

Ms. Fiona Marshall
Secretary to the ACCC
UN-ECE Environment Division
Palais de Nations
Av. de la Paix 10
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Wien, 01.12.2014

Case ACCC-C89 Slovakia – Mochovce NPP
Submission by the communicant

Dear Ms. Marshall,

please find below our submission answering the questions of the ACCC after the public hearing in September 2014.

Best wishes,

Thomas Alge

ACCC Case 89 Slovakia - Mochovce NPP

Submission by the communicant answering the ACCC questions following the public hearing in September 2014

1) Please set out your understanding of the meaning of the ruling of the Slovak Supreme Court of 27 June 2013 with regard to the allegations of non-compliance made in your communication.

The communication was filed before the Supreme Court issued the abovementioned verdict. Since the court ruled in favour of the plaintiff some aspects of the communication are legally clarified on domestic level. This would consequently mean there is no non compliance with the Convention. However, the actual (non) impact of the decision on the ground, the time that passed since claiming public participation (2008) and the fact the constructions have been proceeding without stop since 2008 show that the Slovak legal system does not provide for an effective legal framework in order to guarantee rights provided by the Aarhus Convention.

In order to better understand our line of argumentation we recall the procedural history below, following our interpretation of the verdict.

Procedural history

- On 14 August 2008 three permits were approved by UJD: decisions 246/2008, 266/2008 and 267/2008.
- On 14 November 2008 Greenpeace Slovakia appealed decision 246/2008 at the UJD claiming that it was necessary to carry out an EIA including public participation procedures and have the EIA final statement before the decision was issued by UJD.
- On 28 April 2009 UJD dismissed the appeal by Greenpeace and confirmed the decision of the first instance. The statements were rejected on the grounds that the organisation did not fulfil the criteria necessary for organisations to participate in the proceedings.
- In May 2009 Greenpeace Slovakia filed a petition with the Bratislava regional court challenging the UJD decision on the ground that there was no opportunity for public participation and claiming that its rights to public participation and access to justice were infringed.
- On 11 May 2012 the Bratislava regional court dismissed the complaint. The Court found that Art 6 of the Convention does not apply, since the permit did not deal with any activity pursuant to Annex I of the Aarhus Convention. The permit does not have any effect on the environment and

it does not concern a new activity, but only changes of the original permission. The court concluded that Greenpeace Slovakia therefore did not have standing.

Ruling of the Slovak Supreme Court:

The Court recognized that according to Art 6/1(a) and item 22 Annex I of the Aarhus Convention changes or extensions of activities, where such a change or extension in itself meets the criteria set out in Annex I, shall be subject to article 6/1(a). It confirmed that nuclear power stations and other nuclear reactors including the dismantling or decommissioning are explicitly referred to in Annex I so that the authority is required to facilitate public participation in a period when all options are open. The Court concluded that the plaintiff is necessarily to be considered as a "participant to the administrative procedure" (according to § 14/4 Administrative Act). Therefore the Court found that the authority is obliged to include the plaintiff as a participant of the administrative procedure.

The Court annulled the contested decision of UJD from 28 April 2009 on the ground that the decision of the authority emerged from an incorrect assessment of the case, that the determination of facts was insufficient for assessing the matter and that a deficiency was found in the process which affects the lawfulness of the contested decision. The Court referred the case back to the defendant to deal with it repeatedly in another proceeding and to decide on it with the participation of the plaintiff.

Our understanding of the meaning of the ruling

This ruling confirms our original allegation that the Regional Court and the authority UJD failed to comply with Article 9/2 (and Article 6) by not having granted standing to Greenpeace Slovakia in order to obtain review of the UJD decisions. However, this allegation is still relevant since access to justice was provided for only after construction had started (ACCC/C/2006/17) and as it will be addressed below without any impact on the ground. Construction has not even being stopped while the authority is repeating the public participation procedure. This means even though the Court annulled a key permit, constructions could continue and nothing had changed on the ground.

Thus we claim Slovakia fails to provide for a clear and consistent framework that guarantees effective enforcement measures of court decisions in cases of successful litigation. Notwithstanding the court clarified the Convention is applicable, no legislative measures were taken to regulate this in general rules, in particular for cases where old permits are updated and when no EIA has to be carried out. Therefore, we allege that Slovakia still fails to comply 6/4 in conjunction with Articles 3/1 and 9/4 of the Convention. We do not claim a breach of Article 9 par 2 since the Court ruled Greenpeace should have standing in the specific case. We are not convinced however that authorities would apply the same interpretation in similar future procedures without legislative changes.

The ruling confirmed that the Regional Court and the authority failed to comply with Article 6/1(a) and 4 by not having provided for early and effective public participation, when all options are open. If this would be the legal position in the Slovak Republic and applied in the Mochovce case, there would be no allegation of non compliance. However, the ruling moved the case back to the stage when Greenpeace Slovakia appealed decision 246/2008 at the UJD claiming that it was necessary to carry out an EIA including public participation procedures and have the EIA final statement before the decision was issued by UJD. It was our understanding that the permitting and construction process would be repeated and halted respectively until all permits are re-done.

