

**Statement of Observer Justice and Environment concerning
Communication ACCC/C/2019/163 (Austria)**

7 September, 2023

1. Justice and Environment, a network composed of 15 European NGOs, submits the present statement for the Committee's consideration in advance of the hearing to discuss the substance of communication ACCC/C/2019/163 (Austria) (C163).
2. The communication concerns the construction of underground transportation infrastructure in the city of Feldkirch, located in the province of Vorarlberg (*Stadttunnel Feldkirch*, the Project).¹ The Project falls under point 9(h) of annex 1 to the Austrian EIA Act² and thus is a "column 3" project for which an EIA in the "simplified form" was required.³ It is accordingly not in dispute that article 6 of the Convention is engaged.
3. It is not clear from reading Austria's response whether or not it acknowledges that the communicant is a member of the public concerned. We submit at any event that it would be difficult to deny the communicant this status *inter alia* because of the fact that the communicant is composed of individuals residing in municipalities that are located directly adjacent to the municipality where the Project is to be located, and Austria could not exclude potential negative impacts and thus undertook a transboundary assessment.⁴ Austria appears rather to rely on three arguments in support of its position that it has not violated article 3(9) in conjunction with article 6, and 9(2) of the Convention.
4. First, Austria submits it could not violate the rights of the public concerned from Liechtenstein as that country is not a Party to the Convention.⁵ Second, Austria claims it provides sufficient rights for the public concerned through its provisions under the Austrian EIA Act concerning the rights of individually affected persons, such as neighbors, and NGOs, both of which can be foreign.⁶ Third, Austria makes a number of statements regarding citizen initiatives as an institution, its place within national, EU, and international frameworks, yet submits that there is no mechanism by which to verify that the foreign public concerned has formed such an association.⁷ Throughout, Austria

¹ Communication, p. 1, Party's response, p. 1.

² Annex 5 to the communication, p. 1. Point 9(h) of annex 1 to the EIA Act reads: "Expansion measures of other types on expressways, new construction of other roads or their sections with a continuous length of at least 500 m, in each case if an area worthy of protection of category B or D is touched and an annual average daily traffic volume (JDTV) of at least 2,000 motor vehicles in one forecast period of five years is to be expected." Protection categories B and D are listed in annex 2 of the Austrian EIA Act and correspond to protected alpine areas and those areas affected by air pollution, respectively.

³ See communication, para. 7, and Party's response, p. 9. Simplified EIA procedures differ from normal EIA procedures in that simplified procedures do not involve the creation of an environmental assessment report pursuant to article 12 of the Austrian EIA Act, but only a summary of the environmental impacts under article 12(a) of that Act. Simplified procedures furthermore historically involve limitations on public participation rights and the ability to bring a legal appeal under article 19(2) of the Austrian EIA Act, which is discussed below.

⁴ Communication, paras. 5 and 11, Parties response, pp. 7-8.

⁵ Party's response, p. 2.

⁶ Party's response, pp. 4-7

⁷ Party's statement on admissibility, pp. 1-2, Parties response, pp. 3-5, and 10.

suggests it discharged its duties to the public concerned in the present case, including through the transboundary procedure under the Espoo Convention.⁸ We address these points below.

I. Obligations to the public (concerned) in a non-Party to the Convention

5. Contrary to Austria's contention, the obligations Austria assumed as a Party to the Convention towards the public (concerned) are not dependent on obligations stemming from other international instruments, including the Espoo Convention, a point which the Committee has made clear in its findings on communication ACCC/C/2012/71 (Czechia) (C71). Moreover, even where a Party of origin and affected Party share joint responsibility for ensuring public participation in the territory of the affected Party (as under the Espoo Convention), or even where an affected Party has sole responsibility for this, the obligation to ensure that the requirements of article 6 always rests with the Party of origin.⁹
6. Moreover, as the Committee clarified in its findings on communication ACCC/C/2013/91 (UK), the definitions of the public and public concerned in article 2(4) and (5), respectively, "must be seen in the context of the requirements set out in article 3, paragraph 9, of the Convention, which requires that the public shall have access to information, have the possibility to participate in decision-making, and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile [...] the scope of obligations related to public participation in decision-making with respect to proposed activities subject to article 6 of the Aarhus Convention is not limited to the public only in the Party concerned...[In] cases where the area potentially affected by a proposed activity crosses an international border, members of the public in the neighbouring country will be members of the "public concerned" for the purposes of article 6."¹⁰
7. Crucial to the present case is the fact that, Parties "to the Convention have obligations under article 2(5) and article 6 of the Convention to ensure the effective participation of the public 'affected or likely to be affected by, or having an interest in, the environmental decision-making,' irrespective of whether those persons reside in an Aarhus signatory state or not [...] article 1 of the Convention expressly convey the rights of the Convention to every person, not every citizen of a party to the Convention. Likewise, article 3(9) of the Convention makes clear that the public has the right to participate in decision-making without discrimination as to citizenship, nationality or domicile. Moreover, the right to participate applies to the public concerned from affected countries that are not Party to either the Aarhus Convention or Espoo Convention is explicitly stated in paragraph 23 of the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters."¹¹

