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Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee

Addendum

Findings and recommendations with regard to communication ACCC/C/2009/41 concerning compliance by Slovakia (adopted by the Compliance Committee on 17 December 2010)

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I. Introduction

1. On 1 July 2009, the Austrian non-governmental organization (NGO) Global 2000/Friends of the Earth Austria (hereinafter, “the communicant”), in collaboration with Friends of the Earth Europe (FoEE), Greenpeace Slovakia and International, Za Matky Zem and VIA IURIS, and with the legal support of Oekobuero, submitted a communication to the Compliance Committee alleging a failure by Slovakia to comply with its obligations under article 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter “the Aarhus Convention” or “the Convention”).
2. The communication alleges that, with regard to the Mochovce Nuclear Power Plant (hereinafter, “the Mochovce NPP”), by failing to provide for public participation in the decision-making process for a construction permit additional to the one already granted in 1986, as well as related permits in 2008, the Party concerned failed to comply with article 6, paragraphs 1, 4 and 10 of the Convention. The communicant also alleges that, 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 its legislation, the Party concerned fails to comply with article 9, paragraphs 2, 3 and 4, of the Convention.
3. At its twenty-fourth meeting (30 June–3 July 2009), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 23 July 2009, along with a number of questions put forward by the Committee soliciting additional information from the Party on matters relating, inter alia, to the applicable legal framework and the decision-making procedures for the project.
5. At its twenty-fifth meeting (22–25 September 2009), the Committee agreed to discuss the content of the communication at its twenty-seventh meeting (16–19 March 2010).
6. The Party concerned and the communicant addressed the questions raised by the Committee on 2 December 2009 and on 29 December 2009, respectively.
7. The Committee discussed the communication at its twenty-seventh meeting, with the participation of representatives of the communicant and the Party concerned. At the same meeting, the Committee confirmed the admissibility of the communication. During the discussion, the communicant and the Party concerned provided documents and written statements to the Committee. The Committee also received a letter signed by mayors of four Slovak municipalities near the Mochovce NPP.
8. The Party concerned submitted additional information to the Committee on 13 and 14 April 2010; and the communicant on 20 May 2010.
9. The Committee prepared draft findings at its twenty-ninth meeting (21–24 September 2010), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 11 October 2010. Both were invited to provide comments by 8 November 2010.
10. The Party concerned and the communicant provided comments on 29 and 30 November 2010, respectively.
11. In its reply, the Party concerned expressed “strong concerns about the conclusions” reached by the Committee in its draft findings. The Party concerned argued, inter alia, that

it appeared from the draft findings that no analysis was performed as to whether the conditions for application of public participation obligations under article 6 were fulfilled. In particular, the Party concerned argued that the reference to “mutatis mutandis, and where appropriate” in article 6, paragraph 10, should be understood as meaning that “it is for the relevant national authority to make the additional assessment identifying where it is ‘appropriate’ to carry out a public participation procedure”. The Party concerned also argued that “it is not open to the Committee to substitute its views for those of the authority; it can only interfere when the decision is manifestly unreasonable”. Moreover, the Party concerned referred to the amendments of legislation adopted in 2009 and submitted that these amendments bring Slovak law fully in compliance with the requirements of the Convention. The Party concerned also asked the Committee to hold a second meeting with the Party concerned “where the facts and applicable law could be presented before the Compliance Committee in person”.

12. In its reply, the communicant in general agreed with the findings. It clarified that since the Mochovce NPP environmental impact assessment (EIA) was concluded in May 2010, new legislation applies and the public concerned will have standing. The communicant also explained that, while it had alleged at the discussion during the twenty-seventh meeting that this was not the case, it is now aware that the new legislation is applicable for cases following the Mochovce NPP EIA.

