\(^567\) However, the ACCC also noted that the violation resulted from the obligations within the 2006 Covenant and the amendments made to the Nuclear Energy Act. The Covenant restricted the authorities in its capacity to take decisions. The authorities only had the opportunity to decide on nuclear safety. On this basis, not all options were open. However, the authority did not have the competence to decide against this, since the Act included the operating end date. Thus, the ACCC refrained from deciding upon the compliance, when considering the implementation of Articles 6(6) and 6(8).\(^568\) Nevertheless, the ACCC gave its general opinion on the correct

\(^{566}\) Borssele NPP case (n 423) paras 64-65 and 71.
\(^{567}\) Ibid., para 82.
\(^{568}\) Ibid., paras 24-25 and 83-84.
implementation of these Articles and noted that it favoured the manner in which the authorities are required to present a summary of its reasoning.

The review of Article 6(6) showed that the ACCC can only consider whether information was made available and not if the substance of this information is correct. In this case, the ACCC declared that the lack of information did not constitute non-compliance with Article 6(6). It did not favour the fact that the authority had not shared its analysis on the consequences on the environment with the public. Nevertheless, the authority had taken the public participation due account of its decision and due to this, was compliant with Article 6(8).\textsuperscript{569}

This year alone, the plant could not operate for one and a half months, due to electronical malfunctioning of the system that secures the functioning of the plant. In this respect, it confirmed the opinion of the ACCC, which is to revaluate the environmental dangers of the plant, because a malfunctioning of the plant could potentially damage the environment severely.\textsuperscript{570}

\textbf{6.2.2 Possible Outcome of the Benelux Union Case}

The ACCC declared the case inadmissible due the lack of information submitted by the communicant. However, a general assumption can be made in this case, when considering the type of organization the Benelux Union is. The Benelux Union has quite similar features as the EU but is merely a smaller collaboration of countries. The ACCC stated that the EU has a certain discretion when implementing the Aarhus provisions, but it should be possible for its Member States to comply with both the Aarhus Convention and the EU regulation.\textsuperscript{571} If this principle is subsequently applied to the Benelux Union, these three countries have to comply with the Union as well as the Aarhus Convention. These countries will infringe upon their individual obligation to comply with the Aarhus Convention if the Union jointly drafts contradictory legal provisions. In none of these instances would this provide a desirable outcome.

\textbf{6.2.3 Possible Outcome of the Wind Farms Case}

This case addressed three main issues in which the Netherlands could be in violation with the Aarhus Convention. First, it discussed whether a wind farm in general should be considered a

\textsuperscript{569} Ibid., paras 85-86.


\textsuperscript{571} Kazokiskes EU case (n 192) para 59.
proposed activity under Article 6(1) of the Convention. Second, whether the plans that have been adopted throughout the years showed a lack of public participation possibilities in the drafting of it. Finally, the proper functioning of the Council of State was disputed.

Article 6(1) establishes that an activity falls within its scope if it is an activity under Annex I or a significance test requires the Party to carry out an EIA procedure. The Dutch EIA Decree considers if an activity requires an EIA procedure under its national law. The Decree contains several legal elements that determine if such a procedure might be required. Part C obliges the Party to carry out an EIA procedure without a previous environmental significance assessment. Meanwhile, Part D of the EIA Decree lists activities the Party has the duty to consider the urgency of an EIA before actually carrying the EIA out. When strictly examining wind farms, the activity only occurs in part D of the EIA Decree. This provision requires the Party to examine if it concerns a decision under Articles 3.4 of the GALA and 13.2 of the Environmental Management Act. The ACCC will in all likelihood not determine that the Party is in a state of non-compliance, since the communicant has not presented an actual example of a breach. This makes it impossible for the ACCC to assess whether there is a legitimate fear the activity can potentially harm the environment.\(^572\)

The second allegation concerned a breach in relation to plans, programmes or policies under Article 7. This Article obliges an authority to comply with the Article 6, paragraph 3, 4 and 8 provisions when drafting plans and programmes. The provision for policies is less strict and only requires environmental policies to comply solely with the Article 7 obligations. Between 2001 and 2013, seven documents were drafted: according to the communicant, these documents were plans under Article 7, while the Netherlands claimed that the documents contained general development policies outside the scope of Article 7. This section excludes a discussion on the determination on whether the documents were plans, programmes or policies under Article 7, since this thesis has not discussed how to make this distinction, because its focus is on on Article 6. Therefore, the documents shall be considered a plan under Article 7 of the Convention for the purpose of this discussion. Article 7 creates the obligation for the authority to comply with the provisions of Article 6, paragraphs 3, 4 and 8 of the Convention. In addition, other provisions of Article 6 might even be applicable during the drafting of one of the documents. This would be the case if one of the documents required an EIA procedure.\(^573\)