⁸ Party's response, pp. 7-8.

⁹⁹ ECE/MP/PP/C.1/2017/3, para. 67.

¹⁰ ECE/MP/PP/C.1/2017/14, paras. 68-69

¹¹ Committee's first progress review concerning decision VI/8k (UK), para. 114. See also Committee's report concerning decision VI/8k (UK), ECE/MP/2021/60, para. 48.

8. In light of the above, Austria's argument that it owes no duties to the public (concerned) in Liechtenstein due to the fact that the latter is not a Party to the Convention must fail. The communicant is a member of the public affected or likely to be affected, whose members reside directly across the border between Austria and Liechtenstein in an area where negative impacts can occur. Accordingly, it must be asked whether the means by which Austria ensures rights to the public (concerned) in Liechtenstein are adequate, and the communicant was afforded its rights.

II. The rights granted to foreign persons and organizations

9. To be clear at the outset we do not agree with Austria's suggestion that, because it affords rights to foreign persons and foreign organizations, this means that it fulfilled its obligations to the communicant and members of the public (concerned) like it.¹² Even were Austria to perfectly fulfill its obligations with respect to foreign persons and foreign organizations – a point we dispute – this would satisfy the requirements concerning but two subsets, and not the entire scope of, the public (concerned).
10. However, for the sake of completeness and to address any questions as to why the communicant could not avail itself of either of the two ways in which Austria claims to provide rights to the foreign public (concerned), or could not do so adequately, we provide the below. We stress, however, that we are not seeking to expand the scope of the communication. Rather, our aim is to provide background information that may assist the Committee in its deliberations.

a. Foreign persons

11. It is correct that article 19(1) of the Austrian EIA Act provides party standing in EIA procedures. Neighbors are specifically:

“People who are endangered or bothered by the construction, operation or existence of the project, or whose rights *in rem* could be endangered at home or abroad, as well as the owners of facilities in which regularly stop persons temporarily, with regard to the protection of these persons; Neighbors are not people who are temporarily in the vicinity of the project and who do not have rights *in rem*; with regard to neighbors abroad, the principle of reciprocity applies to states that are not contracting parties to the Agreement on the European Economic Area.”

12. This is similar to many provisions concerning the rights of individuals in other jurisdictions that, like Austria, follow a strict impairment of rights legal regime. From this flow two significant points.
13. First, an individual seeking to participate in an EIA procedure and bring any legal challenge thereafter must prove that the project would impair their subjective rights. To fail to do so means

¹² Party's response, p. 7.

that individual would lack standing in the public participation procedure and before a court. As the communicant is composed of residents located in an area directly adjacent to the project,¹³ we presume they could show they are people who would be endangered or bothered by the construction, operation or existence of the project, or whose rights *in rem* could be endangered. The main standing hurdle in article 19(1) of the EIA Act is generally the “temporarily” criterion, about which the Committee voiced some concerns in its findings on communication ACCC/C/2010/48 (Austria).¹⁴ However, according to jurisprudence, this criterion is examined regardless of the legal grounds upon which the person is situated there.¹⁵ Thus tenants can attain standing¹⁶ provided that the stay is “not simply temporary”.¹⁷ Whilst there may be compliance issues with these provisions, the communicant, being residents, would presumably not have difficulties with the “temporarily criterion”. Nonetheless, they would have to actively prove they satisfy the criteria of being a neighbor.