13. At its thirtieth meeting, the Committee considered the request from the Party concerned for a second discussion with the Party concerned, and decided that such a discussion was not necessary, since the Committee had received the concerns of the Party in writing. At the same meeting, the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as addendum to the Committee’s report to the fourth meeting of the Parties (or as separate document, as appropriate). It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues¹

14. This communication, while also pertaining to Slovak legislation, essentially concerns the alleged failure by the Party concerned to provide for public participation in accordance with article 6 of the Convention in three specific instances of decision-making by the Slovak Nuclear Regulatory Authority (*Úrad Jadrového Dozoru*; hereinafter, “UJD”) concerning the Mochovce NPP. These are:

(a) Decision No. 246/2008 of 14 August 2008 to permit the change of construction of Mochovce NPP Units 3 and 4;

(b) Decision No. 266/2008 of 14 August 2008 to permit the implementation of changes in safety-related equipment during completion of the Mochovce NPP Units 3 and 4; and

(c) Decision No. 267/2008 of 14 August 2008 to permit the implementation of changes in the document “Preliminary Safety Report of NPP Mochovce Units 3 and 4”.

¹ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

A. Legal framework

15. The main Slovak legislation concerning nuclear installations is found in Act No. 541/2004 Col. on the Peaceful Use of Nuclear Energy, as amended (hereinafter, “the Nuclear Act”) and Act No. 50/1976 on Land-use and Building Proceedings (hereinafter, “the Building Act”). UJD is the competent administrative body to issue the various consents or permits for the use of nuclear energy under these acts.

16. For nuclear installations, the three main decisions required, all issued by UJD, are:

- (a) Consent for the location of the installation under the Building Act;
- (b) A construction permit under the Building Act; and
- (c) An operation permit under the Nuclear Act and the Building Act, which is a two-tier permit consisting of a permit to commence operation and a permit for operation.

17. Other additional permits are also required, e.g., on the disposal and transport of nuclear material.

18. While the general rules for public participation are set out in the Code of Administrative Procedures (Act 71/1967), there are also specific rules on public participation in Act No. 24/2006 on Environmental Impact Assessment (hereinafter, “the EIA Act”) and in the Building Act. The EIA procedure is not a permitting procedure in itself, nor does it provide for public participation as a part of the permit procedure, although the results of the EIA shall be considered in subsequent permitting procedures.

19. The Code of Administrative Procedure provides for participation in administrative procedures for persons whose rights and legally protected interests or obligations are the subject matter of or may be directly affected by the decision, persons who claim that their rights, legally protected interests or obligations may be affected by the decision (until it is proven otherwise), and persons recognized as participants under specific laws.

20. When the EIA procedure was initiated for the Mochovce NPP in February 2009, the public concerned that could participate in the EIA procedure, according to the EIA Act, included civic initiatives (at least 500 natural persons with permanent residence in the affected municipality), civic organizations promoting environmental protection (at least 250 natural persons of over 18 years of age, of whom at least 150 with permanent residence in the affected municipality) and non-governmental organizations promoting environmental protection established under special regulations and active for more than two years (necessary proof of registration).

21. Under the Building Act, the parties to the process are: the applicant; persons with ownership or other land rights that may be affected by the permit; other persons assigned such status by relevant regulations (such as the EIA Act); a building surveyor or other qualified person; and the designer of the building. The Constitutional Court of Slovakia has ruled that this list of participants is definitive for the purposes of construction proceedings and any expansion is not permissible.

22. Decisions by UJD can be first appealed to UJD itself. In such cases UJD is to apply the provisions on participation in the Code of Administrative Procedure. Appellate decisions by UJD can be brought to the Regional Court for a legal review, in accordance with the Act on Civil Procedure.

B. Facts

23. The Mochovce NPP is located in Southern Slovakia, 120 km east of the capital, Bratislava, in Levice Okres (district). The location permit for the project was issued in 1979, and the construction permit for the four reactors (Soviet Generation II reactors, type VVER 440/V213, designed in the 1970's) was initially issued on 12 November 1986, under the condition that construction be completed in 115 months.

24. Two reactors, Mochovce 1 and 2, were finalized and started operating in 1989, whereas the other two, Mochovce 3 and 4, were only partially constructed. The work on these two reactors was curtailed in the early 1990's due to financial constraints. On 5 May 1997, the period for the completion of construction work under the construction permit was extended by the relevant authority for the first time to 31 December 2005, and later, for the second time, on 15 July 2004, it was extended to 31 December 2011. In 2007, Slovakia decided to complete the Mochovce NPP by finalizing and putting into operation reactors Mochovce 3 and 4. The developer responsible for the project is ENEL/SE, a consortium between the Italian company Enel SpA and the Slovak Slovenské Elektrané a.s.

