

**COMMUNICATION TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE**  
**ON COMPLIANCE OF THE SLOVAK REPUBLIC WITH THE UN ECE CONVENTION**  
**ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING**  
**AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE CASE NPP**  
**MOCHOVCE EXTENSION**

**I. INFORMATION ON CORRESPONDENT SUBMITTING THE COMMUNICATION**

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## **II. STATE CONCERNED**

4. The Slovak Republic is the state party concerned by this communication (hereinafter referred as Slovakia).

## **III. FACTS OF THE COMMUNICATION**

### **3.1 Background facts and history NPP Mochovce**

5. In 1979, the location permit for the NPP Mochovce, Southern Slovakia was issued.
6. In 1986, the construction permit for four reactors was issued, under the condition that construction be completed in 115 months. The four permitted reactors are a VVER 440/V213, a Soviet Generation II reactor, designed in the period 1970-1980.
7. In 1998 and 2000, two reactors, Mochovce 1 and 2, were finalized and went into operation, the other two reactors, Mochovce 3 and 4, were only partially constructed.
8. In the 1990's, the work on reactors 3 and 4 was curtailed due to financial constraints.
9. On 5 May 1997, the period for the completion of construction work under the construction permit was extended by the relevant authority to 31 December 2005.
10. On 15 July 2004, the period for completion of construction work was extended to 31 December 2011.
11. In 2007, Slovakia decided to extend the existing NPP by completing reactors 3 and 4. The operator is ENEL/SE, a consortium between the Italian company Enel SpA and the Slovak Slovenské Elektrárne a.s.
12. In May 2008, the developer applied for three permits.
13. On 14 August 2008, the three permits were approved by UJD (Slovak Nuclear Regulatory competent administrative body) decisions 246/2008, 266/2008 and 267/2008.
  - Decision to permit the change of construction of Mochovce NPP Units 3 and 4
  - Decision to permit the implementation of changes in safety-related equipment during completion of the Mochovce NPP Units 3 and 4
  - Decision to permit the implementation of changes in the document 'Preliminary Safety Report of NPP Mochovce Units 3 and 4'
14. In June and August 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.
15. In September 2008, the Slovak Ministry of Environment decided that an EIA would be carried out for the operation, but not for the construction changes to the project.
16. On 3 November 2008, the construction work officially started.

17. In May 2009, UJD dismissed the appeal by Greenpeace and confirmed the decision of the first instance. The statements were rejected on the grounds that the organizations did not fulfill the criteria necessary for organizations to participate in the proceedings.
18. 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.
19. On 28 July 2009, GLOBAL 2000/Friends of the Earth Austria submitted a communication to the Aarhus Convention Compliance Committee (ACCC), alleging a failure by Slovakia to comply with its obligations under article 6, paragraph 1, 4 and 10 of the Convention by failing to provide for public participation in the decision-making process for the construction permits granted in 2008. The communicant further alleged that the Party concerned failed to comply with article 9, paragraph 2, 3 and 4, of the Convention, since it was not possible to appeal against the different decisions due to restricting standing requirements in Slovak law and by generally not providing for access to justice in environmental matters in legislation.
20. On 12 May 2011, the Compliance Committee issued its findings and recommendations with regard to communication ACCC/C/2009/41 (ECE/MP.PP/2011/11/Add.3) concerning compliance by Slovakia:

The Committee considered, that ‘the fact, that the original construction permit was issued in 1986 ‘does not, as such, prevent the Convention from being applicable to subsequent reconsiderations, and updates by public authorities of the conditions for the activity in question, and to possible permits given for extensions of the activity, after the entry into force of the Convention for the Party concerned’ (ECE/MP.PP/2011/11/Add.3, para. 44).

**The Committee found that ‘by failing to provide for early and effective public participation in the decision-making leading to the 2008 UJD decisions [...] the Party concerned failed to comply with article 6, paragraphs 4 and 10, of the Convention.’** (ECE/MP.PP/2011/11/Add.3, para. 69).

**The Committee recommended Slovakia ‘to 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.’** (ECE/MP.PP/2011/11/Add.3, para. 70 (a)).

As regards the claim that Slovakia failed to provide for access to justice in accordance with article 9 of the Convention, the Committee decided not to consider it without awaiting the outcome of the pending case (ECE/MP.PP/2011/11/Add.3, para. 47).