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572 Ibid., paras 42 and 46.
573 Armenia Dalma Orchards case (n 174) para 31-33.
The allegations of a breach with Article 6, paragraphs 3, 4 and 8, were made in relation to seven plans. Five of the plans concerned were subject to allegations claiming a lack of open public participation. The other two plans were alleged to have featured public participation that was not taken into the consideration in the final determination. There is a strong possibility that the first plan will not be discussed by the ACCC, since it was drafted and adopted before the Aarhus Convention was ratified by the Netherlands. It will likely only be assessed by the Committee if the communicant can prove that the plan has significantly affected licencing procedures after the Convention was ratified.  

According to Articles 6(3) and 6(4) of the Convention, the effectiveness of public participation relies on timely frameworks and the ability of the public to participate early in the process, when all options are open. Article 6 guarantees these provisions as a minimum for the public concerned. The Borssele NPP case confirmed this and prevented the authority from solely inviting the stakeholders that it chose. Although the Party claims to have included several actors with different backgrounds in its participation procedure, this is not a sufficient way to establish whom the public concerned is. Thus, it would be rational to believe that the Netherlands was indeed non-compliant with Article 6(4).

The communicant also claimed that the authority has failed to take due account of the comments of the public participation in the decision-making, which resulted in a breach of Article 6(8). In case the ACCC confirms that the Party failed to comply with Article 6(4), it is most likely that the authority also failed to correctly come to an outcome that contains all the opinions of the public concerned, since the public was excluded from participating. However, the ACCC can also come to the conclusion that the public participation was done in a proper manner. If this is the case, the ACCC will probably repeat what it had declared in the Borssele NPP case, where it stated that the comments were thoroughly considered, because the format that is being used in the Dutch legislation implements the provisions of paragraph 8 accurately.

According to the communicant, the Council of State has acted with a ‘high degree of passiveness’, while the Dutch legislation obliges the court to take an active position in its determination whether a breach of law has occurred. This passive attitude of the court is being challenged by the communicant but is being defended by the Party as a limitation on its authority that is supported by its constitutional separation of powers.

574 Kazokiskes Lithuania case (n 191) paras 54 and 56 and Armenia Deposits case (n 259) para 47.
575 Borssele NPP case (n 423) para 82.
576 Ibid., para 86.
577 Communication Wind Farms case (n 422) para 51.
Every State has the responsibility to implement regulations that provide access to justice and under Article 3(1) of the Convention and each Party has the obligation to implement this in a clear, transparent and consistent framework. Although the separation of powers has not been disputed in any of the cases in this thesis, the independence of the judiciary has been disputed in several instances. The ACCC ruled that the implementation of any international agreement cannot be limited by justifying this through the claim of the separation of powers. Its arguments were based on two cases relating to Kazakhstan and Belgium. The ACCC stated that the separation of powers must be guaranteed in order to assure legal independence. All three branches within the separation of powers – the judiciary, the executive and the legislature – have the duty to implement new legislation that thrives from an international agreement. This might mean that amendments to administrative legislation are required in order to be compliant. In addition, the ACCC noted the importance of international law and specifically highlighted Article 27 of the Vienna Convention on the Law of Treaties. This Article prevents Parties from invoking internal law as a justification for failure to comply with an international treaty obligation. This means that a Party cannot justify its action to not implement a treaty fully because of an internal division of powers. When reflecting these opinions on the issue in this case, that would indicate that the legislative power should give the judicial power, the Council of State, the ability to consider decisions from an executive power, the public authority. Thus, the Council of State should be competent to consider the accuracy of a report the authority has used to base its decision on.

6.3 Main Findings of the Chapter
The findings of the ACCC have been used to provide insight into the correct implementation of Articles 6 and 9(2) of the Aarhus Convention. The provisions under Article 6 are applicable for proposed activities and for activities that are being reconsidered. To determine what is a proposed activity, an activity must be listed in the Annex I or must require an EIA. If this requirement is not met, the Party has the obligation to check if the activity can still pose a threat to the environment. The Party has to perform a significance test in order to determine if the activity can form a risk to the environment. Once it has been established that it is a

proposed activity or change of activity, the public concerned must be given the opportunity to participate in the decision-making procedure. It has been confirmed that the term ‘public concerned’ may not be interpreted more strictly than is stipulated in Article 2(5) and the authority therefore is not allowed to determine for itself who the interested party is in a process.

