Alternative report
on the implementation of the Aarhus Convention
in Slovakia

We have decided to submit an alternative ("shadow") report on the implementation of the Aarhus Convention in Slovakia. Our reasoning is that many parts of the report submitted by the Slovak Government are **unclear and confused**, some information is **incomplete, untrue,** and the text of the report is very long and **not clearly arranged**.

In spite of the fact that NGOs submitted their comments expressing many objections against the content of the report, these comments were not discussed with NGOs and a lot of mistakes remained in the official report.

In our alternative report we will focus on the issues that we consider to be the most serious and important at the present time. This report does not focus on all the issues covered by the Aarhus Convention, but only on those areas where the biggest deficits in implementation exist in Slovakia.

In Part I of our alternative report we briefly describe **recent highly negative developments** regarding public participation and access to justice in Slovakia.

In Part II we briefly describe the biggest **deficits in the implementation** of the Aarhus Convention in Slovakia.

Part I.
Recent negative developments regarding public participation and access to justice in Slovakia

Recent developments regarding public participation and access to justice in Slovakia have been very negative.

From the beginning of the year 2007, the new government began to weaken the position of civic associations and environmental NGOs in decision-making procedures having an impact on the environment, privacy, and health. In the years 2007 and 2008, several laws that abolished access to court of law in order to challenge legality of acts and omissions (access to justice) and weakened participation rights were passed.

The first of such changes was an **amendment to the act on the promotion of the construction of highways**. This amendment abolished the rights of associations of local citizens and environmental NGOs to participate in permit proceedings regarding the construction of highways. Specifically, it abolished the right that their comments must be taken into account in the decision making process (in the permit decision) and their right to access a court of law. The government perceived the right of civic associations to challenge unlawful decisions as an obstacle in the fast construction of highways in Slovakia.

Even the Legislative Council of the Government declared that this proposal did not comply with EU Directive on public participation, the Cabinet (Government) and subsequently Parliament approved and passed this law. The act came info effect on July 1st 2007.

The second law that weakened participation rights and abolished access to justice for civic associations and environmental NGOs was an **amendment to the Nature Protection Act**. This amendment intended abolished rights of ecological associations in decision-making procedures affecting the nature and in procedures having the most significant effects on health and environment. The bill was proposed by members of parliament (members of the coalition parties), but was silently supported also by the Ministry of the Environment and the Ministry of Agriculture.

An **amendment to the Environmental Impact Assessment (EIA) Act** was incorporated into the aforementioned act. This amendment reduced the participation rights of environmental NGOs and abolished access to court for environmental NGOs **in all permit proceedings that are subject to EIA procedures.**

The President of the Slovak Republic did not sign this amendment to the Nature Protection Act and the EIA Act because of its non-compliance with the Aarhus Convention, but parliament overrode the presidential veto. The act came into effect on December 1st 2007.

On February 15th 2008 parliament passed an **amendment to the Act on the Use of Genetically Modified Organisms (GMO Act)** that abolished the right of NGOs to access the courts regarding most of the GMO decision-making procedures, and reduced existing participation rights. Paradoxically, the Government proposed the ratification of the GMO amendment to the Aarhus Convention at the same time.

By reason of the violation of EU Directive 2003/35/EC on public participation and the Aarhus Convention by the aforementioned acts, a complaint was submitted to the European Commission by environmental NGOs.

Part II.
Biggest deficits in the implementation of the Aarhus Convention in Slovakia

Article 2: Definitions

Violation of Article 2 paragraph 5:

The Slovak legal order defines the "public concerned" more narrowly than is required by Article 2 paragraph 5 of the Aarhus Convention. The Slovak legal order does not cover persons *"having an interest in the environmental decision-making"* (according to the Implementation Guide to the Convention this provision does not require the existence of any legal interest – factual interest is sufficient).

Under § 14/1 of the Slovak Administrative Procedure Code, an administrative standing (with the position of "party to the proceedings") is granted to a person whose rights, interests protected by the law, or obligations may be directly affected by the decision; or a person who claims that s/he may be directly affected until the opposite is proven. This is a general definition applicable in all administrative proceedings (decision-making processes) unless a specific law stipulates otherwise.

