Comments of the Slovak republic as the Party concerned to communicant response of 1 December 2014 (communication ACCC/C/2013/89/Slovakia)

1. The meaning of the ruling of the Slovak Supreme Court of 27 June 2013 with regard to the allegations of non-compliance made in communication

The communicant Ökobüro states that continuation of the Mochovce Nuclear Power Plant Units 3&4 (MO34) construction proves insufficient regulation by the Slovak legislation. However, it is not possible to identify the result desired by the plaintiffs (suspension of the MO34 construction) with effective legal framework and access to justice. If an effective and binding decision is issued it is not possible to prevent a proceeding party, who is in a good faith, from exercising of its rights if a public interest is not endangered or if a risk of a major damage to the other party does not exist. However, such other party is entitled to apply for cancellation of the decision permitting the activity and even a postponement of enforceability of the decision issued by an administrative authority.

The Supreme Court of the Slovak Republic (hereinafter referred to as "the Supreme Court") provided an effective judicial protection by cancellation of the decision of the Nuclear Regulatory Authority of the Slovak Republic (hereinafter referred to as "NRA SR") in the appellate proceedings, and ordered to repeat administrative proceedings and respect a position of Greenpeace Slovensko as a party to the proceeding as well as rights of the general public.

Concerning the opinion of the Supreme Court that an environmental impact assessment (EIA) has to be made before issuance of an administrative decision, as mentioned even in responses of the Slovak Republic, the environmental impact assessment procedure was made in 2009 to 2010. The communicant Ökobüro neglects this fact and insists on its assertion that the EIA should be done. However, it is evident that the EIA was performed and NRA SR took the final EIA statement into consideration at making a decision in the newly opened appeal proceedings. Thus, the sentence of the Supreme Court of the Slovak Republic was fulfilled in the entire scope, including observation of the legal opinion of the Supreme Court.

By exclusion of a suspensory effect of the appeal of Greenpeace Slovensko, NRA SR applied the provision of article 55 paragraph 2 of Act No. 71/1967 Coll. on Administrative Proceedings (Administrative Procedure Act) for protection of a party to the proceedings (protection of rights acquired in good faith and prevention of an irreparable loss that might occur to the party to the proceedings) as well as protection of an compelling general interest. The NRA SR decision was not arbitrary but based on facts proving that the suspension of the construction might endanger the general interest and the interest of the party to the proceedings. It cannot be in any case evaluated as ineffective execution of the Supreme Court decision. The institute of exclusion of the suspensory effect is applicable for any administration proceedings in the Slovak Republic the course of which is regulated by the Administrative Procedure Act, and therefore it is not considered a special regulation for licensing of construction or operation of nuclear installations.

We protest against misrepresentation of facts in the Ökobüro response. We emphasise that Greenpeace Slovensko as the plaintiff did not submit a single motion for suspension of enforceability of the NRA SR decision during the entire proceedings before Slovak courts.

2. Right of the public to participate in proceedings

In general, we would like to point out that neither Ökobüro nor Greenpeace Slovensko tried to participate in the proceedings conducted according to the Atomic Act.

The assertion that the provision of article 14 paragraph 1 of the Administrative Procedure Act is insufficient is disproved by the fact that in the newly opened appeal proceedings according to Act No. 50/1976 Coll. (Building Act) before NRA SR the communicant Greenpeace Slovensko utilised its right to be a party to the proceedings according to article 14 paragraph 1 of the Administrative Procedure Act, and NRA SR accepted its participation as well as participation of other natural persons and legal entities.

The Slovak Republic insists on the fact that the existing interpretation of the provision of article 14 paragraph 1 of the Administrative Procedure Act by courts and administration authorities of the Slovak Republic aimed at providing of the widest possible participation of the public in the decision making related to licensing of activities with an impact on the environment provides a legal frame for participation of the public in accordance with the Aarhus Convention.