25. In May 2008 the developer applied for the three permits in question. The applications were approved, by UJD decisions 246/2008, 266/2008 and 267/2008, on 14 August 2008.

26. UJD decision 246/2008 permits the change of construction of NPP Mochovce Units 3 and 4, and provides a long list of binding conditions and different deadlines. The decision also extends the general deadline for completing the construction to 31 December 2013. In its justification, UJD refers to the notice made to different public bodies. While UJD does not consider it necessary to carry out an EIA before granting the construction permit, it holds that such an assessment, based on the EIA Act, should be made before permitting the operation of the facility.

27. UJD decision 266/2008 of August 2008 permits the implementation of changes in safety-related equipment during completion of the NPP Mochovce Units 3 and 4. It includes a list of 120 items for which changes would be undertaken.

28. UJD decision 267/2008 of 14 August 2008 permits the implementation of changes in the document "Preliminary Safety Report of NPP Mochovce Units 3 and 4". In its decision, UJD refers to the fact that the preliminary safety report for NPP Mochovce Units 3 and 4 was elaborated in 1984 and 1986, and that the applicant had submitted the updated version of the report in full to UJD because of the changed legislative requirements during the period in which the completion of NPP Mochovce Units 3 and 4 was being planned.

29. Before the decisions were made, in June and August 2008, two organizations, Greenpeace Slovakia and Za Matku Zem, filed their statements with UJD relating to the developer's application for construction changes, as parties to the proceedings in accordance with the general provisions of the Code of Administrative Procedure, and claimed that it was necessary to carry out the EIA and have the EIA final statement before the decision was issued by UJD. Their arguments were rejected on the grounds that these organizations did not fulfil the criteria necessary for organizations to participate in the proceedings. In decision 246/2008, while there is no reference made to the statements submitted by the two organizations, it is stated that the parties to the proceedings had not raised any objection.

30. While it is not fully clear to the Committee when the preparatory work for the nuclear plant restarted, the construction work officially restarted on 3 November 2008.

31. In September 2008, the Slovak Ministry of Environment decided that an EIA would be carried out not for the construction changes to the project, but for its operation, and that

such an assessment would be finalized before the initiation of its operation. Accordingly, the scoping phase of the environmental impact assessment started in February 2009.

32. The completion of the first reactor of NPP Mochovce Units 3 and 4 is scheduled for February 2012.

C. Domestic remedies

33. In September 2008, Greenpeace Slovakia and Za Matku Zem appealed decision 246/2008, arguing that one of the required documents, the EIA report, was missing, and that for that reason UJD could not issue the permit. In May 2009, UJD dismissed the appeal by Greenpeace (Za Matku Zem did not continue the proceedings), and confirmed the decision of the first instance, on the grounds that the appeal had arrived too late, that the Ministry of the Environment had issued an opinion that the project was not a new activity and did not introduce new major changes, and that Greenpeace Slovakia was not considered a party to the proceedings under the Code of Administrative Procedure.

34. In May 2009, Greenpeace Slovakia filed a petition with the regional court in Bratislava to review the legality of the decision on appeal. In its petition, it claims that its rights to public participation and access to justice were infringed. Greenpeace Slovakia also claims that it failed to comply with the 15-day deadline for appeals because UJD did not communicate decision 246/2008 on time. At the time of adopting these findings, the case is still pending in the regional court.

D. Substantive issues

Relation between the 1986 and 2008 decisions

35. While it is not disputed that nuclear power plants are covered by article 6 of the Convention, the communicant and the Party concerned disagree about the relation between the construction permits granted in 1986 and 2008.

36. According to the communicant, the 2008 permit involved a considerable update and review of the 1986 construction permit, to the extent that it would not have been possible to follow the 1986 permit and also comply with updated nuclear safety and technology standards. The modifications involved huge changes such as, for instance, a shift to a digital system, a shift of fuel and a power upgrade. Furthermore, the recommendations given by the European Commission, based in the Euratom treaty, differ widely from what was permitted in 1986. Thus, according to the communicant, the criteria in article 6, paragraph 10, were fulfilled, and the Party concerned was under an obligation to ensure public participation before the decision on the 2008 permit was made.