14. The second issue would, by contrast, pose a significant problem in the present case, in that the scope of an individual’s rights, and thus the scope of arguments it can put forth, are limited to subjective rights.¹⁸ This means for example that an owner of a property bordering a project can intervene in an EIA permitting procedure and bring a legal appeal due to potential noise impacts on this piece of property, but cannot intervene or appeal on the basis of potential impacts on regional flora or fauna, or environmental interests in general, which is an objective right that individuals do not possess. These scope restrictions for individuals were alleged to fall short of the Convention’s requirements in communication ACCC/C/2010/48 (Austria). In its findings, the Committee considered those allegations to not be sufficiently substantiated, by way of jurisprudence, for example, but expressed concerns that the scope might not allow for challenges as to procedural and substantive legality.¹⁹ We are very much of the view that these scope restrictions fall short of what the Convention requires. We are not attacking this, however, as we view the communication does not raise this issue as such. Nonetheless, we highlight that this was a major factor driving why status as a citizen initiative was beneficial, and thus was sought, and why the Committee should bear this in mind.
15. By contrast, citizen initiatives do not have to prove their standing by alleging an infringement of their subjective rights. Rather, their affectedness is presumed as a matter of law provided that they

¹³ See the illustrative map on p. 2 of the communication.

¹⁴ ECE/MP/PP/C.1/2012/4, paras. 60-66.

¹⁵ VwGH 20.10.1999, ZI 99/04/0016.

¹⁶ VwGH Slg 4007A, 5154A.

¹⁷ US 16. 02. 2009, 3B/2005/19-72 NÖ 380 kV-Leitung Etzersdorf-Theiß II

¹⁸ Wendl, in Stolzlechner/Wendl/Bergthaler (editors), *Die gewerbliche Betriebsanlage*3 (2008), recital 249

¹⁹ ECE/MP/PP/C.1/2012/4, paras. 60-66.

fulfill the criteria in article 19(4) of the Austrian EIA Act.²⁰ And crucially, citizen initiatives in Austria have the right to enforce all environmental provisions, and thus the scope of their rights, and arguments they can put forth, is considerably broader.²¹ This is a huge advantage over standing as an individual under article 19(1) of the Austrian EIA Act and must be seen on top other many factors, such as costs, capacity, procedural economy, safety, which are discussed in detail below.

b. Foreign NGOs

16. As regards foreign NGOs, Austria correctly points out article 19(11) of the EIA Act. We consider, however, that Austria's description of that provision and thus its scope, is incomplete.²² This provision reads in full:

“An environmental organization from another State can exercise the rights under paragraph 10²³ if a notification of another State pursuant to section 10, para, 1, point 1 has occurred²⁴ and the environmental organization from another State could participate in the procedures for the EIA and permitting, if the project would be realized in that State.”

17. There are multiple points to unpack from in provision. We note first it is clear that the Austrian system makes the rights of foreign NGOs dependent on Espoo procedures and the willingness of Austria to notify potential affected States. In light of the arguments in paras. 5-8 above, and the Committee's jurisprudence cited therein, we submit this restriction is incompatible with the Convention. Second, it makes such rights conditional, limited to those NGOs in such affected States which meet their own domestic requirements, and there is no guarantee, obviously, that those requirements are sufficiently broad to satisfy the Convention.

18. In this regard, we would like to point out that the Liechtenstein EIA Law, specifically its article 5(c) translates “the public” as one or more natural or legal persons or their associations, organizations or groups. In this regard it repeats virtually verbatim article 2(4) of the Aarhus Convention, merely omitting “in accordance with national legislation or practice”. Its article 17 governs public participation, and specifically article 17(h) gives “every person” the right to provide comments on the environmental report within an appropriate period of time. Moreover, other provisions concerning participation²⁵ use the term “the public” without any further restriction, implying this

²⁰ Communication, para. 12.

²¹ Ennöckl, Daniel/Raschauer Nicolas (2006): Umweltverträglichkeitsprüfungsgesetz, Kommentar, 2. Auflage Springer Wien New York

²² Party's response, p. 6.

²³ This paragraph accords environmental organizations party standing in the article 6 permitting procedures and the ability to bring legal challenges.

²⁴ Section 10 of the Austrian EIA Act is Austria's implementation of article 7 of the EIA Directive, relating essentially to the Espoo Conventions and duties in the transboundary context.

²⁵ Such as those concerning notification, consideration of the concerns and opinions submitted during the public participation procedure, etc.

corresponds directly to what is contained in article 5(c) of the Act. Moreover, unlike in Austria, there does not appear to be a specific provision concerning party standing in the article 6 context in the Liechtenstein EIA Act. Given this, it seems clear NGOs would be able to submit comments and enjoy other participatory rights, but in doing so would have no special privileges beyond those accorded to other members of the public. Accordingly, it seems an absurd proposition to expect from members of the public such as the communicant that it organize itself as an NGO in Liechtenstein for the purpose a project such as the one at issue, were it to be planned on Liechtenstein's territory. It is doubtful that the communicant could achieve this in the time allotted for comments, and there would be no advantage in being an NGO.