21. On 1 July 2011, the Meeting of the Parties to the Convention at its fourth session confirmed the findings and recommendations of the Committee (ECE/MP.PP/2011/11/Add.3) in Decision IV/9e on compliance by Slovakia with its obligations under the Convention (ECE/MP.PP/2011/2/Add.1).
22. On 11 May 2012, the Bratislava regional court dismissed the complaint (case No. 4 S 125/09 concerning the review of the 2008 decisions and procedures by an administrative body). The court found that the permit did not deal with any activity pursuant to Annex I of the Aarhus

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

23. On 2 July 2012, Greenpeace Slovakia filed an appeal with the Slovakia Supreme Court.

### **3.2. Accession of Slovakia to the Aarhus Convention**

24. Slovakia deposited its instrument of accession to the Aarhus Convention on 5 December 2005. No declaration or reservation was made upon notification of approval. The Convention entered into force for Slovakia on 5 March 2006.

### **3.3. Key applicable national legislation**

25. Legislation concerning nuclear installations: Act No. 541/2004 Col. on the Peaceful Use of Nuclear Energy and Act No. 50/1976 on Land-use and Building Proceedings

26. Legislation concerning public participation and access to justice in environmental cases: Act No. 24/2006 Col. on Environmental Impact Assessment, Act No. 71/1967 Col. on Administrative Proceedings, Act No. 50/1976 Col. on Land-use and Building Proceedings, Act No. 99/1963 Col. Civil Proceedings Act.

27. Legislation concerning injunctive relief in environmental cases: Act No. 99/1963 Col. Civil Procedure Act.

## **IV. NATURE OF ALLEGED NON-COMPLIANCE**

28. This communication alleges two kinds of non-compliance: (a) several violations of the Aarhus Convention requirements in the specific case of the NPP Mochovce which took place during decision-making to extend the NPP and (b) general non-compliance of some national legislation with Convention requirements.

### **4.1. Violation of article 9, paragraph 2, of the Convention**

29. We allege that Slovakia did not ensure that members of the public concerned have access to a review procedure before an independent and impartial body to challenge the legality of any decision subject to the provisions of article 6. By not having applied the obligations under the Aarhus Convention and by not having granted standing to Greenpeace Slovakia in order to obtain review of the Article 6 decision in question the Bratislava regional court and consequently Slovakia failed to comply with article 9, paragraph 2, of the Convention.

30. On the basis of the findings and recommendations of the Committee (ECE/MP.PP/2011/11/Add.3) as well as of the decision of the Meeting of the Parties to the Convention (ECE/MP.PP/2011/2/Add.1) it should have been clear to the Bratislava regional court that the decision concerned falls within the scope of article 6 of the Convention. The court was specifically informed by Greenpeace Slovakia about the ACCC's findings before it took the decision.

31. Nevertheless, the Bratislava regional court did not take any account of the Committees' findings and recommendations and dismissed the appeal on the grounds that the permit did not deal with any activity pursuant to annex I of the Convention, since it did not concern a new activity but only changes of the original permission. Consequently, the court concluded that Greenpeace Slovakia did not have standing (Case No. 4 S 125/09 concerning the review of the 2008 decisions and procedures by an administrative body).
32. Judicial independence is a precondition for the access to justice process (ECE/MP.PP/C.1/2006/4/Add.1, paragraph 24). However, in international law the judicial branch is also perceived as a part of the state. Consequently, also the judicial branch is involved in the implementation of Slovakia's obligations under the Aarhus Convention and should thus make an effort to bring about compliance with an international agreement. The judicial branch has to carefully analyze the standards in the context of an international obligation, and apply them accordingly (ECE/MP.PP/C.1/2006/4/Add.2, para. 42). The interpretation of the legal position by the court is in stark contrast to the Committee's findings and recommendations in case ECE/MP.PP/2011/11/Add.3. The result of this incorrect interpretation of the Convention is that access to justice for NGOs is denied.
33. **In summary**, the Slovak Court did not ensure compliance with the Convention by not having granted standing to Greenpeace Slovakia in order to obtain review of the Article 6 decision, so that Slovakia is in breach with article 9, paragraph 2, of the Convention.
34. Additionally, we are conscious of the fact that the ACCC and the Meeting of the Parties have already found a breach of article 6 of the Convention by Slovakia. However, according to article 3 'each party shall take the necessary legislative, regulatory and other measures [...] as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention'. Consequently, we allege that Slovakia did not take the necessary measures and is in breach with article 6, paragraphs 4 and 10, in conjunction with article 3, paragraph 1, of the Convention.

#### **4.2. Violation of article 9, paragraph 4, of the Convention**

35. We allege that procedures did not provide adequate and effective remedies in a timely manner, including injunctive relief as appropriate, which constitute a violation of article 9, paragraph 4, of the Convention.

