Ella Behlyarova
Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10, Switzerland
E-mail: public.participation@unece.org

Case ACCC/C/2009-41: Implementation of MoP Decision IV/9e concerning Slovak Republic and NPP Mochovce

Vienna, 12. December 2012

Dear Ms. Behlyarova,

Concerning the latest progress report submitted by the Slovak Republic we react as follows:

At MoP4 in Moldova the Meeting of the Parties: (Decision IV/9e):

2. Endorses the following finding of the Committee that the Party concerned: by failing to provide for early and effective public participation in the decision-making leading to the decisions by the Slovak Nuclear Regulatory Authority 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning the Mochovce Nuclear Power Plant, the Party concerned failed to comply with article 6, paragraphs 4 and 10, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters;

3. Recommends that the Party concerned review its legal framework so as to ensure that early and effective public participation is provided for in decision-making when old permits are reconsidered or updated, or the activities are changed or extended compared to previous conditions, in accordance with the Convention;

The Slovak progress report contains many positive changes with regard to standing and public participation rights. They have to be seen in the context of bringing Slovak legislation both in compliance with EU law (following and EU infringement procedure) and the Convention. However, most of them do not refer to the issue at stake.

We understand the MoP recommendation in the way that cases such as Mochovce (permitting without public participation) must not occur again. This refers particularly to changing, reconsidering or updating of existing permits since Slovak legislation saw this both out of EIA and Aarhus scope. It seems that the recent legislative changes have not solved this matter since again, public participation is triggered only by an EIA procedure, whereas in Mochovce

this was exactly the problem (that there was no EIA before the permit were issued). Therefore we don't see this issue solved.

This observation is confirmed by the fact that Slovak Courts do still apply legislation that is in contrast to what the MoP and the ACCC decided. In the procedure following a Greenpeace complaint against one of the three above mentioned permitting decisions of the Mochovce NPP the court decided in May 2012 that the building permission of 2008 is not covered by Annex I of the Convention and therefore NGOs neither have standing nor the right to participate in the permitting procedure. This is in line with the argumentation of the Slovak government in the compliance procedure before the MoP decided (ACCC C 41), but in contrast to what the MoP and the ACCC found. Next to the continued breach of Article 6 of the Convention by the Slovak institutions, we furthermore see a principle breach of Article 9 par 4 of the Convention by the mere fact that it took the Court 3 years to decide in the issue, whereas constructions are coming to the end.

Please find in the Annex a brief elaboration of the mentioned recent legal developments in Slovakia.

Best wishes,

Dr. Klaus Kastenhofer
Director GLOBAL 2000/Friends of the Earth Austria
Telephone: 0043/1/812 57 30
Fax: 0043/1/812 57 28
E-mail: Klaus.kastenhofer@global2000.at

Annex:

LEGISLATION changes since MOP4 (June/July 2011):

- There were two amendments to the EIA Act No 24/2006 (No. 258/2011 and No. 408/2011), only the later one is relevant for the public participation
- The Act No. 408/2011 amends provisions on environmental assessment of strategic EIA, changes provisions on public participation and other various petit changes, except for an intermediate provision – Article 65b:

  „(1) The provision of article 65 paragraph 3 does not apply on impact assessment of the strategic documents that were subject to preparation and approval process within the period from 21 July 2004 to 31 January 2006. Strategic environmental Assessment of the effects of such documents shall be carried out in accordance with the law effective from 1 December 2011 [i.e. Act No. 408/2011]*. Environmental assessment of strategic documents that were subject to preparation and approval process before 21 July 2004 and were approved after more than 24 months from 21 July 2004 shall be carried out only if the competent authority upon a proposal of a contracting authority decides that the environmental assessment of the strategic document is feasible. The competent authority shall publish its decision on the web site of the Ministry of Environment.*
  (2) If written statement pursuant to article 23 paragraph 4, article 30 paragraph 5 or article 35 paragraph 3 cannot be submitted due to the fact that the environmental impact assessment pursuant to this Act was completed before 30 April 2010, public interested pursuant to Article 24 and article 24b shall be considered to be a party to the subsequent consent proceedings. Suct public interested shall submit written statement showing its interest in the decision ..."
- In other words: Article 65b para. 1 deals with the strategic assessment of the **strategic documents**, in case of which their preparation and approval procedure had commenced in the period from 21 July 2004 to 31 January 2006. This provision **does not apply** to the environmental assessment of **projects** (activities)
- Article 65b para. 2 deals with public participation in consent procedures in case of **projects** (activities) in case of which EIA was conducted before 30 April 2010.

Nevertheless, none of the above mentioned provisions, nor any other provision of the EIA Act responds fully to the recommendation of the Meeting of the Parties to the Aarhus convention: the above mentioned provision of Article 65b para. 2 deals only with projects that **actually were subjects to EIA**. However, the case of Mochovce power plant is different: the original building permission was issued long ago the first EIA Act was even adopted in Slovakia, therefore the nuclear power plant **was not** subject to EIA. This type of projects is not touched by this amending provision.

COURT PROCEEDINGS:
Greenpeace filed petition to the court back in 2009. And the Regional Court in Bratislava has decided on the case in May 2012, i.e. three years (!!) after the petition was filed – and it **dismissed** the case. The court dealt with two main questions:

1: whether the plaintiff (Greenpeace) has standing in the decision-making regarding nuclear power plant Mochovce

2: whether EIA was supposed to precede the disputed building permission.

Ad 1: The court stated that in given case the the building permission **does not** deal with any activity (project) pursuant to Annex I of the Aarhus Convention and therefore the plaintiff (Greenpeace) **does not have standing**. The court stipulated that the disputed building permissions are not **new** permissions, but „only" changes of the original permission and these changes do not influence building and technological part of the project, but only contribute to nuclear safety and reliability of the nuclear power plant, and „*subsequently influence increase of environmental level*" (?!?).

Ad 2: EIA:

The court stipulated that it is not **new activity (project)** and not it is not an operation permission regarding nuclear facility. Pursuant to the court the Nuclear Regulation Authority followed all relevant legal provisions, gathered all necessary statements of relevant state authorities, including Ministry of Environment (as the most important expert guarantor with regard to the EIA Act). (in other words – the statement of the Ministry of Environment is sufficient for the court in order to fullfil the aim of the EIA Act). The court stated again, that the disputed permission is not a new permission, there is also not new land taking, trees cutting or other new interference with the environment. Therefore (pursuant to the court) the EIA did not have to precede the disputed permission and the permission was issued pursuant to the law.
We filed an appeal and the case is still pending at the Supreme Court.

Conclusion:

Slovakia still did not adopt relevant legislative changes requested by the Meeting of the Parties of the Aarhus Convention.

Moreover, the court dealing with the case did not consider the permitted activity to be a subject to the Aarhus Convention and therefore did not find the reason for Greenpeace to have standing in the decision making procedure.

Eva Kováčechová, Nov 2012