19. Similarly, there would be no reason for the communicant to organize itself in Liechtenstein as an NGO if the Project were to be realized in Liechtenstein for purposes of bringing a legal challenge within the meaning of article 9(2) of the Convention. Pursuant to article 32(1)(c) of the Liechtenstein EIA Act, among other requirements, only NGOs that have existed for five years prior to the EIA procedure be entitled to go to court, and have had that entitlement independent of the procedure in question. At the same time, article 32(1)(d) "Persons which are affected or likely to be affected by, or have an interest in, the EIA procedure" are also entitled to go to court, and can apply for this right easily, submitting a short statement as to their reasons, and do so at different times in the procedure. Thus again, there is no reason to set up an NGO where the article 9(2) standing rights are so broad in Liechtenstein for members of the public concerned. Accordingly, it is unreasonable, if not impossible, to have expected the communicant to found an NGO in Liechtenstein so that, presuming all requirements were met, it could exercise its Aarhus rights using article 19(11) of the EIA Act.

20. For the sake of completeness we note that, whilst theoretically a foreign NGO operating within the territory of Austria could under some circumstances qualify for recognition directly under article 19(7) of the Austrian EIA Act, as Austria suggests,²⁶ this avenue would be entirely blocked for the communicant due to the criterion that the NGO in question must have been in existence for three years, an impossible hurdle for an ad hoc group like the communicant needing to timely intervene in an article 6 procedure. This defies the wording and very purpose of article 6.²⁷

21. The role and status of citizen initiatives

22. Citizen initiatives have a long history in Austria and were already regulated and given full party rights for all procedures in the original Austrian EIA Act dating back to 1993, that is, prior to Austria's accession to the EU and prior to the Convention's adoption.²⁸ In the course of the

²⁶ Party's response, p. 7.

²⁷ Jendroska, J., 'Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas', *Journal for European Environmental & Planning Law*, 2020 (17).

²⁸ Communication, annex 4, p. 3.

comprehensive amendment of the EIA Act in 2000 a distinction between normal and simplified EIA procedures (see para. 2 above) was introduced, and the rights of citizen initiatives were reduced. From then on, citizen initiatives only had party standing as to normal procedures. As to simplified procedures, they were only accorded the status of “participants.” Participants only have the right to inspect the administrative file.²⁹ They do not have the same rights to submit proper comments (*Einwendungen*) as parties to the procedure do, and those limited comments they can provide are given less weight. They have, moreover, no right to challenge the decision-making in court. As the first instance authority for the Project observed, the national legislator thus granted citizen’s initiatives a special procedural status that differs from that of “the public concerned” as implemented and regulated in the Austrian legal system.³⁰

23. Yet, as the authority and the Austrian Supreme Administrative Court confirmed in case Ro 201510610008-7,³¹ both normal and simplified procedures are “environmental decision-making” which must fulfill the requirements of the EIA Directive (and article 6 and 9(2) of the Convention).³² Moreover, citizen initiatives are members of the public, specifically “groups” within the meaning of the second clause of article 2(4) of the Convention. By virtue of the fact that they are a collective group of individuals who reside in the siting municipalities or those directly neighboring, meaning that a close geographical relationship is established and affectedness or likely affectedness by the project’s permit is to be affirmed, they are also members of the public concerned.³³ Accordingly, a “properly formed” citizen’s initiative must be accorded full party rights in the article 6 procedure, and concomitant article 9(2) rights. To fail to do so would, as the authority suggested, be an “incomplete implementation of the Convention.”³⁴ In other words, it would fail to comply with article 6 and 9(2) of the Convention.

24. In light of the above, we find Austria’s observation that “the institution of citizen groups is neither mentioned in the Aarhus Convention nor in the Espoo Convention nor at the European level,” misplaced. Yes, it is true that this particular institution is a national construct, but if this is intended to indicate that to reduce the rights of citizen initiatives or even abolish this institution entirely would not run afoul of EU or international law is dangerously mistaken (and contrary to what the Supreme Court said in case Ro 201510610008-7). Failing to accord standing to ad-hoc groups of individuals coming together to share their concerns about an article 6 procedure and, where needed, bring a challenge as to both procedure and substance, falls short of the Convention’s

²⁹ Communicant’s update of 14.11.2018, annex, p. 9, referring to the then relevant provision of the Austrian EIA Act, which has since been removed following the Supreme Administrative Court’s ruling.