37. The communicant also claims that the necessary changes set out in the 2008 decision are such that they have to be considered as a new project in the sense of annex I, paragraphs 1 and 22, to the Convention. In order to fulfil the updated safety and technological requirements, the changes in the plant design had to be very different from the one licensed in 1986. For that reason, in view of the communicant, the Convention is also applicable on this basis.

38. According to the Party concerned, the 2008 permit decision is a permit for a change in the construction before completion. The change relates to a permit granted in 1986 rather than a new building. It is the continuation of an existing project that was suspended in 1990 for financial reasons. The 2008 decision did not replace the 1986 construction permit, but only modified it. Thus, the 2008 permit was not about an extension, but about the completion of a plant in accordance with the original project. Moreover, according to the

Party concerned, the 2008 permit entailed stricter requirements and additional conditions with higher standards than before. Yet, it did not provide for any physical change in the planned activity.

Early public participation

39. It is not disputed that there was no opportunity for the public to participate in the decision-making procedure leading to UJD decisions 246/2008, 266/2008 or 267/2008.

40. According to the communicant, by providing for public participation only in the EIA procedure, after the issuance of the construction permit and while construction was proceeding, the Party concerned failed to comply with article 6, paragraph 4, of the Convention. Fundamental technological, safety and other environment-related decisions had already been taken at the time the construction was proceeding and contracts had been signed with suppliers. Thus, according to the communicant, it is absolutely unclear how the public's view would be taken into account in the decision-making process when changes were no longer feasible at the time of the EIA procedure. To provide for public participation in such circumstances cannot be compatible with the Convention because by then public participation is neither early nor effective and major options are no longer open.

41. According to the Party concerned, the 2008 construction permit was not an extension but a completion of an installation in accordance with the original project. Thus, there was not a change in the activity, and no new activity was permitted by the 2008 decisions. It follows that there was no obligation to provide for public participation before the construction permit was issued. The EIA procedure initiated in 2009 was carried out in accordance with the Convention on Environmental Impact Assessment in a Transboundary Context and applicable EU law. In this process several members of the wider public and NGOs, as well as neighbouring countries, participated. The permit to operate the activity will be issued only after the EIA procedure, and the outcome of the EIA procedure will be taken into account in that decision.

Access to justice

42. The original communication was limited to claiming a failure by the Party concerned to comply with article 6 of the Convention. In the course of the proceedings before the Committee, the communicant expanded its claim so as to include a claim of a breach of article 9, paragraphs 2 and 3, by the Party concerned, since it had not been possible to appeal against the permitting decisions due to restricting standing requirements, and since no injunctions had been granted, with the result that the construction could start immediately after the issuance of the permits.

III. Consideration and evaluation by the Committee

43. Slovakia deposited its instrument of accession on 5 December 2005. The Convention entered into force for Slovakia on 5 March 2006.

44. Nuclear power plants, such as the Mochovce NPP, are activities covered by article 6, paragraph 1, and annex I, paragraph 1, of the Convention, for which public participation shall be provided in permit procedures. The Committee notes that the original construction permit for Mochovce NPP Units 3 and 4 was issued in 1986, long before the Convention entered into force for Slovakia. This 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.

Use of domestic remedies and access to justice

45. The Committee notes that while its findings are being finalized the appeal by Greenpeace Slovakia to the Bratislava regional court is still pending. In the appeal to the court, the UJD decision is challenged, *inter alia*, on the ground that there was no opportunity for public participation, which is indeed the core issue also in the case before the Committee. While it cannot be excluded that the regional court will reverse the UJD decision, the Committee decides not to defer the case before it in order to await the outcome in the Bratislava regional court.

46. According to the information received from the communicant and the Party concerned, it may take a long time, possibly up to three years, before the court makes its decision. Yet, the 2008 UJD construction permit prescribes that the construction should be completed by 31 December 2013. In this context, the Committee notes that the regional court did not decide to inhibit the construction of the Mochovce NPP while the case is pending before it. In other words, the construction of the plant is being carried out despite the appeal for judicial review and it may almost be completed before the court has made its decision. The Committee moreover considers that for a major installation like this, when a construction permit has been granted and the construction is carried out, there may be considerable pressure on a court not to stop the activity and not to annul the permit decision for lack of public participation. Even if it were to do so, the construction in itself is likely to cause significant environmental effects. For these reasons, the Committee decides to examine the communication and not to await a possible decision by the national court.