Regardless this fact we would like to point that meanwhile **a wide amendment to the Act on EIA was passed and published under the No. 314/2014 Coll. which will become effective on 1 January 2015.** In addition to modification of the EIA issue itself, **the Act in article IV interfered also article 8 paragraph 3 of the Atomic Act. After amending, the mentioned provision states as follows:**

Article 8 paragraph 3 of the Atomic Act states:

"(3) The Authority will decide on issuance of an approval or a permit after review that the applicant fulfilled all conditions defined by the Act and respective general binding legal regulations issued on its basis. The Authority proceeds in the action on issuance of the approval or the permit independently of proceedings of another administration authority. ***The party to the proceedings on issuance of the permit is also a natural person or a legal entity the position of which results from a special regulation[16]).*** *The Authority will refuse publishing of sensitive information according to article 3 paragraph 14 and 15 to these parties."*

It results from the aforementioned quotation that after the respective amendment **the participation in the proceedings according to the Atomic Act is not bound to the previous EIA process as it was up to now.** We kindly ask AC CC for taking this fact into account at review and consideration of the Ökobüro statements.

3. Examples of inadequately long decision making processes of Slovak courts

With regard to complicated nature of the reviewed matters, the duration of the proceedings is, in our opinion, adequate. In general, it can be stated about cases in the administrative justice that they are complicated and require a demanding study of extensive sets of documents and, last but not least, large scale of specialised legislation contained in voluminous legal regulations. If the courts oriented on solving the issue only from the time viewpoint, quality of decisions could be deteriorated because of inconsistencies. It has to be kept in mind that the Supreme Court of the Slovak Republic is the court of second instance in this case and it is not possible to bring an appeal against its decision.

The decision-making process of the Constitutional Court of the Slovak Republic in the issue related to the Slatinka water reservoir cannot be considered a decision-making process of courts in the administrative justice. The Slovak courts have already decided in this matter and issued an effective decision. The decision-making process of the Constitutional Court concerns protection of constitutionality, in this case observance of fundamental human rights and freedoms. Petition to the Constitutional Court of the Slovak Republic is an extraordinary instrument of the judicial protection.

In reaction to other examples of proceedings cited by the communicant which relate mainly to proceedings in the Supreme Court of the Slovak Republic, please note the statistics published by the Ministry of Justice of the Slovak Republic. Based on these statistics, the average length of the proceeding between the day when a court of first instance decided and the date of effectiveness of a decision made by the Supreme Court (second instance) in the administration justice manner in 2012 equals to 11.89 months and in 2013 to 11.98 months. It is therefore evident that the cases mentioned by the communicant are not standard if considering their duration.

We would like to point out that four out of eight cases mentioned as examples were lawfully decided within two years from bringing a suit to court. The Slovak Republic does not consider decisions of courts issued within two years as issued within an inadequately long time. We consider necessary to detail some other individually mentioned cases which, based on the communicant's opinion, exceed the usual framework of the proceedings. In brief, we would like to illustrate actions which were made in objected cases and aimed at making the decision in the matter.

1. Highway in Kysuce:

(8Sžp/27/2011): In the subject case the court sent an appeal to the defendant that the defendant responded to on 5 June 2012. On 6 June 2012 the Ministry of Construction and Regional Development of the Slovak Republic took a standpoint to the subject appeal. The date of the next proceeding was set to 28 June 2012; afterwards, the plaintiff's lawyer was asked for assessment of costs of the proceedings that he, based on the call, assessed on 29 June 2012. On 28 June 2012, the court cancelled the appealed decision and returned the case to the Regional Court in Žilina.

2. Site planning case in Vysoke Tatry:

(6Svzn/2/2012 and 6Svzn/3/2013): In relation to the case 6Svzn/2/2012 a statement of the defendant was delivered on 4 September 2012; afterwards on 13 September 2012 it was sent to the plaintiffs' lawyer for commenting. On 23 September 2013 the dossier was submitted to the electronic filling office for recording the next file No. - assigned file No. 6Svzn/3/2013. The date of the next proceeding was set to 25 September 2013 when the court cancelled the appealed decision and returned the case to the Regional Court in Prešov.