³⁰ Communication, annex 4, p. 3.

³¹ Communicant’s update of 14.11.2018, annex.

³² Communication, annex 4, p. 6, communicant’s update of 14.11.2018, annex, pp.13-14.

³³ Communication, annex 4, pp. 5-6, communicant’s update of 14.11.2018, annex, pp.15-16.

³⁴ Communication, annex 4, p. 3.

requirements. Thus, “citizen groups” may be the modality Austria has chosen to (partially)³⁵ fulfill its obligations towards such ad-hoc groups, but the fact that EU legislation and international instruments fail to use this specific term in no way changes the ultimate nature of these obligations.

25. As Austria itself observes, citizen groups help build a common platform for individuals to argue their interests in relation to a specific project approval [...] bundling similar interests of individuals concerned by a project in order to allow the local population to submit their comments in an aggregated way to the competent authority. Especially with respect to major projects or projects of large scale their participation may well ensure the acceptance of project approvals.³⁶ It is thus a special institution in the interest of procedural economy.³⁷ All of this is true, and other advantages can be added to this list. Individual members of citizen initiatives can pool their financial and other resources in order to make more effective interventions, they can act more safely, with diminished fear of reprisals for their engagement in what can often be controversial projects, and they can ensure that environmental laws are properly enforced when, for reasons of a lack of capacity, or undue political pressure, established NGOs fail to act.

26. Austria is in no way unique. Many groups in other countries, be they citizen initiatives in Germany,³⁸ partnerships in Romania,³⁹ unregistered environmental associations in Italy,⁴⁰ or unincorporated environmental NGOs representing residents in Ireland⁴¹ come together as ad hoc groups to exercise article 6 and 9(2) rights. They do so for the very reasons sketched out in the paragraph above. Crucially, all Parties to the Convention must find appropriate ways to fulfil the same obligations, despite the fact that they come from a vast range of jurisdictions, each with their own legal histories and specificities.

³⁵ The author is not of the opinion that article 19(4) of the Austrian EIA Act is adequate for a number of reasons, but these are not discussed in detail as they are outside the scope of the present communication.

³⁶ Party’s Response, pp. 3-4

³⁷ Party’s Response, p. 4.

³⁸ Such as the *Aarhus Konvention Initiative*, which is very active in environmental cases at the national level and a communicant in cases ACCC/C/2012/71 (Czechia), ACCC/C/2016/143 (Czechia), and ACCC/C/2020/178 (Germany).

³⁹ See the Opinion of AG Medina in case C-252/22

⁴⁰ ACCC/C/2023/200 (Italy)

⁴¹ See Dublins 8 residents association, which is currently on appeal to the CJEU: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CN0613>

27. Nor is the Committee alone in having to grapple with the rights of such organizations. The CJEU has been asked to weigh in about such rights, and certainly more questions will come.⁴² The Committee will surely have to confront more questions concerning the rights of adhoc groups as well, and we invite the Committee to take a forward-looking approach that does not unduly close off options due to the narrow scope of the present communication.

Application in the present case

28. The core issue in the present communication is this: Did Austria violate the communicant's rights under article 6 and 9(2) of the Convention, either as stand-alone provisions, and/or in conjunction with its article 3(9). We submit the answer is "yes."

29. Following the Committee's approach in case C71⁴³ we first turn to the article 6 and 9(2) allegations,⁴⁴ since, without assessing the extent to which the communicant in Liechtenstein had the possibility to effectively participate in the decision-making and have access to justice, it is not possible to properly assess whether discrimination has occurred or not.

Article 2(5)

30. As noted in para. 3, it is not clear that Austria disputes that the communicant is a member of the public (concerned). The first instance authority notably did consider that the communicant could be affected by the environmentally relevant decision-making procedure for the Project and did grant the communicant full party rights accordingly.⁴⁵ Both court instances did not truly address the issue. The communicant would appear to be a member of the public, namely a group in accordance with national legislation and practice, presuming the voting requirement, the one criterion the communicant was unable to fulfill by virtue of being located in Liechtenstein, should be stricken. At any event, considering the description of the Project's scale, and the map provided,⁴⁶ it is hard to imagine that the communicant, which is all composed of local residents, would not be affected, or likely to be affected, by the Project and thus, like its Austrian citizen initiative counterpart, is a member of the public concerned. This affectedness was never in dispute.⁴⁷

Article 6

⁴² Sandymount and residents association, available here: https://www.courts.ie/acc/alfresco/4bb24962-9d63-492b-a588-a37cf1915b71/2013_IEHC_542_1.pdf/pdf#view=fitH; and the Dublin case: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CN0613>

⁴³ See para. 61.