This definition is narrower than the definition in Article 2 paragraph 5 of the Aarhus Convention because it covers only persons whose "legal" rights or interests "protected by

law" may be directly affected. It does not cover persons whose "factual" interests may be affected (e.g. persons that have a factual interest in the environmental decision-making).

This means that **persons who have a factual interest in environmental decision-making are not considered to be members of the "public concerned"** by the Slovak legal order, and therefore **do not have rights under articles 6 and 9 of the Convention.**

The permitting of most activities falling under Annex I is subject to the Construction Act. In these cases, the Construction Act is a special legal norm and the definition in the Administrative Procedure Code does not apply. The Construction Act has a special provision defining parties to the proceedings – it is even narrower than the definition in the Administrative Procedure Code.

Many individuals (natural persons) whose rights are affected, or are likely to be affected by environmental decision-making, do not have participation rights guaranteed under article 6. For example, under the Construction Act (that regulates permitting of most of the activities falling under annex I of the Convention) natural persons have participation rights only if their "property rights" or "other rights" related to a piece of ground (parcel of land) may be directly affected.

This means that **many persons whose rights may be affected are not considered to be "public concerned"** by the Slovak legal order, and thus **do not have rights under articles 6 and 9 of the Convention.**

Moreover, the position of individuals in administrative proceedings affecting their privacy, health, and environment is **very weak** in practice. Public authorities often do not respect the right of an affected person to participate in the decision-making process and his/her right to be "party to the proceedings." Public authorities often decide that no person is affected by the activity that is subject to the permit proceeding. Also, this fact means that guaranteeing the position of a "party to the proceedings" for environmental NGOs in any decision-making procedures is very important. The involvement of environmental NGOs in the proceedings is often the only possibility for members of the public to participate in the decision-making process which ultimately may affect their health, privacy, and environment.

Article 3: General provisions

The public administration in Slovakia is not aware of the importance of public participation in environmental decision-making. Public authorities and officials usually perceive efforts of the public to participate in the decision-making process as a burden or an obstacle in the proper course of administrative proceedings. When active citizens or environmental NGOs challenge unlawful administrative decisions before the courts they are often publicly labeled as groups that want to obstruct the development of the economy and prosperity, or to damage investors. For these reasons, generally, there is no support from public authorities for citizens to participate in the decision-making process.

Judges in Slovakia are generally not educated with regards to environmental issues and issues related to the Aarhus Convention. There is no form of any training for judges concerning environmental issues and the application of the Aarhus Convention. Also, for this reason formalism regarding deciding environmental cases still pertains in the court practice.

With regards to the application of the principles of the Aarhus Convention in international forums, there is no information about any measures taken to implement Almaty guidelines concerning public participation.

Article 6: Public participation

Violation of Article 6 paragraph 1 b):

The Slovak government violated an obligation under this article and did not determine activities (not listed in Annex I) which may have a significant effect on the environment. Such activities were determined in the past - until the year 2007. Under the Nature Protection Act environmental NGOs could be "parties to the proceeding" with regards to proceedings to permit activities subject to this act – for example, killing protected species, mining wood in protected forest, using chemicals and pesticides in protected areas. But in year 2007 the participation rights of environmental NGOs were reduced and their right to access the court of law (access to justice) was abolished regarding activities subject to the Nature Protection Act.

Violation of Article 6 paragraph 8:

In cases of permitting activities falling under Annex I of the Convention, in most of the GMO decision-making procedures and in cases of permitting activities that may have a significant effect on the environment, environmental NGOs have no rights guaranteed under Article 8, paragraph 8, stating that *"in the decision due account is taken of the outcome of the public participation."*

If environmental NGOs submit their comments, the public authorities do not have any obligation to explain in the permit decision why the comments of NGOs were rejected, or how such comments were taken into account. This means that the public authority does not have to take comments of NGOs into account and may totally ignore them.