47. In this context, the Committee also notes that the communicant expanded its original claims against the Party concerned, submitting that the Party concerned also failed to provide for access to justice in accordance with article 9 of the Convention. Although the Committee decides to examine the claims concerning lack of public participation in the case, despite the pending case before the national court, it would not be appropriate to examine the claims about access to justice without awaiting the outcome of the pending case. For this reason, the Committee decides not to consider the added claim about access to justice, and to limit its findings to the issue of public participation in the decision-making processes leading to the 2008 decision on the Mochovce NPP.

Relation between the 1986 and 2008 decisions: reconsideration or update of operating conditions — article 6, paragraph 10 — or change to or extension of activity — annex I, paragraphs 1 and 22

48. Before considering whether the minimum requirements for public participation in article 6 of the Convention were met by the Party concerned in the decision-making processes concerning Mochovce NPP, the relation between the 2008 decisions and between the 2008 and 1986 decisions must be clarified.

49. The three decisions in question for the Mochovce NPP, *i.e.*, UJD decisions 246/2008, 266/2008 and 267/2008, deal with different aspects of the Mochovce NPP and concern different legal issues, *i.e.*, the construction, safety modifications and the implementation of changes in the preliminary safety report. Although they form part of a tiered decision-making where the requirements for public participation may apply at different occasions, among themselves, the three decisions are nevertheless closely related in the procedure. Indeed, decisions 246/2008, 266/2008 and 267/2008 appear to have been issued in the same process. They were all issued by UJD on the same date, based on applications by the same developer, that were all submitted in May 2008. In one way or the other, they all deal with the operating conditions for the nuclear plant.

50. Nuclear power plants, such as the Mochovce NPP, are covered by article 6 of the Convention. In the present case, however, the applicability of the Convention depends on

the relation between the 1986 and the 2008 decisions. The Convention is not applicable to the 1986 decision. The application for the 2008 UJD decisions was made in May 2008. Thus, the Convention was applicable, and accordingly the Party concerned was obliged to ensure public participation before taking the 2008 UJD decisions, if they amounted to a reconsideration or an update of the operating conditions, under article 6, paragraph 10 of the Convention, or if the decisions concerned a change to or extension of the activity in accordance with annex I, paragraph 22, to the Convention.

51. If the 2008 construction permit implied a reconsideration or an update of the operating conditions of the Mochovce NPP, the Party concerned should have ensured that the provisions on public participation in article 6, paragraphs 2 to 9, of the Convention were applied, “*mutatis mutandis, and where appropriate*”.

52. The Party concerned was also under an obligation to ensure that the provisions of article 6 were applied if the 2008 construction permit concerned a change to or extension of the activity in question, and if the change or extension in itself met the criteria/threshold set out in annex I to the Convention.

53. As held in paragraph 49 above, the three decisions made in August 2008, while part of larger, tiered decision-making, were closely related. Thus, when determining whether the 2008 decision-making on the Mochovce NPP by UJD amounted to a reconsideration or an update of the operating conditions by a public authority, according to article 6, paragraph 10, of the Convention, or a change to or an extension in itself that met the criteria of annex I to the Convention, the Committee considers the legal effects of the three 2008 decisions together.

54. The 2008 decisions entailed a number of new conditions for the Mochovce NPP. The Committee notes that the legal requirement in Slovak as well as EU law for a nuclear power plant in 2008 were considerably different from those that applied in Czechoslovakia in 1986, when the original construction permit was granted. UJD decision 246/2008 provides a long list of new binding conditions and different deadlines; UJD decision 266/2008 includes a list of 120 items for which changes would be undertaken; and UJD decision 267/2008 refers to the changed legislative requirements during the planning period for the completion of Mochovce NPP Units 3 and 4. During the formal discussions with the communicant and the Party concerned at the Committee’s twenty-seventh meeting, the Party concerned referred to the Mochovce NPP as a “non-standard case”.