⁴⁴ Following the Committee's practice, we are not independently examining article 2(4) and (5) as violations as such, but rather as a threshold issue to establish whether or not the communicant was entitled to article 6 and 9 rights. The article 3(1) allegations are briefly addressed below.

⁴⁵ Communication, annex 4, pp. 8-9.

⁴⁶ Communication, pp. 1-2.

⁴⁷ Communication, para. 15.

31. It bears repeating that the authority in the first instance thought that the status of a participant in Austria fell below what article 6 requires in that it insufficiently guaranteed the rights of the public concerned, and the Supreme Administrative Court agreed insofar as domestic members of the public concerned form as Austrian citizen initiatives are concerned (see para. 23 above). Yet what happened in the satellite litigation concerning the communicant's status is that it was stripped of all rights entirely. It was no longer even a participant. Rather, it was rendered essentially a non-entity for purposes of the ongoing and re-opened EIA procedure⁴⁸ because the courts determined that, having failed to evidence signatures of those with voting rights in the Austrian municipality in which the Project was to be located or in an adjacent Austrian municipality, no citizen's initiative was formed at all.⁴⁹ This means that the communicant could not exercise *any* article 6 rights in the ongoing EIA procedure, nor were any further means to obtain these rights in court.⁵⁰ The EIA procedure meanwhile concluded in 2019 and, indeed, in light of the judicial rulings at issue in the present communication, the communicant was denied critical article 6 rights, a situation which stands in direct contrast to its Austrian counterpart.
32. For the sake of completeness we would also like to clarify that it is no answer to the complaints alleged in this communication, that an Austrian citizen initiative submitted comments that were similar, or the same to those submitted by the communicant. For the reasons elaborated above and in particular as to article 6(7) in paras. 36-47 below, this is not the same as submitting comments that will be effective within an article 6 procedure in Austria. Austria also mentions the fact that Liechtenstein NGOs took part in the EIA procedure. This, too, is irrelevant. That a subset of the public concerned took part in the procedure has no bearing whatever on the fact that the communicant, also a member of the public concerned, was denied its rights to participate and enjoy concomitant rights to appeal.

Article 6(4)

33. As the Committee has emphasized, the obligation to ensure opportunities for the public to participate effectively is the fundamental standard against which all aspects of a public participation procedure under the Convention should be measured.⁵¹
34. We submit that this fundamental standard has been violated in the present case. Whilst the communicant specifically alleged violations of this provision, together with article 6(7) of the Convention, the cross-cutting standard of article 6(4) of the Convention cannot be ignored.

⁴⁸ Party's response, p. 10.

⁴⁹ Party's response, p.

⁵⁰ Communication, para. 27.

⁵¹ ACCC/A/2020/2 (Kazakhstan).

35. The Party concerned submits that the communicant has been afforded its article 6 rights. We disagree. Austria's support for this assertion is vague and unclear, based primarily on the bare statement that "all comments by the public presented in the oral hearing, also comments by the citizens group "mobil ohnr Stadttunnel", were taken into account by the authorities in its EIA decision. Also the concerns raised by the Communicant were similar to those raised by the Austrian citizens group established according to the EIA Act and named "statt Tunnel."⁵²

Article 6(7)

36. The Austrian courts' ruling that the communicant had failed to properly constitute a citizen's initiative in accordance with article 19(4) of the Austrian EIA Act meant the communicant could not submit comments in a manner that would satisfy article 6(7).

37. It is true that the communicant submitted some comments (a *Stellungnahme*) attached to the list of signatures of residents in Liechtenstein with voting rights in adjacent, affected municipalities.⁵³ It did so because, unlike for forming citizen initiatives in Liechtenstein, this is a requirement for the proper formation of a citizen initiative in accordance with Austrian law, specifically article 19(4) of its EIA Act. However, these "comments" are broad, and within the Austrian legal system merely serve the purpose to demonstrate to the authorities that a group of people have chosen to come together due to certain common concerns and achieve a status in the article 6 procedure. They are not the same as proper comments submitted within the course of the EIA procedure (*Einwendungen*), within the meaning of article 6(7) of the Convention. Indeed, even if a legitimate citizen's initiative is formed and *Einwendungen* are not provided within the deadline for comments, the status obtained through the formation of the citizen's initiative is lost.⁵⁴