4. Nuclear power plant Mochovce (Greenpeace)

(5Sžp/21/2012): In the subject case, the date of the next proceeding was set to 27 June 2013 when the court cancelled the appealed decision and returned the case to the Regional Court in Bratislava. On 1 July 2013 an assessment of costs of the proceedings was delivered to the court by the advocacy office of the party to the proceedings. Then on 26 July 2013 the file was handed over for copying and on 31 July 2013 it was returned back.

5. Waste dump in Pezinok (standing)

(3Sžp/52/2009): In the subject case the proceedings were held on 23 March 2010. It was adjourned without day. Then a resolution was issued by which the court cancelled the motion for change of the party. However, a decision in the merit was not made. On 13 May 2010 the proceedings in relation to the case were held. It was adjourned without day again, and the court made all actions aimed at issuance of a decision in the merit. The court confirmed the appealed decision on 17 June 2010 and on 24 June 2010 the file was dispatched to the Regional Court in Bratislava.

6. Highway in Povazska Bystrica

(4Sž-o-KS/87/2006): In the subject case, the date of the next proceedings was set to 20 June 2007 when the court cancelled the appealed decision and returned the case to the Regional Court in Trenčín. Then on 30 August 2007 the file was handed over for copying. On 19 October 2007 the file was returned back.

7. Highway in Ziar nad Hronom

(1Sž-o-KS/194/2004): In the subject case the proceedings were held on 25 August 2008. It was adjourned to make all actions aimed at making a decision in the merit. The date of the next proceedings was set to 13 September 2005 when the court cancelled the appealed decision and returned the case to the Regional Court in Banská Bystrica.

We would like to point out that according to the Justice Scoreboard for 2013, the time needed for examination of an administrative justice case in the Slovak Republic is the shortest among the European Union Member Countries[1].

The Slovak Republic does not deny that some delays might occurred in the some of the aforementioned proceedings. However, we consider the examples mentioned by the communicant Ökobüro mainly unfounded.

[1] Please see diagram 3
http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf

4a) Examples of cases where the public concerned asked the court to grant an injunction or sought to appeal via court proceedings an administrative refusal to grant an injunction and the court did not address the request/appeal of the public concerned at all

In the AC CC hearing a representative of the communicant Greenpeace Slovensko mentioned that there are many cases ("hundreds of cases") when courts do not deal with motions of plaintiffs to issue a decision according to article 250c of the Civil Procedure Act on suspension of executability of the decision.

Finally, the communicant mentioned just three cases. The Slovak Republic does not exclude that in individual cases some inaccurateness of courts may occur but based on three doubts of courts at application of the legal regulations it is not possible to state that the legal framework does not provide an effective tool for protection of rights of the parties to the proceedings.

If in individual cases the court omitted to fulfil this obligation, the party is entitled to claim for its rights. It can do it by a complaint against idleness of the court according to article 62 to 68 of Act No. 757/2004 Coll. on Courts, and if the complaint is not accepted and the remedy is not done, it is entitled to complain to the Constitutional Court of the Slovak Republic.

4b) The text of the Slovak legal provisions and/or jurisprudence (together with English translations thereof) that allow the courts not to answer a request by the public concerned for an injunction or an appeal by against a refusal to grant an injunction

The court shall deal with every submission of a party to the proceedings and assess it. The provision of article 250c of the Civil Procedure Act gives the court the right to issue a decision on suspension of the enforceability but it does not give an option whether the court will deal with the submission or not. If it does not evaluate circumstances so that a serious damage threatens to the party and does not issue a preliminary measure, it shall notify the plaintiff thereof.

The article 250c of the Civil Procedure Act in the Slovak language states in the last sentence:

"Ak predseda senátu nevyhovie žiadosti, ***upovedomí*** *o tom účastníka."*

Translation:

"If the presiding judge does not satisfy the request, ***it shall notify*** *the participant thereof."*

In Slovak language the term "upovedomí" means an obligation of the presiding judge to act; it does not allow any alternative. In English language and in legal text this obligation is expressed by "shall".

The communicant replaced the word "shall notify" in its translation into English by the conditional "should notify".

If the Civil Procedure Act defines that the presiding judge "shall notify", it means that he "is obliged to notify the party" who applied for the injunctive relief.