

CASE ACCC/C/2016/143 (CZECH REPUBLIC)

ACCC Hearing, 3 July 2019

On 3 July 2019, the Aarhus Convention Compliance Committee (ACCC) held a hearing on Case ACCC/C/2016/143 (Czech Republic) in Geneva. The delegation of the Czech Republic consisted of three representatives from the Czech Ministry of Environment (legislative department, EIA department and the department responsible for the implementation of the Aarhus Convention) and one representative of the legal department of the Czech State Office for Nuclear Safety (SUJB/SONS) as responsible authority. The communicants were represented by Patricia Lorenz (GLOBAL 2000) and Priska Lueger (OEKOUERO). Among the observers was a representative of Nuclear Transparency Watch, a lawyer working for France Nature Environnement as well as a group of visitors from Earth Justice.

Background

Together with the communicants Calla, Jihočeské matky and the Aarhus Konvention Initiative, OEKOBÜRO and GLOBAL 2000 had filed a communication in 2016 claiming the Czech Republic's non-compliance with Articles 3 (1), 6 and 9 (2) of the Convention. The communicants argued that the Party had failed to fulfil the requirements of public participation and access to justice regarding the extension of the operational period of Reactor 1 of the Dukovany nuclear power plant, but also presuming a systemic non-compliance of the Czech legislative system emerging from the Czech Atomic Act.

In February 2017, the communicants submitted an update to the communication, explaining that the authority in the meantime had also started a permitting procedure regarding Reactor 2 and citing recent jurisdiction according to which access to justice was again denied in the scope of the Atomic Act.

In July 2017, the Party reacted to the communication, mainly explaining that Article 6 of the Convention would not be applicable in the specific case as the renewal of the operational permit would neither contain a new or updated activity, nor an update of the operating conditions.

One week before the hearing, the communicants submitted an updated Chronology including latest developments in Czech Republic.

All relevant documents on the case are available online at <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2016143-czech-republic.html>.

Discussion on the Case

Curator Peter Oliver presented the case pointing out three different issues: First, the question of public participation regarding the extension of the nuclear power plant's operational period, second the question of extending the operations for an indefinite timeframe and third the lack of access to justice in cases regulated by the Czech Atomic Act. Also, he drew attention to the Committee's recent findings in Case ACCC/C/2014/104 (*Netherlands*) which might also affect the present case.

In their opening statement, the communicants focussed on the applicability of Article 6 of the Convention as the main point addressed in the Party's statement and laid down why the present would indeed fall under Article 6, referring to inter alia, the opinion of Advocate General Kokott in Case C-411/17 of the European Court of Justice. Their main arguments included the fact that without the State Office for Nuclear Safety issuing the operational permits, the NPP would have ceased operations. The fact that the NPP had been re-assessed according to latest scientific findings would show that there has been an assessment procedure regarding the extended activity. The communicants also questioned the approach of the new Atomic Act as it would indicate that the procedures to assess whether an operating license can be granted for an additional period of time will be carried out within periodic safety reviews to be performed every ten years without providing for public participation.

The Czech Republic opened the discussion stating that the Compliance Committee was required to assess the application of the Convention rather than develop its own case-law and that the delegates did not fully agree with the findings in Case ACCC/C/2014/104. They explained that the "expected lifetime" of nuclear reactors was a misunderstood term and in the case of the Dukovany Reactors it would be rather accurate to use the term "continuous equipment" although very little of the original equipment would still be in use and a more advanced technical knowledge is available today. They considered the term "operating conditions" to be a set of rules not representing the permit itself. The Authority is obliged to issue a permit given that all relevant conditions were met and in the case of Dukovany the permits in discussion did not introduce any changes. In the absence of a "proposed activity", the Czech Republic did not consider Article 6 para 1 of the Convention applicable. The operation of the nuclear reactors should be regarded an ongoing activity with continuous monitoring and evaluation activities.

The Committee explained that even though it is not the purpose of the ACCC to create case-law in the usual sense, in the past there has only been one exception when the Committee's findings of non-compliance have not been endorsed by the meeting of the Parties.

Regarding the case of Dukovany, the Committee drew attention to the fact that the operational permits determined whether to continue or discontinue operations. In the preceding assessment procedure, the authority had evaluated the safety requirements of the reactors and decided that conditions are met and suited the application for license. The Party agreed that if there were substantial lacks to meet the relevant standards, a permit would need to be refused.

While the Party refused to consider the issued permits as an update of the operating conditions but rather called it a "renewal", the Committee contemplated whether Article 6 para 1 could be applicable taking into account, inter alia, that the permit had been based on a new Atomic Act which had not been in force when the reactors had originally started to operate. The communicants drew attention to the fact that the application for the extension of the operational period had been prepared for many years and that malfunctions and breakdown risks were reflected in the permits which also indicated a change in the operating conditions. The administrative procedure included an assessment of the NPP's compliance with the state of the art. Regarding Reactor 1, the old permit was no longer valid which led to a completely new authorization. Whereas the Party stated that this was due to a conservative approach of the former Atomic Act which implied the issuance of a new license every ten years.