Violation of Article 6 paragraph 9:

The public (including the public concerned) also does not have a right guaranteed under Article 8, paragraph 9 stating that "each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based."

According to the EIA Act the public authority has an obligation to publish an "essential part of the reasons" for permit decision. Thus there is no obligation to publish whole text of the decision. Moreover, under the Administrative Procedure Code a public authority does not have to state reasons for its decision when this decision meets all requirements submitted by all "parties to the proceeding". In cases, where environmental NGOs are not "parties to the proceeding", a permit decision doesn't have to include reasons.

A violation of Article 9, paragraphs 8 and 9 was caused by amendments to the Environmental Impact Assessment Act, the Nature Protection Act and the GMO Act. These amendments abolished the procedural position of "party to the proceeding" for environmental NGOs and reduced it to a position of "participating person" that has no aforementioned rights guaranteed under the Convention.

Article 8: Public participation during the preparation of generally applicable legally binding normative instruments

Violation of Article 8 with regards to access to justice (article 9):

People have the right to submit comments in relation to proposals of generally binding normative instruments. If a group of more than 500 people submits comments, representatives of this group have the right to discuss their views with the public administrative bodies (e.g. ministry) involved.

But public participation in the preparation of generally applicable legally binding normative instruments is regulated only by a decision of the Government. Therefore, measures taken to secure public participation during the preparation of normative instruments are not legally binding – they do not have the nature of generally binding legal rule. Respect for public participation therefore cannot be enforced by the courts because the court enforces only legal rules. For this reason, the public cannot effectively enforce its rights guaranteed by Article 8.

Article 9: Access to justice

Violation of Article 9 paragraph 2:

In Slovakia only a "court" review could potentially fulfil the requirements of Article 9, paragraph 4 of the Aarhus Convention. Under the Slovak legal order, only a person having the position of "party to the proceeding" in the previous administrative permit proceeding has the right to file a complaint in court in order to challenge an unlawful administrative decision (§ 250/2 of the Civil Procedure Code).

As was mentioned above, the position of environmental NGOs in permit proceedings that are subject to EIA procedures (regarding the permit of activities that may have a significant effect on the environment), in decision-making procedures affecting the nature and proceedings regarding the introduction of genetically modified organisms (GMO) into the environment and placing GMO products on the market was changed from "party to the proceeding" to "participating person." Therefore, environmental NGOs **do not have the right to file a complaint in court** to initiate a court review of an unlawful decision to permit an activity, or an unlawful omission of an administrative body. Thus, they do not have access to justice as required in Article 9, paragraph 2 of the Aarhus Convention.

Since natural persons whose rights other than those related to pieces of property may be affected are not considered "parties to the proceeding" in proceedings regarding permits of construction (according to the Construction Act), **they also do not have access to a court review** with regards to unlawful acts. Thus, also members of the "public concerned" that have sufficient interest do not have access to justice.

Violation of Article 9 paragraph 3:

According to Article 9, paragraph 3, the Slovak Republic must determine certain members of the public meeting the criteria laid down in national law (if any) that will 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. Such procedures must fulfil the requirements of Article 9, paragraph 4.

There is no subject determined by the Slovak legal order that has the right to challenge any (every) act or omission which contravenes provisions of its national law

relating to the environment in the procedure that fulfils the requirements of Article 9, paragraph 4 – fairness (including independence and impartiality), timeliness, equity, adequate, and effective remedies, or the possibility of issuing injunctive relief.

Only a **court review** could potentially fulfil the requirements of Article 9, paragraph 4. According to the Slovak legal order, persons have access to the courts in order to challenge acts and omissions by private persons only if their rights have been impaired. As was mentioned above, a person has a right to access the courts in order to challenge any unlawful act of the public authorities only if the person was recognized as a "party to the administrative proceeding" in the previous administrative proceeding and if his/her rights were impaired by the administrative decision. **Under the Slovak legal order, no member of the public has the right to challenge every act or omission that contravenes the provisions of national law relating to the environment before the court.**

Members of the public also have the right to submit petitions and submissions to the public prosecutor's office, but these procedures obviously do not fulfil the requirements of fairness, adequacy and efficiency.

