

**Communication to the Aarhus Convention Compliance Committee
filed by the Municipality of Szentgotthard**

Statement by Austria

March, 2010

The communication by the Municipality of Szentgotthard was received by the UNECE/Aarhus Secretariat on June 3, 2009 (ACCC/C/2009/39). The Compliance Committee has declared the communication to be admissible. In a letter dated October 29, 2009 the Aarhus Secretariat sent the communication together with a number of questions of the Aarhus Convention Compliance Committee to Austria as Party concerned, requesting a response within five months, i.e. by March 29, 2010.

The Republic of Austria submits the following statement on the questions of the Aarhus Convention Compliance Committee:

Question 1. What measures were taken by the Government of the Federal Land of Burgenland to duly inform the public of the Municipality of Szentgotthard about the intended construction of the incinerator, and to ensure early public participation?

Information and involvement of the public took place throughout the Environmental Impact Assessment (EIA) procedure pursuant to Article 10 of the Austrian Federal Act on Environmental Impact Assessment 2000¹ (EIA Act 2000), which implements the relevant provisions of the EU EIA Directive, the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo-Convention) and of the Aarhus Convention (**conf. question 4, item 4.4.**):

On April 13, 2007 the project applicant of the waste incineration plant applied for a voluntary **preliminary (scoping) procedure pursuant to Article 4** of the EIA Act 2000 and submitted an outline of the future environmental impact statement.

On May 16, 2007 the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management as Point of Contact concerning the Espoo-Convention **submitted a notification** to the **Hungarian Ministry of Environment** as Hungarian Point of Contact **together with a Hungarian translation of the outline** of the future environmental impact statement. In this notification letter, Austria described in detail the Austrian procedure and asked its Hungarian counterpart **to ensure that the opportunity provided to the public is equivalent to that provided to the public of Austria (conf. Annex 1)**.

On July 16, 2007 Hungary submitted an official statement on the project together with comments of the **Hungarian public** (including also the comments made by the Municipality of Szentgotthard of July 3, 2007, **conf. Annex 2**) to the Austrian EIA authority. These comments were submitted to the project applicant.

¹ Federal Law Gazette I No. 697/1993, last amended by Federal Law Gazette I No. 87/2009.

On October 19, 2007 the project applicant submitted the **application for development consent** for the waste incineration plant together with the environmental impact statement to the Land Government of Burgenland.

On January 16, 2008 the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management submitted inter alia the **application for development consent** as well as the **environmental impact statement** to the Hungarian Ministry of Environment in German language. The essential information for the Hungarian public, i.e. a special report concerning the possible transboundary impacts on Hungary and a summary of the environmental impact statement were submitted **in Hungarian language**. Furthermore the Austrian Federal Ministry of Agriculture, Forestry, Environment and Water Management **asked its Hungarian counterpart to provide the Hungarian public with the same opportunity to participate in the procedure as the Austrian public**. Also some proposals for the participation of the public were given by Austria (**conf. Annex 3**).

On March 27, 2008 the Hungarian Ministry of Environment forwarded the official Hungarian opinion and several comments made by the concerned Hungarian public and municipalities (including **the comments of the Municipality Szentgotthárd, Annex 4**) to the Land Government of Burgenland as the EIA authority.

On July 21, 2008 the EIA authority submitted the environmental impact expertise to the Hungarian Ministry of Environment **in Hungarian language**. This expertise evaluated the environmental impact statement, the application and the other submitted documents in accordance with the state of the art in a comprehensive and summary overall review, examined the comments received, and made proposals for additional measures. This expertise was also open for public inspection.

From September 16 to 18, 2008 the EIA authority held a hearing of the parties within the EIA procedure in Oberwart (Burgenland), covering all applicable administrative provisions. According to the minutes of this hearing, Hungarian participants (including the Mayor of Szentgotthárd, Mr. Viniczay Tibor) as well as representatives of the Hungarian Ministry of Environment were present. Furthermore the hearing was attended by a translator for the Hungarian language, who translated the facts of the case as well as several questions of the participants and answers on demand.

According to Article 5 of the Espoo-Convention, Hungary was invited to **bilateral consultations** in Eisenstadt (Austria), which took place on June 10, 2008 and on September 18, 2008. At the meetings discussions were held inter alia on the following topics: location of the project, air and water pollution, nature and landscape protection, waste management, noise.

Question 2. Does the legislation of Austria provide for the right to participation in decision-making processes related to the environment for the representatives of the public (as per article 2, paragraph 4, of the Aarhus Convention) who are not residents of Austria? Are there any restrictions?