When the communicants countered that according to the New Atomic Act, the licences were unlimited in duration but an updated safety report on the fulfilment of various conditions must be submitted to SUJB for approval every year, the Party noted that the annual safety reports could not be considered a renewal of the permit. On question of the Committee, the Party explained that these documents are not open to public participation or official consultation but can be accessed and commented on request. The communicants, however, noted that according to their experience, Czech authorities would consider these documents technical rather than environmental information and thus expressed their doubt regarding public accessibility.

The second part of the hearing, after the lunch break mainly focused on similarities and differences regarding Case ACCC/C/2014/104, the evaluation of environmental impacts and the question of access to justice.

The communicants stated that as in this case on the Dutch NPP Borssele, the Committee should come to the conclusion that the permitting duration of an NPP falls clearly within the scope of article 6 unless "a change to the permitted duration is for a minimal time and obviously would have insignificant or no effects on the environment". As the operational periods permitted in Dukovany were first up to one year and finally even for an indefinite time, this could not be considered "minimal". However, unlike in the case of Borssele, the licenses in Dukovany expired, hence paragraph 1 of Article 6 had to be considered applicable rather than its paragraph 10.

On question of the Committee whether the Party agreed with the updated Chronology submitted by the communicants stating that all four reactors in Dukovany had by now

been permitted for an indefinite time period, the Czech Republic assured to check the document and confirm or refute its content at a later point.

Regarding the assessment procedure as such, the Party confirmed that in the case of the Dukovany reactors in 2016 and 2017, there was no procedure to assess environmental risks apart from the procedures according to the Atomic Act which only involved the applicant and the States Office for Nuclear Safety. The Czech Republic did not conduct an environmental impact assessment, because the extension of the operational time was not considered a "new activity". The Party also stated that there was no regulatory impact assessment carried out before the new Atomic Act entered into force.

Concerning the evaluation of economic safety and environmental impacts including the assessment of environmental risks in the future, the Party explained that the main responsibility of the State Office for Nuclear Safety is the safe operation of NPPs, which would imply that no environmental impacts are given. Unlike coastal power plants which might be prone to flood impacts, Czech NPPs would not be affected by climate change impacts. The communicants disagreed pointing out that water shortage would be an issue regarding cooling systems especially in Dukovany. After all, this also led to a change of technical details and adaptations of the license according to new state of the art.

The communicants also pointed out that while licenses were published at last, none of the applications for permit were ever open to public access. The Czech Republic replied that they would be made available on request.

Regarding access to justice, the communicants explained that the Czech Administrative Code of Justice restricted standing to challenge decisions to parties to the procedure. As the Atomic Act granted only the applicant party status, legal remedies by anyone else would be denied. Ruling of the Municipal Court in Prague concluding that there had not been any non-compliance with Article 6 and hence there was also no violation of the right to access to justice also pointed into this direction.

The Party noted that the Czech Administrative Code of Justice especially its § 65 para 1 would grant wide access to justice. On question of the Committee how the phrase "unless otherwise provided for by this Act or by a special law" was interpreted in practise, the Party mentioned a decision of the Supreme Administrative Court granting access to justice for a member of the public. The Committee expressed its concern that this verdict – according to the Party's statement from the year 2014 – had not been brought up earlier by the Czech Republic. Due to technical problems, the Czech delegation could not directly present the ruling to the Committee, but assured to provide it at a later stage.

As observer, Nuclear Transparency Watch expressed their preoccupation regarding the Party's criticism concerning the Committees finding in Case ACCC/C/2014/104 expressed at the very beginning of the hearing and creating a hostile atmosphere. The observer noted that the process of licensing was clearly not in line with the Convention and perhaps even represented an intentional non-compliance.

In their closing statement, the communicants maintained their accusation of non-compliance with Articles 3 para 1, 6 para 1 and 9 para 2 of the Convention and called

upon the Czech Republic to provide for the necessary legislative measures to ensure that public participation as well as access to justice is granted within the periodic safety reviews which determine whether a nuclear reactor can continue its operations.

The Party assured to welcome the means of public participation when significant changes are considered, which, however, in their opinion was not the case with the Dukovany reactors.

Outlook

The ACCC concluded to send out additional questions on the case. What they could already assure was that the brought up verdict of the Supreme Administrative Court granting access to justice in an environmental matter should be submitted by the Party, including prove that it had been followed by other Court ruling. On question of the Committee whether the Party would be ready to accept recommendations of the ACCC before the Case was presented to the Meeting of the Parties, the Party agreed to consider this option.

Even though it cannot yet be affirmed whether the Committee will conclude that the Czech Republic is in non-compliance with the Convention, there was a clear tendency towards certain aspects of non-compliance. The Committee will also consider non-compliance with paragraph 1 of Article 6 as the hearing showed that new operational licenses had been issued in the case of Dukovany, after the old ones expired.

Further developments, including the provision of additional information must be awaited to determine what can be concluded by the Committee.