Articles 6(2) to 6(4) speak about ensuring the effectiveness of public participation. Effectiveness is promoted by assessing the complexity, size and impact of an activity. A part of the public participation process is sending comments to the authority. These comments do not have to be motivated and may also concern problems that are not just related to the environment. The authority then includes these opinions in its assessment and publishes the decision quickly. The ACCC advises the authority to use the provisions of Article 6(2) to ensure that the publication is done promptly and effectively.

According to Article 9(2) the courts are obliged to review a decision under Article 6, if the public concerned challenges it. In addition, an action under Articles 7 or 8 may also be addressed by a court if it contains Article 6 elements. The court considers whether it can examine the issue by determining the public’s interest. According to the ACCC, they must have at least met the minimum standard of the public with an interest. Thereafter, the court has the task of taking an active stance in the review procedure to ensure its effectiveness. The Party cannot justify an incorrect execution of this on the basis of the separation of powers. Although the ACCC may determine that the public participation provisions of Article 6 have not been implemented in a correct manner, it does not necessarily have to result in a violation of Article 9(2).
7. Conclusion

7.1 Conclusion
This research has aimed at answering the question how Articles 6 and 9(2) can best be interpreted and when an incorrect interpretation creates a non-compliance situation. The examination of several documents from the UN has granted insightful information into the content and functioning of the Articles. These Articles are further examined through the analyses of reports from the ACCC. The results of the analyses have shown the issues encountered by the Parties with regard to a correct implementation of the provisions of the Convention, how this has had an effect on Article 9(2) and in what respect the Dutch legislator has not fully fulfilled its implementation task.

First, the ACCC considers the admissibility of a communication. The Benelux Union case offered insight into a reason to declare a case inadmissible. The ACCC was unable to consider the case, due to the lack of information made available to it. After the ACCC declares a communication admissible, the concerned Parties are consulted and asked to present their opinion on the matter. Within the scope of this thesis and its focus on Articles 6 and 9(2), the ACCC thereafter establishes whether the issue was concerned with an activity under Article 6. In principle, Article 6(1) requires that an activity is a proposed activity if an activity is listed under Annex I and thus can definitely cause a harmful impact on the environment, or the activity requires an EIA procedure in order to establish the possible harmfulness of the activity. The prediction of the possible harmful effects of an activity is reflected in the extent to which the ACCC assesses the necessity to apply the Aarhus principles. For example, the Kazokikes EU case discussed that a Party does not always have to provide public participation for activities that are hardly related to the environment. If an EIA procedure is performed for actions that fall under Articles 7 and 8, these actions become an action with an Article 6 element and thus, the authority or body has to comply with the Article 6 provisions.

Furthermore, the results showed that the most common implementation problems were to effectively ensure public participation and access to justice. The effectiveness of public participation plays a major role in considering whether a Party has complied with its obligations. The public participation principles of the Convention are often situations where a Party must consider how to meet its requirements on a case-by-case basis. An overarching idea that emerged in ACCC case law is that the range of available information, reasonable time-frames, notifications and publications, are subject to the size, complexity and
environmental impact of an activity. This confirms what has already been mentioned in the AIG and proves that the use of Appendix III of the Espoo Convention is useful not only for the implementation of Article 6(3), but also for the correct implementation of the other provisions. The notification element in particular is important, because a proper notification ensures that the public is familiar with the decision-making procedure and the participation possibilities throughout the procedure.

The extent to which notification is important for public participation is similar to the manner in which a Party complies with its obligation to publish a decision, since the publication will affect the public’s possibility to enjoy their right of access to justice. In addition to publication, various other factors also play a role in an effective right of access to justice. The elements are ‘when’ and ‘what’ a court can review. The ‘when’ is concerned with whom has legal standing in a procedure. This specific right is granted to the public who has a sufficient interest or a right that has been violated. Article 9(2) itself specifically states that NGOs can have an interest in a case and thus also can have a right that has been impaired. The Parties therefore have a duty to include legal standing for NGOs in their national legislation. Subsequently, the court may decide using its own national statutes whether the NGO actually has sufficient interest but will in any case consider them to have legal standing when they have participated in the decision-making procedure.