2.1. The Austrian EIA Act 2000 considers public participation as highly important. Therefore, the EIA Act 2000 contains extensive provisions for the protection against harmful impacts and for the participation of the general public in the process. Article 9 para. 5 of the EIA Act 2000 determines, that **anybody may submit written comments on the project and on the environmental impact statement**, within the public inspection period of at least six weeks. There are **no restrictions** by citizenship, nationality, domicile or seat. The comments can even be given in one's native language (concerning the present case this was also possible in Hungarian language, as pointed out in the letter dated January 16, 2008, **Annex 3**).

In addition, **neighbours** and **environmental organisations** from Austria as well as from abroad have *locus standi* according to Article 19 of the EIA Act 2000. Having *locus standi* means to have all procedural rights to enforce given rights. Thus, neighbours or environmental organisations who have *locus standi* have inter alia the right to inspect the files concerning their case and to participate in the hearing. They have the opportunity to take notice of the result of the evidence taken and to comment on it. They also have the right to appeal.

2.2. As described in detail in the above mentioned notification letter, **neighbours** are persons (also from Hungary) who might be endangered or disturbed or whose rights *in rem* might be harmed at home or abroad by the construction, operation or existence of the project as well as the owners of facilities in which persons stay temporarily on a regular basis with regard to the protection of such persons.

There are some prerequisites for the *locus standi* of neighbours. These are however in force independently of citizenship, nationality, domicile or seat. Thus, neighbours from Austria or from abroad who claimed *locus standi* according to Article 19 para. 1 of the Austrian EIA Act 2000 have *locus standi* with the right to appeal insofar as they have filed written complaints concerning infringement of their rights during the period for public inspection in Austria directly to the EIA authority.

2.3. The following criteria have to be met by **environmental organisations** to have *locus standi*:

2.3.1. An **Austrian environmental organisation** has to meet the following criteria of Article 19 para. 6 of the EIA Act 2000:

“(6) An environmental organisation is an association or a foundation:

- 1. whose primary objective is the protection of the environment according to the association’s statutes or the foundation’s charter,*
- 2. that is non-profit oriented under the terms of Articles 35 and 36 Bundesabgabenordnung—BAO (Federal Fiscal Code), BGBl. No. 194/1961, and*
- 3. that has been in existence and has pursued the objective identified in number 1 for at least three years before submitting the application pursuant to paragraph 7.”*

Pursuant to Article 19 para. 7 of the EIA Act 2000 the Federal Minister of Agriculture and Forestry, Environment and Water Management decides upon request by administrative order in agreement with the Federal Minister for Economic Affairs, whether an environmental organisation meets the above mentioned criteria of paragraph 6 and in which *Laender* the environmental organisation is entitled to exercise the rights related to *locus standi*. The rights related to *locus standi* can be exercised in procedures on projects to be implemented in this Land/in these *Laender* or in directly neighbouring *Laender* (conf. Article 19 para. 8 of the EIA Act 2000).

According to Article 19 para. 10 of the EIA Act 2000 an Austrian environmental organisation which is recognised, pursuant to paragraph 7, has *locus standi* and is entitled to claim the observance of environmental provisions in the procedure insofar as it has filed written complaints during the period for public inspection according to Article 9 para. 1. It is also entitled to lodge a complaint to the Administrative Court.

2.3.2 An **environmental organisation from abroad** does not have to be recognised pursuant to Article 19 para. 7 of the EIA Act 2000. According to Article 19 para. 11 an environmental organisation **from a foreign state** does have *locus standi* if that state has been notified pursuant to Article 10 para. 1 no. 1 of the EIA Act 2000, if the effects impact

that part of the environment in the foreign state whose protection is pursued by the environmental organisation and if the environmental organisation would be entitled to participate in an environmental impact assessment procedure and in a development consent procedure if the project was implemented in this foreign state.

2.3. All mentioned prerequisites comply with the Aarhus Convention, as the Convention does not interdict to establish criteria according to national legislation [*"In the framework/in accordance with (national legislation)"*] — These and similar phrases can be found at several instances in the Convention. Among them are article 2, para. 4, and article 6, para. 1b (*"in accordance with national legislation"*). The Austrian criteria are reasonable and in accordance with the Aarhus Convention.

Question 3. Please inform the Committee about the level of involvement of representatives of the public (including individuals who are residents of Hungary, and legal entities governed by Hungarian law, apart from non-governmental organizations) in the decision-making process related to the intended construction of the incinerator.