But in contrast on 21 August 2013 UJD issued a decision which excludes the suspensory effect of the appeal filed. Therefore, we allege that Slovakia fails to comply with Article 9/4 of the Convention since the remedies available are not effective. If the authority has the discretion to exclude the suspensory effect when implementing a Supreme Court decisions, the legal system is not effective both with regard to Article 9 par 4 and Article 3 par 1 since no "proper enforcement measures" are available. The same applies for the fact the contested permits were from the year 2008, while the administrative appeal and court procedures took five years without any injunctive measures that would impact the construction process.

As regards the last part of the ruling the Court states that it identifies itself with conclusions drawn in the appeal, amongst others, that an EIA according to the EIA-Act is to be conducted. This paragraph does not seem to have a legally binding effect. Thus, it has not been clarified by the Supreme Court whether an EIA is to be carried out. Although the Convention does not establish an EIA regime per se, public participation needs to be facilitated in line with the obligations set out in paras. 1-10. If no EIA is carried out - as it was in the Mochovce permitting process in 2008 - another legal basis must exist that provides for public participation as required by the Convention. However, there is no such legal basis in Slovak law, even after the improvements in legislation with regard to EIA in the last years. Consequently, Slovakia fails to comply with Art 6/1-10 and 3/1 as long as legislation is not brought under compliance with the court's ruling. That no early and effective public participation have taken place was not cured by the Court's ruling since construction is far progressed and the authority refused to issue any interim measures in the new permitting process.

2) With respect to article 9, paragraph 3, of the Convention:

a) You allege that members of the public concerned are not granted the status of a Party to the proceedings in procedures conducted under the Nuclear Act. Is this allegation based on your interpretation of Slovak law or on jurisprudence related to the Administrative Procedure Act and/or Nuclear Act? Please support your answer with concrete references to the Administrative Procedure Act, the Nuclear Act and jurisprudence.

Pursuant to the Nuclear Act No. 541/2004 a right to participate in proceedings according to this Act is bound to preceding participation in environmental impact assessment (EIA) according to the EIA Act No. 24/2006. The Nuclear Act stipulates:

"A natural person or legal entity, whose standing is based on special statute (i.e. the EIA Act), shall be a party to the permission proceedings which was preceded by environmental impact assessment." (Article 8 par. 3 of the Nuclear Act)

It means that there are two conditions defined by the Nuclear Act for standing in proceedings run pursuant to the Nuclear Act:

- a natural person or legal entity must have standing in EIA process according to the EIA Act,
- an EIA must precede the permission proceedings pursuant to the Nuclear Act.

In other words – if there is no EIA preceding the processes pursuant to the Nuclear Act, public (natural person, legal entity) has no standing guaranteed by the Nuclear Act.

Administrative Procedure Act No. 71/1967 is a general act regulating administrative procedures. However, if there is a specific law for specific area and this law stipulates special regulation, such special regulation has a priority to Administrative Procedure Act.

Administrative Procedure Act defines a circuit of parties to the proceedings (Article 14):

"Standing is guaranteed to a person whose rights, legally protected interests or duties are subject to a proceedings, or whose rights, legally protected interests or duties may be directly affected by the decision. Standing is also guaranteed to a person who claims that his/her rights, legally protected interests or duties may be directly affected, and this is until it is proved otherwise. Standing is also guaranteed to a person whose standing is acknowledged by a special law."

In other words – to claim standing pursuant to the Administrative Procedure Act one must fulfil conditions stipulated by the Article 14. It means that such a person must be directly affected on his/her rights, legally protected interests or duties. His/her standing is based on direct affection by the decision. This is often a problem to prove, especially for members of public (such as legal entities, or people not living in imminent surroundings of nuclear facility).

To sum up: standing in the processes regulated by the Nuclear Act is based on the preceding EIA. Only then – and after public participate in EIA – can public participate also in proceedings pursuant to the Nuclear Act.

b) Have you or any other member of the public sought to be granted the status of a party to proceedings under the Nuclear Act since 2011? If so, what was the outcome of those applications?

We do not have information on such proceedings. The Communicant did not participate in any new proceedings pursuant to the Nuclear Act.

3) With respect to timeliness of procedures under article 9, paragraph 4, please provide the Committee with examples of environmental court proceedings that you allege to be too lengthy. For each example,

please specify the date when the request/appeal was filed, the number of hearings, the reasons for adjourning each hearing, and the date of the final decision.