55. Based on the information given by the communicant and the Party concerned, including the translation of the three decisions in question, it is clear that UJD decision 246/2008 in itself — but even more so in combination with decision 266/2008 and decision 267/2008 — regardless of whether it involved any significant change or extension of the activity, amounted to a reconsideration and update of the operating conditions by a public authority of an activity (a nuclear power plant) referred to in article 6, paragraph 1 (a), of the Convention. Thus, in accordance with article 6, paragraph 10, of the Convention, the Party concerned was obliged to ensure that the provisions of article 6, paragraphs 2 to 9, were applied, “*mutatis mutandis, and where appropriate*”. In this context, the Committee wishes to stress that, although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause “*mutatis mutandis, and where appropriate*” does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation.

56. The Committee considers that the clause “*where appropriate*” introduces an objective criterion to be seen in the context of the goals of the Convention, recognizing that “access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take

due account of such concerns” and aiming to “further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment”. Thus, the clause does not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the present case.

57. The Committee finds that when the authority reconsidered or updated the operating conditions for an activity of such a nature and magnitude, and being the subject of such serious public concern, as this nuclear power plant, with the changes and increased potential impact on the environment as presented to the Committee, public participation would have been appropriate. This conclusion is not countered by the fact that most, if not all, changes in the 2008 construction permit lead to stricter requirements than those set in the 1986 permit. Thus, by failing to provide for public participation according to article 6, paragraphs 2 to 9, the Party concerned failed to comply with article 6, paragraph 10 of the Convention.

58. The Committee also considers that if the Mochovce NPP had been in operation since 1986 under the conditions set at the time, the changes of the activity required by the 2008 decisions would have met the criteria set out in annex I, paragraphs 1 and 22, of the Convention. In this context, the Committee wishes to stress that, while for many activities listed in annex 1 to the Convention there are certain criteria or thresholds envisaged below which the requirements of article 6 paragraph 1 (a) would not apply, for some of the activities listed (including nuclear power stations) the Convention does not establish any criteria or thresholds. This means that these activities, regardless of their size, are subject to article 6, paragraph 1 (a), and thus provisions of article 6 must be applied with respect to decisions of whether to permit such activities. By virtue of the first sentence of paragraph 22 of annex 1 the same applies to a change or extension of such activities. Thus, in principle, all changes or extensions to such activities are subject to article 6. However, bearing in mind that a change or extension to already permitted activities requires reconsideration or updating of the existing permit, the provisions of article 6 would apply “mutatis mutandis, and where appropriate”, as stipulated in article 6, paragraph 10.

59. The Committee concludes that the Party concerned was obliged to ensure public participation in the decision-making process leading to the UJD decisions adopted in August 2008 for the Mochovce NPP.

Early public participation — article 6, paragraph 4

60. As stated in paragraph 39 above, there was no opportunity for the public to participate in the decision-making procedure leading to UJD decisions 246/2008, 266/2008 or 267/2008. Thus, rather than further examining this procedure, the Committee considers whether the Party concerned provided for early and effective public participation through other procedures relating to the decisions for Mochovce NPP, in particular through the EIA procedure launched in February 2009.

61. It follows from article 6, paragraph 4, of the Convention that a core criterion for public participation in decisions on specific activities is that it is provided at an early stage “when all options are open and effective public participation can take place”. While there was no opportunity for public participation in the decision-making leading to the three UJD decisions of August 2008, the EIA procedure that provided for public participation was carried out before the permit was given to put the Mochovce NPP into operation. In this context, the Committee recalls that under Slovak law, the EIA procedure is not a permitting procedure in itself, although the results of the EIA should be considered in the subsequent permitting procedures. The question is thus whether the opportunity for public participation in the EIA procedure after the construction permit was issued, but before the operation was permitted, was sufficient to meet the requirements of the Convention.

62. Each Party to the Convention has certain discretion to design the decision-making procedures covered by article 6 of the Convention. Also, in tiered decision-making procedures, each Party can decide which range of options is to be discussed at each stage of the decision-making. Yet, within each and every such procedure where public participation is required, it should be provided early in the procedure so as to ensure that indeed all options are open and effective participation can take place (ACCC/C/2006/16 (Lithuania) ECE/MP.PP/2008/5/Add.6, paras. 57 and 71).