#### *Timely*

36. Greenpeace Slovakia appealed UJD decision in June 2008. UJD dismissed the appeal in May 2009. In July 2009 Greenpeace filed a petition with the Bratislava regional court. The regional court decided on the case on 11 May 2012. The procedure at the regional court took three years, the entire procedure took four years, and meanwhile the construction of the NPP was being carried out. Now the case is pending before the national Supreme Court, where the procedure is also going to take a long time. The case is pending at the Supreme Court for almost a year and according to usual length of the administrative proceedings at this level it can take a few months or even one more year before the case is decided by the Supreme Court. The Civil Procedure Act does not provide any deadlines for courts to handle and decide the administrative cases. Therefore, we allege that procedures did not provide effective remedies in a timely manner.

### *Injunctive relief was not granted*

37. Injunctive relief is essential for effective access to justice. The Committee decided already on the grounds of the first communication not to await the decision of the Bratislava regional court, since ‘the construction in itself is likely to cause significant environmental effects’ (ECE/MP.PP/2011/11/Add.3, para. 45, 46).
38. National legislation (Civil Procedure Act) provides for the possibility to obtain injunctive relief. The Chairman of the senate may grant injunctive relief in any administrative case, including environmental cases. The law states that the judge may do so upon request of the party to the proceedings in case of threat of serious damage. However, the Chairman of the senate is not obliged to grant injunctive relief; in fact the judge does not even have to decide on such request. Usually, such request is not dealt with by the court, not to mention that the injunctive relief is granted only very rarely. Furthermore, the possibility to ask for injunctive relief is dependent on the proof by the claimant that serious damage is directly connected with the decision in question.
39. In the case concerned it turned to be impossible to argue in line with national legislation that serious damage was directly connected with the decision in question. Therefore, Greenpeace Slovakia decided not to apply for injunctive relief. Consequently, we allege that there is a general failure of effectively granting injunctive relief in environmental procedures.
40. This was also recently confirmed by the ECJ which found in a preliminary ruling that injunctive relief is an integral part of environmental procedures. For the purpose of the Convention, the exercise of the right to bring an action can only be effective, if a possibility exists to prevent the operation in question. Thus, the Court found that the ‘members of the public concerned must be able, in the context of the action provided for by that provisions, to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit [...] pending the final decision’ (ECJ, preliminary ruling (Slovakia), C-416-10).
41. Not providing members of the public with the effective possibility to obtain injunctive relief in nuclear cases impedes the public to challenge any conditions set in the construction permit. This is critical in environmental cases, especially in nuclear procedures, since resulting damages to health or the environment would be irreversible.
42. **In summary**, access to justice is only effective, if it is provided when it is still possible to challenge the decision permitting the activity in question. Timeliness and injunctive relief are crucial in order to ensure the effectiveness of access to justice. Slovakia failed to comply with the requirements of article 9, paragraph 4, of the Convention with respect to the lengths of procedures and not providing for injunctive relief in nuclear cases.

### **4.3. Violation of article 9 (3)**

43. In many countries with NPPs nuclear procedures are separated from environmental and other administrative procedures. There are specific authorities, laws and procedural provisions. Such procedures are constantly “one party procedures” where only the operator is a party.

44. In Slovakia, there is a special law (Nuclear Act) regulating nuclear procedures which are handled by the Nuclear Authority. The administrative procedure in nuclear cases is regulated by the general Administrative Procedure Act. The public may be party to the proceedings if the permission / approval proceedings were preceded by an EIA. In other words, members of the public (natural person or legal entity) which participated in an EIA have standing in subsequent permission proceedings. If no EIA is conducted before the nuclear permission proceedings, members of the public may derive their standing only based upon general public participation provisions of the Administrative Proceedings Act. The Nuclear Authority, however, refused to apply this provision (provision on public participation) of the general Administrative Proceedings Act on nuclear procedures.
45. Public participation in administrative proceedings (including nuclear cases) is important for access to justice since it is granted only for those who were parties to the administrative proceedings.
46. Access to justice is regulated by the general Civil Procedure Act also in case of nuclear procedures. There are no special provisions regulating judicial proceedings in nuclear cases.
47. Whereas it is obvious that the public concerned has standing if Article 6 decisions are concerned, there are other nuclear decisions that either do not trigger an EIA or a public participation procedure. However, also in such cases, if respective acts and omissions relate to the environment, NGOs should have standing in accordance with Article 9, paragraph 3, of the Convention.
48. Therefore, coming back to the Bratislava court decision, the court should have granted standing, even if Article 6 would not have been applicable. We allege that the members of the public did not have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment, which constitutes a violation of article 9, paragraph 3, of the Convention. This allegation is further specified below:

*Environmental matters – Applicability of the Convention in nuclear cases*

49. Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment.
50. According to the Bratislava regional court the decision in question does not concern a case relating to the environment. The court ruled that the decision in question does not have any environmental impact, since it amounts only to changes of the original permission which do not influence the building and the technological part of the project, but not on decisions concerning the intended release of genetically modified organisms into the environment. In the courts opinion the Convention applies only to decisions related to the release of genetically modified organisms into the environment.
51. Although the term ‘environment’ is not defined by the Convention its meaning can be deduced from the Convention. According to article 1 of the Convention each Party shall guarantee the right of the Convention in environmental matters in accordance with the provisions of the Convention. The term ‘environment’ shall be interpreted in reference to the detailed definition of ‘environmental information’ in article 2, paragraph 3 of the Convention. (see The Aarhus Convention: An Implementation Guide, ECE/CEP/72, p. 35). Article 2, paragraph 3 (b), explicitly mentions the term ‘radiation’.

52. Furthermore, NPPs are listed in annex I to the Convention. While for many activities listed in annex I the Convention establishes certain criteria or thresholds, for nuclear power stations no criteria or thresholds exist. Article 22 of annex I of the Convention explicitly states that it refers also to a change or extension of such activities (see ECE/MP.PP/2011/11/Add.3, para. 58).
53. Obviously, for the drafters of the Convention NPPs have in itself such environmental effect, that thresholds do not need to be set. In line with this argumentation the Committee highlighted already in the 2011 findings and recommendations to the NPP Mochovce, that nuclear power plants are ‘an activity of such a nature and magnitude’, and ‘subject of such serious public concern’ which have ‘increased potential impact on the environment’ (ECE/MP.PP/2011/11/Add.3, para. 57). Consequently, it cannot be denied that NPPs have an environmental and are within the scope of the term ‘environment’. The Convention is applicable.

#### *Standing of NGOs*

54. According to the Bratislava regional court’s decision, Greenpeace Slovakia did not have standing due to the fact that the activity concerned did not fall within the scope of article 6 and annex 1 of the Convention. Even if this was true, and without prejudice of the aforementioned, Slovakia is in breach with article 9, paragraph 3, of the Convention.
55. Although members of the public concerned have only access to justice as regards procedures subject to the provisions of article 6, which are listed in annex I, members of the public shall have access to justice as regards violations of national law relating to the environment. Members of the public have the right to challenge violations of national law relating to environment, whether or not these are related to the information and public participation rights guaranteed by the Convention (see The Aarhus Convention: An Implementation Guide, ECE/CEP/72, p. 131).
56. The Convention requires the Parties to ensure standing to enforce environmental law for members of the public meeting criteria that may exist in national law (see The Aarhus Convention: An Implementation Guide, ECE/CEP/72, p. 131). Any such criteria shall be consistent with the objectives of the Convention to ensure wide access to justice. Parties are not obliged to establish a system of *actio popularis*, but they shall not set such strict criteria, that they effectively bar all or almost all environmental organizations or other members of the public from challenging act or omissions (ECE/MP.PP/C.1/2012/4, para. 68).

#### *Conditions laid down in national law*

57. The right of members of the public to have access to justice is legally guaranteed in Civil Procedure Act. As mentioned above, general prerequisite to initiate judicial proceedings is that a person (natural person or legal entity) must be a party to the administrative proceedings preceding the judicial review of the administrative permit. Public participation for nuclear proceedings is regulated by the Nuclear Act.
58. In general, the Civil Procedure Act stipulates: “Plaintiff is a natural person or legal entity alleging that being a party to the proceedings he/she was aggrieved on his/her rights by the administrative decision or administrative proceedings.” Thus, access to justice is bound to participation in administrative proceedings. Only party to the proceedings may initiate judicial review of the administrative decision.

59. In case the administrative authority refuses the public to have standing in administrative procedure, the public may appeal against such decision (on refusing standing). The appellate decision may be then reviewed by the court in administrative judicial proceedings.
60. **In summary**, there was no possibility for any member of the public including environmental NGOs to have access to justice in environmental matters outside the scope of the EIA and IPPC procedures so that Slovakia is in breach with article 9, paragraph 3, of the Convention.
61. Furthermore, even if the public would have had access to justice, the procedure in practice failed to provide adequate and effective remedies since it was not effectively possible to challenge the decision permitting the activity in question. Consequently, we allege that Slovakia is in breach with article 9, paragraph, 4 in conjunction with article 9, paragraph 3, of the Convention.