The Article also refers to ‘what’ a court can review. A court must review the substantive and procedural legality of Article 6 decisions. However, its review mechanism is not limited to solely considering Article 6 decisions. The court has the obligation to also consider Articles 7 and 8 actions that performed an EIA, since the ACCC established that those Articles can contain Article 6 elements that are applicable to a review procedure under Article 9(2). Furthermore, the court’s review capacity cannot be restricted by claims of a separation of powers. The latter is an issue that is currently under the ACCC’s scrutiny. It is therefore impossible to indicate whether the Netherlands has violated its obligations in this respect, because this conclusion is based on the outcome of other reports. However, the ACCC did give its opinion in the Borssele NPP case, where it found that the Dutch authority imposed requirements that were too narrow in determining the public concerned. As a result, some of the stakeholders were excluded from participation possibilities in the decision-making procedure. The same situation arose in the NLVOW Wind Farms case. The authority had provided public participation only for organizations it had chosen. In view of the fact that the ACCC has not yet taken a decision, this is also an assumption, but on the basis of the above facts it would be logical to extrapolate that the authority in this respect was also in
conflict with the Aarhus obligations. Due to the authority’s restriction to determine who the stakeholders of a decision-making procedure are. The question arises whether a lack of public participation will subsequently lead to a non-compliance situation of Article 9(2), since in principle only Article 6 decisions can be challenged. However, this question cannot be dealt with conclusively because the ACCC has not given its opinion on this situation in the reports. Nevertheless, one important factor has emerged when considering how the public can make use of their right to review a procedure under Article 9(2), when it was excluded from participating. It is important that the public makes at least an attempt to bring the issue to a court, after they have discovered that the authority has taken a decision.

7.2 Discussion
For this research, the purpose of Articles 6 and 9(2) were examined, as well as how the ACCC envisaged the implementation of these Articles. This observation was done by analysing all issues that were communicated to the ACCC with regards to possible violations of mainly these two Articles. When repeating this research, the conclusions reached will probably only be different at the moment the ACCC makes its decision in the Wind Farms case. This decision will provide a more comprehensive assessment of the problem.

The review of the case studies showed that the ACCC attaches particular importance to the effectiveness of public participation in decision-making processes and the ability of the public to engage in an effective review procedure through the court system. Although the effectiveness element was dealt with in the examination of the content of the Articles, the degree of importance was not yet clear. This might be a result from the fact that both Articles 6, and 9(2), contain many components that also require significant attention. Furthermore, it was expected that an answer would be given to whether a lack of public participation under Article 6 would cause a violation of Article 9(2), because this Article can in principle only be triggered by decisions under Article 6. This question has not been dealt with by the ACCC and thus it is not in line with the original expectations of the research. Nevertheless, the ACCC explains this discrepancy: it states that a case must first be brought before a court before it can consider whether there was an incorrect implementation of Article 9(2) on the basis of the exclusion of the public in a decision-making process.

The current research complements the existing literature regarding the implementation of the Aarhus Convention. However, it must be duly noted that this research focused exclusively on Articles 6 and 9(2) and that the main sources of information came from the UN. For this reason, this study is unable to encompass the manner in which scholars’ belief
that a correct implementation is achieved and thus, further research should be undertaken to explore whether the opinion of scholars is different from that of the ACCC.
Reference List

Books and Articles


Benjamin J. Richardson and Jona Razzague, ‘Public Participation in Environmental Decision-making’ in Benjamin J. Richardson and Stephen Wood (eds), Environmental Law for Sustainability, (Bloomsbury, pp. 165-194 2006).


Elena Petkova and Peter Veit, Environmental accountability beyond the nation-state: The implications of the Aarhus Convention (World Resources Institute 2000).


Lis Dhundale, Public Participation Compliance (The Danish Institute for Human Rights 2013).


‘The Dutch Government systematically excluded its citizens’ *Netherlands Association of People Living in the Vicinity of Windfarms* (30 June 2015) NLVOW.


**International Treaties and Conventions**


104

**Legislation of the EU**


**Legislation of the Netherlands**


Council of State Act 2009.


Nuclear Energy Act 1963.

**Other national legislation**

*Czech Republic (Case No. 2 As 1/2005–62)* (2 March 2005) Decision Supreme Administrative Court.

Sweden Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun* [2009] Judgement of the Court (Second Chamber)
United Kingdom Town and Country Planning Act 1968

United Nations documents


UN, ‘Guidance document on the Aarhus Convention Compliance Committee’ (UNEP).