According to Article 9 para. 1 of the Austrian EIA Act 2000, the application and the Environmental Impact Statement were open for public inspection and comments for the period of six weeks (beginning on January 30, 2008 ending on March 13, 2008) at the Land Government of Burgenland and the municipality of Heiligenkreuz. A brief project description and a summary of the Environmental Impact Statement were available together with the announcement of the public inspection on the Internet (www.burgenland.gv.at). The announcement of the public inspection was also published in two newspapers widespread in the Land of Burgenland (*"Neue Kronen Zeitung"* and *"Kurier"*) on January 28, 2008 and in the national official journal *"Amtsblatt zur Wiener Zeitung"* on January 26, 2008 (conf. decision of the Land Government of Burgenland, page 79, **Annex 5**). The announcement also included detailed information concerning the right to participate, in particular with regard to Hungarian environmental organisations. Furthermore it was pointed out in the announcement, that the EIA authority carries out a transboundary EIA according to Article 10 of the EIA Act 2000, as the project might have significant effects on the environment in Hungary (confer the Austrian statement under question 1).

Thereupon the EIA authority received 5.610 comments made by the public, among these the impressive high number of **more than 3.300 (about 60 %)** were **comments from Hungary**, This including first of all comments made by Hungarian citizens but also comments of several NGO's, municipalities, district administrations (for example the Komitat of Vas) as well as an official Hungarian opinion (conf. decision page 79 to 151, **Annex 5**).

As pointed out under question 1, Austria has forwarded all relevant information concerning the Hungarian public to the Hungarian Ministry of Environment. It was up to Hungary to provide the Hungarian public with the same opportunity to participate in the procedure as the Austrian public. The above mentioned high number of comments made by Hungary shows definitely, that Hungary had the possibility to participate in accordance with the Aarhus Convention.

In addition, as further public participation possibility, **a Hungarian translation of the environmental impact expertise** was forwarded to the Hungarian Ministry of Environment (confer Question 1), which also scrutinized **all Hungarian comments**. This expertise was also open for public inspection. The announcement of the public inspection for the period of four weeks, beginning on July 30, 2008, was published on July 11, 2008 in the newspapers *"Neue Kronen Zeitung"* and *"Kurier"* and in the national official journal *"Amtsblatt zur Wiener Zeitung"*. The announcement also included the summons to the hearing of the parties on

September 16 to 18, 2008 (conf. page 156 of the decision of the Land Government of Burgenland, **Annex 5**).

Question 4. Was the involvement of the Austrian municipalities in the decision-making process concerning the construction of the incinerator determined by their status (or responsibilities) as public authorities or by their status as representatives of the public, within the meaning of article 2, paragraphs 2 and 4 respectively, of the Convention?

4.1. The ombudsman for the environment, the host municipality and the directly adjoining Austrian municipalities which may be affected by significant effects of the project on the environment have *locus standi* in the development consent procedure (and in the acceptance inspection procedure) according to Article 19 para. 3 of the Austrian EIA Act 2000. Based on this provision these Austrian municipalities and the Austrian ombudsmen for the environment are classified as formal parties ("Formalparteien"). They are entitled to claim the observance of legal provisions that serve to protect the environment or the public interests in their competence as a subjective right in the procedure and to lodge complaints to the Administrative Court. However, they cannot claim individual rights of the citizens.

4.2. Besides the *locus standi* under item 4.1., Austrian Municipalities have to be involved in the decision making process in case they are classified as "co-operating authorities" (concerning the definition of "co-operating authorities" conf. the enclosed Article 2 para. 1 of the EIA Act 2000, **Annex 7**). This involvement is determined by the status of the municipality as authority (for example by its responsibility as competent authority for building law).

4.3. The Aarhus Convention demands an involvement of the public in decision making processes, but there is no obligation for the parties to grant rights for (domestic or foreign) formal parties or (domestic or foreign) authorities.

In applying the EIA Act 2000, the Land Government of Burgenland as competent EIA authority rejected the *locus standi* of the Municipality of Szentgotthard as an authority (formal party). Thus the comments made in its formal status as municipality were rejected (conf. page 76 of the decision, item IV/2, **Annex 5**).

However, the Municipality of Szentgotthard was entitled to make comments in its status as owner of facilities, in which persons stay temporarily on a regular basis with regard to the protection of such persons i.e. schools, a kinder garden, a foster home and a day care centre for elderly (= in its status as a neighbour). In its status as neighbour the Municipality of Szentgotthard was given *locus standi*. In accordance with Art. 6 para. 8 of the Aarhus Convention the submitted comments were duly scrutinized by the EIA authority. Since no adverse effects on neighbours or the mentioned facilities could be proofed, these comments were together with other remaining comments finally dismissed (conf. the decision's reasoning: "verbleibende Einwendungen", page 76, item IV/3, **Annex 5**). In accordance with Art. 6 para. 9 of the Aarhus Convention the public was informed about the decision and its reasoning.

From the above mentioned facts it can be seen that a huge and comprehensive public involvement (more than 3.300 comments by Hungarians) took place with Hungary in which the Municipality of Szentgotthard did have the possibility to participate in accordance with the relevant provisions of the Aarhus Convention.