63. Providing for public participation after the construction permit can only be compatible with the requirements of the Convention if the construction permit does not preclude that all issues decided in the construction permit can be questioned in subsequent or related decision-making so as to ensure that all options remain open. Yet, a mere formal possibility, *de jure*, to turn down an application at the stage of the operation permit, when the installation is constructed, is not sufficient to meet the criteria of the Convention if, *de facto*, that would never or hardly ever happen (ACCC/C/2007/22 (France) ECE/MP.PP/2009/4/Add.1, para. 39). The risk is obvious that providing for public participation only after the construction permit precludes early and effective public participation when all options are open. Rather, it is likely that once an installation has been constructed in accordance with a construction permit, political and commercial pressures, as well as notions of legal certainty, effectively foreclose discussions concerning the construction itself, as well as options with regard to technology and infrastructure (ACCC/C/2006/16 (Lithuania) ECE/MP.PP/2008/5/Add.6, paras. 74–75).

64. In the present case, the Committee is convinced that, once the construction of the Mochovce NPP Units 3 and 4 is carried out, many of the conditions set in the construction permit are such that they can no longer be challenged by the public. Although the permit to commence the operation and the permit to continue the operation are to be given before the activity starts, there is a considerable risk that once the installation is constructed it is no longer a politically realistic option for the authority to block the operation on the basis of issues relating to the construction, to technology or to infrastructure. Moreover, it is not sufficient to provide for public participation only at the stage of the EIA procedure unless it is also part of the permitting procedure. For these reasons, the Party concerned failed to comply with article 6, paragraph 4, of the Convention in the decision-making for Mochovce NPP Units 3 and 4.

65. Having found that the Party concerned failed to comply with article 6, paragraph 4, of the Convention in the case of Mochovce NPP, the implied question is whether this is due to a systemic failure or whether it refers only to this particular case. Slovakia has a legal framework in place to provide for public participation in environmental decision-making. There are rules on public participation in the Code of Administrative Procedure, but also in the Building Act and the EIA Act. The Committee notes that the communicant's argument has centred on the lack of opportunities for public participation with regard to Mochovce NPP, rather than a lack of such opportunities in general. Indeed, in the original communication, the communicant states that:

[t]he approach of having the EIA after the permitting procedure is not usual in Slovakia. The Slovak EIA procedure is not a permitting procedure by itself. However, the results of the EIA have to be considered in the following permitting procedures, among others to comply with international and European law. The regular EIA-approach in Slovakia is therefore to firstly carry out the EIA and only as second step to permit the activity in order to safeguard that the results of EIA and public participation procedures are legally reflected in the permits.

According to the Party concerned, the Mochovce NPP is a “non standard case”.

66. The Committee nevertheless considers that the decision-making for the 2008 decisions on the Mochovce NPP appears to have been in accordance with Slovak national law. Yet, the case was a special case, where the obligation to provide for public participation under the Convention stems from the reconsideration and update of the operating conditions, as well as the change to and extension of the activity as compared to the one permitted in 1986. For that reason, on the basis of the information provided in this case, the Committee cannot conclude that Slovak law on public participation and EIA in general also fails to comply with article 6 of the Convention.

67. During the discussions, the Committee was informed that current legislation may also fail to ensure public participation when old permits are reconsidered or updated or the activities are changed or extended compared to previous conditions. Not having examined the new legislation, the Committee notes that the legal framework the Party concerned should ensure that early and effective public participation is provided also in these cases in accordance with article 6, paragraph 4, of the Convention.

IV. Conclusions and recommendations

68. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

69. The Committee finds that by failing to provide for early and effective public participation in the decision-making leading to the 2008 UJD decisions 246/2008, 266/2008 and 267/2008 of 14 August 2008 concerning Mochovce NPP, the Party concerned failed to comply with article 6, paragraphs 4 and 10, of the Convention (para. 64).

B. Recommendations

70. The Committee, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance, recommends the Meeting of the Parties to:

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, recommend to the Party concerned 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;

(b) Invite Slovakia to submit to the Committee a progress report on 1 December 2011 and an implementation report on 1 December 2012 on achieving the recommendation above.