#### **4.4. Violation of article 6, paragraph 2 (d) (vi)**

62. According to article 6, paragraph 2 (d) (vi), of the Convention each party shall ensure that the public concerned is informed of the envisaged procedure including an indication of what environmental information relevant to the proposed activity is available.
63. The Nuclear Act No. 541/2004 Col. was amended by the Act No. 145/2010 Coll (in force since 1 May 2010). The new provision significantly limits public access to nuclear information. The law stipulates that the Nuclear Authority may ban access to information if (pursuant to the opinion of the public authority) “its publication is likely to adversely affect public safety”. This limitation applies to the public which is party to the permission or approval proceedings concerning nuclear devices.
64. In the Rosia Montana case the Committee has already decided that EIA studies are prepared to the purpose of public file in administrative procedure. Information should not be held back on the ground of intellectual property law. Rather, EIA studies in their entirety should be available. Exceptions should be based on the list of exemptions contained in article 4 par 3 of the Convention and be decided in a restrictive way. (see ECE/MP.PP/2008/5/Add.7)
65. Radiation is explicitly mentioned in Article 2, paragraph 3 (b) and consequently within the scope of the term ‘environmental information’. The general limitation of public access to nuclear information on the grounds of public safety does not constitute a restrictive exception.
66. **Consequently**, we allege that Slovakia failed to ensure that the public concerned is informed of the envisaged procedure including an indication of what environmental information relevant to the proposed activity is available.

## **V. PROVISIONS OF THE CONVENTION RELEVANT FOR THE COMMUNICATION**

67. Article 9, paragraphs 2, 3 and 4, Article 3, paragraph 1, Art 6, paragraphs 2, 4 and 10

## **VI. USE OF DOMESTIC REMEDIES OR OTHER INTERNATIONAL PROCEDURES**

### **6.1. National procedures**

68. In November 2008, Greenpeace Slovakia appealed decision 246/2008 with the UJD.
69. In May 2009, UJD dismissed the appeal by Greenpeace and confirmed the decision of the first instance.
70. In May 2009, Greenpeace Slovakia filed a petition with the Bratislava regional court challenging the UJD decision.
71. On 11 May 2012, the Bratislava regional court dismissed the complaint in the case No. 4 S 125/09.
72. On 2 July 2012, Greenpeace Slovakia filed an appeal with the Supreme Court. Decision is expected within next few months, but it may also take a year.

### **6.2. Relation to cases by Aarhus Convention Compliance Committee on the same subject/issue**

73. On 28 July 2009, GLOBAL 2000/Friends of the Earth Austria submitted a communication to the Compliance Committee.
74. On 12 May 2011, the Compliance Committee issued its findings and recommendations with regard to communication ACCC/C/2009/41 (ECE/MP.PP/2011/11/Add.3) concerning compliance by Slovakia.
75. In July 2011, the Meeting of the Parties to the Convention issued Decision IV/9e on compliance by Slovakia with its obligations under the Convention (ECE/MP.PP/2011/2/Add.1).

## **VII. CONFIDENTIALITY**

76. Not requested.

## **VIII. SUPPORTING DOCUMENTATION**

77. Annex 1: Translation Bratislava Court decision  
Annex 2: Key provisions of Slovak law (in particular standing in nuclear procedures)  
Annex 3: Bratislava Court decision (original)

## IX. SUMMARY

78. We allege that Slovakia failed to comply with its obligations under the Aarhus Convention in the course of authorizing nuclear power plant extension in Slovakia, namely:

- Slovakia failed to comply with article 9, paragraph 2, by not having granted standing to Greenpeace Slovakia in order to obtain review of the article 6 decisions.
- Slovakia failed to comply with the requirements of article 9, paragraph 4, by not providing adequate and effective remedies in a timely manner, including injunctive relief as appropriate.
- Slovakia failed to comply with the requirements of article 9, paragraph 3, in not ensuring standing of environmental NGOs to challenge acts or omissions of a public authority or private person in environmental matters.
- Slovakia failed to comply with the requirements of article 6, paragraph 2 (d) (vi), in not ensuring that the public concerned is informed of the envisaged procedure including an indication of what environmental information relevant to the proposed activity is available.

## X. SIGNATURES



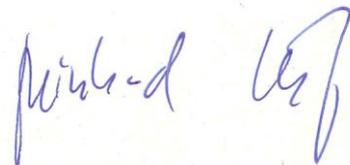
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