4.4. The 2nd pillar of the Convention (Art. 6, 7, 8 and 9 para. 2) in relation to projects has been implemented and applied in Austria on the basis of EU Directives that have already come into force. In order to fully comply with the provisions on public participation of the

Aarhus Convention, the EIA Directive 85/337/EEC and the IPPC Directive 91/61/EC were adapted at the European level by Directive 2003/35/EC.

Austria transposed the EIA Directive 85/337/EEC (amended by Directives 97/11/EC and 2003/35/EC), the UNECE Espoo Convention and the Aarhus Convention at project level into national law by the EIA Act 2000.

In this respect Austria refers to the Petition 1885/2008 by Mr. Viniczay Tibor (Hungarian, Mayor of Szentgotthard), on behalf of the Szentgotthard municipal authorities, concerning the waste incineration plant in Heiligenkreuz. On the occasion of this Petition the Committee on Petitions of the European Parliament requested information and an opinion of the European Commission as the petitioners objections to the construction of this waste incinerator on the grounds that it violates EC legislation in particular the Habitats, EIA, Waste Incineration and IPPC Directives.

In its reply the European Commission pointed out that cross-border consultations were carried out in accordance with Art. 7 of the EIA Directive and Article 5 of the Espoo Convention, allowing the respective national authorities and also the concerned public of the possibly affected cross-border regions in Hungary to express their opinion. Furthermore the European Commission stated, that the competent authorities do not have the obligation to accept all the comments received, but they are obliged to examine them and provide to the public the main reasons and considerations on which their decision is based, to grant the development consent. According to the present case a breach of Community environmental legislation could not be identified by the European Commission (**conf. Annex 6**).

Question 5. What are the domestic remedies available in Austria for the Municipality of Szentgotthard (and/or for any representative of the public concerned who is resident of the Municipality of Szentgotthard) to challenge the decision of the Government of the Federal Land of Burgenland that gave the permit for the construction of the incinerator?

An appeal against the decision of the Land Government of Burgenland can be filed inter alia by the parties mentioned under Question 2 within a period of four weeks according to Article 40 of the EIA Act 2000. The communicant has appealed against the decision of the Land Government of Burgenland to the Environmental Senate as authority of appeal. The Environmental Senate received more than 485 appeals against the decision of the Land Government of Burgenland, among these were about 350 appeals from Hungary. As the appeal procedure is still pending, the Environmental Senate is not entitled to give further information.

Against the decision of the Environmental Senate the Municipality of Szentgotthard as well as other Hungarian neighbours and Hungarian environmental organisations may lodge complaints to the Administrative Court and/or the Constitutional Court within a period of six week.

Question 6. Were Hungarian governmental representatives and/or other Hungarian stakeholders involved in the decision-making process?

Besides the bilateral consultations according to the Espoo-Convention (as mentioned under Question 1), a bilateral consultative committee between Austria and Hungary was set up with representatives from the federal/national and from the regional/local authorities. Two meetings were held on September 23, 2008 (in Budapest) and on November 20, 2008 (in Vienna). The Mayor of Szentgotthard, Mr. Tibor Viniczay, and the Deputy Mayor of Szentgotthard, Mr. József Bugán, were involved as Hungarian representatives. As a result of the meetings, a working group was set up in order to see whether there are possibilities of

cooperation on finding synergetic effects, for example a possible district heating by the plant for Szentgotthard in case of the establishment of the waste incinerator.

On March 10, 2009 a meeting of the working group took place in Heiligenkreuz. At this meeting, Hungary was asked to propose further topics and to set a date for further meetings of the working group.

Conclusions:

Considering all mentioned facts, Austria emphasizes that a comprehensive participation of the Hungarian public has been taking place in the EIA procedure in accordance with the Aarhus Convention. Therefore, Austria as Party concerned, has not failed to comply with the Aarhus Convention concerning the decision-making process related to the intended construction of a waste incinerator in the Land of Burgenland (Heiligenkreuz).

Enclosures:

Annex 1: Notification, May 16, 2007

Annex 2: Comments of the Municipality of Szentgotthard, July 3, 2007

Annex 3: Austrian Federal Ministry, forwarding the application and environmental impact statement, January 16, 2008

Annex 4: Hungarian Ministry of Environment, forwarding the comments of the Municipality of Szentgotthard, March 27, 2008

Annex 5: Decision of the Land Government of Burgenland of February 5, 2009, (conf. in particular page 76, 79-151, 156)

Annex 6: European Parliament, Notice to Members, dated September 1, 2009

Annex 7: Austrian EIA Act 2000 (consolidated version in German language and an informal English translation). Please, note that the consolidated version is not legally binding. The legally binding wording is published in the Federal Law Gazettes.