38. Bearing in mind the above, what happened in the present case is the following:

39. First, the public authority could not accept and consider the comments (*Stellungnahme*) the communicant submitted to form a citizen's initiative as a matter of law in the ongoing (and re-opened) EIA procedure, which subsequently concluded in 2019. Second, the communicant was barred from submitting further comments entirely, and specifically those which would not only be aimed at attaining status in the EIA procedure, but also elaborated comments within the meaning of article 6(7). Following the judicial rulings, in particular that of the Supreme Administrative Court, the communicant, as a non-entity could submit no comments, including at hearings. The Party concerned's assertion that „all comments by the public presented in the oral hearing, also the coments by [the] communicant, were taken into account by the authority in its EIA decision,⁵⁵ is accordingly misleading. This ignores the fact that the courts later not only voided the

⁵² Party's response, p. 7.

⁵³ Communication, annex 2, Party's response, p. 8.

⁵⁴ ÖKOBÜRO: „Voraussetzungen für die Parteistellung von Bürgerinitiativen im UVP-Verfahren“, pp. 6-7.

⁵⁵ Party's response, p. 7.

communicant's party status, but the communicant as an entity at all. This meant that no comments previously submitted by the communicant could be considered by authorities; nor could any future comments be submitted or considered, in clear violation of article 6(7) of the Convention.

40. As a final remark we acknowledge that the communicant specifically invokes article 6(7) of the Convention, yet fails to mention article 6(8) in its communication. We consider that this omission is attributable to the communicant's seeing through the lens of the particular legal system in Austria, which couples the right to make comments with the duty for these to be properly considered. We invite the Committee to, in accordance with its long-standing practice, not be bound by the specific pleadings by communicants, but rather examine the issues raised within the scope of the communication itself so that it can address the heart of the matter.

41. Thus, in the present case, and in all cases involving Austria's compliance, restrictions on who can submit comments directly entail restrictions on if and to what extent such comments are taken into account, and in particular whether they "weigh more" than other comments. Here the Committee has emphasized that "a system whereby only the comments of certain members of the public are duly taken into account, while others are disregarded or considered to 'count less' by the decision-making authorities, would not be consistent with the Convention."⁵⁶ We submit that the present case indeed exemplifies precisely the system the Committee has already identified as noncompliant.

Article 9(2)

42. By the court decisions in the present case and specifically the Supreme Administrative Court's ruling, the communicant was denied standing to challenge either the substantive or procedural legality of the decision to permit the Project, which is article 6 decision-making. This is not disputed. As described above, the communicant is a member of the public concerned, and no other failure to meet the requirements of article 9(2) have been put forth, other than that the communicant failed to constitute a citizen's initiative under Austrian law by virtue of the fact that its members, affected residents in adjacent municipalities, do not have voting rights in Austria. This is not disputed.

43. We submit this constitutes a clear violation of article 9(2) of the Convention.

Article 3(9)

44. We consider the above already entails violations of article 6 and 9(2), even without reference to article 3(9) of the Convention. That being said, the present case exemplifies the problems that discriminatory, arbitrary and absurd formalities can cause. Specifically we note that the rights of the Austrian citizen initiative was acknowledged and confirmed, which includes the rights to:

⁵⁶ C-96, para. 97, and references cited therein. For example C, 76 Bulgaria, Czech report....

- Enjoy effective participation within the meaning of article 6(4)
- Make comments (*Einwendungen*) in article 6 procedures, that would furthermore be considered, or in other terms: accorded “weight” in the procedure, in accordance with article 6(7)
- Bring a legal appeal as to substantive or procedural failings with respect to the article 6 permitting, in accordance with article 9(2).

45. By contrast precisely these rights were denied to the communicant. This is arbitrary and absurd, and fails to respect the clear and obvious fact that the communicant is a member of the affected, or likely to be affected, public concerned and as such, should enjoy precisely the same rights as its Austrian counterparts.

III. Conclusion and remarks relevant to recommendations

46. We consider the above has established that Austria, by failing to accord full article 6 participatory rights and the right to appeal article 6 decision-making to foreign members of the public concerned, fails to comply with its obligations under article 6 and 9(2) of the Convention, in conjunction with article 3(9). Specifically:

- a. We submit that the Party concerned fails to comply with the article 6(4) in conjunction with article 3(9) of the Convention by denying the exercise of effective public participation of the foreign public (concerned);
- b. We submit further that the Party concerned fails to comply with article 6(7) in conjunction with article 3(9) of the Convention by denying the opportunity for the foreign public (concerned) to properly submit comments;
- c. We also submit that the Party concerned fails to comply with article 9(2) in conjunction with article 3(9) of the Convention by denying the standing of foreign members of the public concerned to appeal decisions affecting them as to procedure or substance.