UNHRC, ‘General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)” (1996) CCPR/C/21/Rev.1/Add.7.

Aarhus Convention documents

ACCC reports


Czech Republic, ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 October 2012.


Lithuania, ACCC/C/2006/16; ECE/MP.PP/C.1/2008/5/Add.6, 4 April 2008.

Communications


Netherlands Association of People Living in the Direct Vicinity of Wind Farms, ‘Communication to the Compliance Committee of the Aarhus Convention’, ACCC/C/2015/133 (9 November 2015).

Netherlands Association of People Living in the Direct Vicinity of Wind Farms, ‘Communication to the Compliance Committee of the Aarhus Convention’ (original communication), ACCC/C/2015/133 (30 June 2015).

The Netherlands, ‘Committee’s findings (advanced unedited version) ACCC/C/2014/104’, ACCC/C/2014/104.


Dutch reports and publications

C.B.F. Kuijpers on behalf of the Netherlands, ‘Implementation Report Aarhus Convention: The following report is submitted on behalf of the Netherlands in accordance with decision I/8’ (December 2013).

Edwin Koning on behalf of the Netherlands, ‘Implementation Report Aarhus Convention: The following report is submitted on behalf of the Netherlands in accordance with decision I/8’ (March 2011).

R.P. Lapperre on behalf of the Netherlands, ‘Implementation Report Aarhus Convention: The following report is submitted on behalf of the Netherlands in accordance with decision I/8’ (July 2018).


The Netherlands, ‘Wet van 30 september 2004 tot wijziging van de Wet milieubeheer, de Wet openbaarheid van bestuur en enige andere wetten’ (Staatsblad 2014/519).

MoP decisions

Decision I/7 Review of Compliance; ECE/MP.PP/2/Add.8 (2 April 2004).
Decision II/1 Genetically Modified Organisms; ECE/MP.PP/2005/2/Add.2 (20 June 2005).

Other


Letter from Ministry of Foreign Affairs of the Netherlands to Aarhus Convention Compliance Committee (3 July 2018).

Letter from Secretary of the Aarhus Convention Compliance Committee to the communicating State (14 April 2015).

Third meeting of the Meeting of the Parties, ECE/MP.PP/2008/5 (22 May 2008).

UNECE Aarhus Convention Secretariat, ‘Provided as input to the report on: The role of good governance in the promotion and protection of human rights’ (September 2012).

Websites


Appendices

Appendix 1

Article 6 of the Aarhus Convention
PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:
   (a) Shall apply the provisions of this article with respect to
decisions on whether to permit proposed activities listed in annex I;
(b) Shall, in accordance with its national law, also apply the
provisions of this article to decisions on proposed activities not listed in
annex I which may have a significant effect on the environment. To this end,
Parties shall determine whether such a proposed activity is subject to these
provisions; and
(c) May decide, on a case-by-case basis if so provided under national
law, not to apply the provisions of this article to proposed activities
serving national defence purposes, if that Party deems that such application
would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or
individually as appropriate, early in an environmental decision-making
procedure, and in an adequate, timely and effective manner, inter alia, of:
(a) The proposed activity and the application on which a decision will
be taken;
(b) The nature of possible decisions or the draft decision;
(c) The public authority responsible for making the decision;
(d) The envisaged procedure, including, as and when this information
   can be provided:
      (i) The commencement of the procedure;
      (ii) The opportunities for the public to participate;
      (iii) The time and venue of any envisaged public hearing;
      (iv) An indication of the public authority from which relevant
           information can be obtained and where the relevant
           information has been deposited for examination by the
           public;
      (v) An indication of the relevant public authority or any
          other official body to which comments or questions can be
          submitted and of the time schedule for transmittal of
          comments or questions; and
      (vi) An indication of what environmental information relevant
           to the proposed activity is available; and
   (e) The fact that the activity is subject to a national or
      transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames
for the different phases, allowing sufficient time for informing the public in
accordance with paragraph 2 above and for the public to prepare and
participate effectively during the environmental decision-making.
4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:
   (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
   (b) A description of the significant effects of the proposed activity on the environment;
   (c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
   (d) A non-technical summary of the above;
   (e) An outline of the main alternatives studied by the applicant; and
   (f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to
the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

**Appendix 2**

**Article 9(2) of the Aarhus Convention**

**ACCESS TO JUSTICE**

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest
or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

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 and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.