Examples of too lengthy environmental proceedings, in which proceedings lasted two, three and more years:

1. Highway in Kysuce:

Petition to the court: (against Administrative decision of 10.08.2010) **24.10.2010**

Regional court in Zilina (21S/89/2010): **21.09.2011** (decision after second hearing, the first hearing was adjourned due to objection of bias against one of the judge)

The Supreme Court (8Sžp/27/2011): **28.06.2012** (decision after 20 months after filing a petition)

2. Site planning case in Vysoke Tatry:

Petition to the court: **06.04.2010**

Regional court in Presov (3S/24/2010): **23.05.2012** (25 months after filing a petition, no court hearing)

The Supreme Court (6Svzn/2/2012, 6Svzn/3/2013): **25.09.2013** (41 months after filing a petition, no court hearing)

3. Water dam in Slatinka

Petition to the Constitutional Court of Slovak Republic: **01.10.2012**

The Constitutional Court: after 26 months the case is still pending, no judicial hearing so far

4. Nuclear power plant Mochovce (Greenpeace)

Petition: **04.09.2009**

Regional Court in Bratislava (4S/125/2009): **11.05.2012** (one hearing, 30 months after filing a petition)

The Supreme Court (5Szp/21/2012): **27.06.2013** (no hearing, 45 months after filing a petition)

5. Waste dump in Pezinok (standing)

a)

Petition: **30.06.2007**

Regional court in Bratislava (2S/176/2007): **09.06.2010** (three hearings: 21/04/2010, 02/06/2010, 09/06/2010 – the court adjourned the hearing due to its own deliberation on the case) – the court decided after 36 months after filing a petition to the court

b)

Petition: **24.06.2007**

Regional court in Bratislava (2S/183/2007): **06.05.2009** (one hearing, decision after more than 22 months)

The Supreme Court (3Sžp/52/2009): **17.06.2010** (one hearing on 23/03/2010 adjourned for further argumentation, decision after 36 months after the petition was filed to the court)

6. Highway in Povazska Bystrica

Petition: **20.06.2005**

Regional Court in Trencin (19S/3/2005): **15.05.2006** (one hearing)

The Supreme Court (4Sž-o-KS/87/2006): **20.06.2007** (no hearing, 24 months after petition was filed to the court)

7. Highway in Ziar nad Hronom

Petition: **12.09.2003**

Regional Court in Banska Bystrica (23S/145/2003): **26.05.2004** (one hearing)

The Supreme Court (1Sž-o-KS/194/2004): **13.09.2005** (two hearings – adjourned for court deliberation, decision after 24 months after filing a petition)

8. Land decision in Nova Polhora

Petition: **30.01.2013**

Regional Court in Presov (6S/25/2013): **pending**, no court hearing so far (after 22 months)

4) With respect to article 9, paragraph 4 and the allegation that the court failed to provide an explicit answer to a request to grant an injunction, please provide the Committee with:

a) 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.

1. Highway in Kysuce:

Petition to the court asking also injunctive relief: **24.10.2010**

Regional court in Zilina (21S/89/2010): **21.09.2011** (the court did not address the request at all)

The Supreme Court (8Sžp/27/2011): **28.06.2012** (the court did not address the request at all)

2. Gold mine in Detva:

Request for injunctive relief (suspension of execution of the administrative decision): 27/02/2012

Regional court in Banská Bystrica (23S/113/2011): 04.04.2012 – the court did not address the request at

all

3. Site planning case in Vysoke Tatry:

Petition to the court: **06.04.2010** – asking for suspension of execution of the administrative act)

Regional court in Presov (3S/24/2010): **23.05.2012** – the court did not address the request at all

The Supreme Court (6Svzn/2/2012, 6Svzn/3/2013): **25.09.2013** – the court did not address the request at all

b) 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.

This provision is provided by the Civil Procedure Code:

§ 250c

- (1) Žaloba nemá odkladný účinok na vykonateľnosť rozhodnutia správneho orgánu, pokiaľ osobitný zákon neustanovuje niečo iné. Na žiadosť účastníka môže predseda senátu uznesením vykonateľnosť rozhodnutia odložiť, ak by okamžitým výkonom napadnutého rozhodnutia hrozila závažná ujma. Ak predseda senátu nevyhoví žiadosti, upovedomí o tom účastníka.

Translation:

Section 250c

- (1) The action shall not have a suspensive effect on the enforceability of the administrative authority decision, unless otherwise provided by a special Act. Upon the request of the participant, the presiding judge may suspend the enforceability of the decision by a resolution, if there is a danger of serious harm in case of immediate enforcement of the disputed administrative decision. If the presiding judge shall not satisfy the request, he/she shall notify the participant thereof.

The Civil Procedure Code stipulates that the presiding judge shall issue a decision, if a suspensive motion is granted. In case when the suspensive motion is not granted, the presiding judge should notify the participant – nevertheless, the courts never do so (as previously stated). Such “notification” is not a decision, it is simply an information provided to the participant. There is not possibility to challenge such a notification by an appeal (since it is not a decision). There is also no penalty for a presiding judge if such a notification is not issued.