Therefore Article 9, paragraph 3 has not been implemented at all.

Violation of Article 9 paragraph 4:

Timely and effective remedies regarding access to information:

Under Article 9, paragraph 4 of the Convention, court review procedures referred to in Article 9, paragraph 1 shall provide adequate and effective remedies – including injunctive relief as appropriate – and be fair, equitable, timely, and not prohibitively expensive.

In Slovakia a review procedure before the courts regarding access to environmental information is neither "timely" nor "effective."

Court proceedings regarding the review of administrative decisions (including administrative decisions refusing access to environmental information) last approximately one year (according to official statistics). The opposing party can appeal the court's judgment and the proceedings can therefore be even longer. Because of this fact, the system of court review cannot be considered as "timely".

The court has no power to order the disclosure of information. The court only reviews the legality of concrete administrative decisions and may revoke them (the so-called cassation principle). A new administrative proceeding before the administrative authority begins after the decision of the court. Within this new procedure the administrative authority may again refuse provision of information (e.g. due to another reason). Because of this fact, the system of court review cannot be considered "effective."

Environmental information may lose its value for the public because of long and non-effective court reviews.

Timely remedies regarding permit procedures:

Court proceedings can be very long (approximately one year; after submitting an appeal, even longer) and a complaint filed in the court against an unlawful decision does not suspend the effect of the decision to permit an activity (project). Therefore a permitted activity is often performed in spite of a possibly unlawful decision on the permit. The court proceeding is very long and a project is often completed by the time of the decision of the court (e. g. a factory or highway is already built).

Injunctive relief:

The conditions with regards to issuing preliminary injunctive relief in a procedure of court review of administrative (permit) decisions are **very vague**. The court does not have any obligation to issue a reasoned decision on the question of whether to issue injunctive relief or not. The applicant for issuing injunctive relief does not have the right to appeal the decision of the court on rejection of injunctive relief

Availability of court decisions to the public:

Court decisions concerning Article 9 **are still not available to the public** – the courts do not publish decisions related to environmental issues.

Bratislava, Slovakia, May 19, 2008

This alternative report on the implementation of the Aarhus Convention was written by Citizen and Democracy Association (Občan a demokracia), 29. augusta 38, 8111 09 Bratislava, Slovakia,
Contact person: Peter Wilfling, Citizen and Democracy Association, +421 2 5292 5568, wilfling@oad.sk

This report is supported by the following Slovak non-governmental organisations:

Centrum environmentálnych aktivít, Mgr. Richard Medal
Centrum pre filantropiu, Mgr. Marcel Zajac
Centrum pre trvaloudržateľné alternatívy (CEPTA), Ing. Daniel Lešinský, PhD.
Dubnická Environmentálna Skupina, Marek Kurinec
Centrum environmentálnej a etickej výchovy Živica, Mgr. Juraj Hipš
GREENPEACE Slovensko, Mgr. Lucia Sabová
Pre Prírodu, Ing. Zuzana Václavová
Klub Strážov, Mgr. Juraj Smatana
Lesoochranárske zoskupenie VLK, Ing. Juraj Lukáč
Nádej pre Sad Janka Kráľa, Ing. arch. Mgr. art. Elena Pätoprstá
Občan a demokracia, PhDr. Šarlota Pufflerová, CSc.
Občianske združenie TATRY, Mgr. Rudolf Pado
Priatelia Zeme – CEPA, Ing. Roman Havlíček
Slovenská ornitologická spoločnosť / BirdLife Slovensko, Mgr. Miroslav Demko
Spoločnosť pre trvalo udržateľný život, prof. RNDr. Mikuláš Huba, PhD.
Združenie Slatinka, Ing. Lesanka Blažencová
Živá planéta, Ing. Peter Sabo, CSc.

This report is also supported by the network of Slovak environmental non-governmental organisations EKOFÓRUM.