47. We underscore that the Committee’s findings, and thus its recommendations, must crucially not be understood merely through the lens of Austrian law. It would be a grave miscarriage of justice and waste years of litigation, were the Committee to base any findings of noncompliance due to the sheer fact that Liechtenstein members of the public concerned were treated differently than the domestic (Austrian) public concerned. The simple fact is: The communicant is a member of the public concerned, despite borders. Was it discriminated in ways that impinged upon its rights under the Convention? Yes. But so were any number of other domestic members of the public.

48. As the law (article 19(4) of the Austrian EIA Act) stands, it discriminates not only against foreign members of the public concerned, but also domestic members of the public concerned. In Vienna alone, approximately one third of the public who reside there and are registered there, are not entitled to vote and thus entirely shut out of any rights under this provision. Despite this it should be beyond all dispute that these people living in Vienna, despite their voting privileges or lack thereof, qualify as the public (concerned) as regards certain projects which could affect them.

49. We consider moreover the limitation in article 19(4) that only those (with voting rights) in municipalities where the project is to be realized, or in an adjacent municipality is problematic under the Convention. At any event we vigorously dispute Austria's suggestion that to "check" with foreign authorities would constitute an undue burden.⁵⁷ Indeed in the present case the Liechtenstein authority also provided evidence that, in accordance with law and practice in Liechtenstein, the communicant qualified as a member of the public concerned and would be accorded full rights, including the right to bring a legal challenge within the meaning of article 9(2) of the Convention. It is common practice throughout the region that people, regardless of their citizenship, register in the areas in which they live. It is also common practice that countries share this information amongst one another. It is accordingly a non-starter to suggest that it is in some way difficult or untenable to inquire or otherwise acquire such information. The present case, in which the Liechtenstein authorities were most helpful in clarifying to their Austrian counterparts that the communicant would enjoy both article 6 and 9(2) rights, merely confirms this.
50. Finally, in light of the above we wish to repeat that, were Austria to "solve" its problem discriminating against foreign citizen initiatives by abolishing this institution entirely, this would be a grave breach of Austrian, EU, and international law. There is no "solution" there and any litigation surrounding this would be a waste of time. Austria fails to adequately provide article 6 and 9(2) rights to the public concerned which chooses to come together as ad hoc groups. Full stop. The foreign public concerned is merely a part of this. By reducing the rights of the public concerned, be they foreign or domestic, Austria only moves further away from complying with the Convention; here in particular article 6 and 9(2) of the Convention.
51. A meaningful step towards implementing such recommendations would be to amend article 19(4) of the Austrian EIA Act as follows:
- (4) Eine Stellungnahme gemäß § 9 Abs. 5 kann durch Eintragung in eine Unterschriftenliste unterstützt werden, wobei Name, Anschrift und Geburtsdatum anzugeben und die datierte Unterschrift beizufügen ist. Die Unterschriftenliste ist gleichzeitig mit der Stellungnahme einzubringen. Wurde eine Stellungnahme von mindestens 200 Personen, die zum Zeitpunkt der Unterstützung ~~in der Standortgemeinde oder in einer an diese unmittelbar angrenzenden Gemeinde für Gemeinderatswahlen wahlberechtigt waren in dem betroffenen Gebiet oder in einem Gebiet wo mögliche negative Einwirkungen möglich sind, ihren Wohnsitz haben, oder nicht bloß vorübergehend in dem betroffenen Gebiet sind,~~ unterstützt, dann nimmt diese Personengruppe (Bürgerinitiative) am Verfahren zur Erteilung der Genehmigung für das Vorhaben und nach § 20 als Partei teil.
 - 4) A statement in accordance with Section 9 Paragraph 5 can be supported by entry in a signature list, whereby the name, address and date of birth must be stated and the dated

⁵⁷ Party's response, pp. 3-4.

signature must be attached. The list of signatures must be submitted at the same time as the statement. Was there a statement from at least 200 people who, at the time of support, ~~were eligible to vote for local council elections in the location municipality or in a municipality immediately adjacent to it,~~ had their registered residence in the affected area or in an area where possible negative impacts are possible, or not just are temporarily in the affected area, then this group of people (citizens' initiative) takes part in the procedure for granting approval for the project and in accordance with Section 20 as a party.