

Mr Jeremy Wates
Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
CH-1211 Geneva 10, Switzerland
Phone: +41 22 917 2384
Fax: +41 22 917 06 34
Email: public.participation@unece.org

Communication to the Aarhus Convention's Compliance Committee

02.09.2010

I. Information on correspondent submitting the communication

GREENPEACE



Complainants:

Greenpeace CEE Romania, Bucharest, 20 Maior Ion Coravu str., sector 2
Tel: +40213105743 +40 720544000,
Fax: +40213105743
E-mail: crisanta.lungu@greenpeace.ro
Represented by Crisanta Lungu, Executive director

Center for Legal Resources, Romania, 19 Arcului str., sector 2
Tel: +40 21 2120690, +40745138165
Fax: +40 21 2120519
E-mail: catalina@crj.ro
Represented by Catalina Radulescu, strategic litigation manager

II. State concerned

Romania

III. Facts of the communication

A. Decision to build a new Nuclear Power Plant and Decisions regarding the location, technology to be used, etc

In February 2009 the Minister of Economy declared that a study regarding a potential location of a new nuclear power plant (NPP) was done, and that out of more than 100 locations which were analyzed, 10 locations are suitable, and 2 of them are mostly preferred. The minister also declared that in September he is going to announce the location where the new NPP is going to be built. He also stated that he does not want to announce the possible locations because the NGOs are going to make waves. Immediately after this statement, Greenpeace Central and Eastern Europe asked the Ministry of Economy to disclose the following information (*see Annex 1*):

- The list of the locations that were analyzed for the building of the new NPP
- The ten possible locations
- The two preferred locations
- A copy of the official decision regarding the two preferred locations
- All documents related to the selection

The minister didn't reply to our request, therefore in March 2009 we submitted again the same request (*see Annex 1*). As we didn't receive any answer, we sued the Minister on Access to Information Act and Aarhus Convention grounds. The court ruled in our favor, according to the attached decision no 2722/14.10.2009, Bucharest Tribunal. The court decided that the Minister must communicate the information requested under the sanction of comminatory damages on amount of 100 lei/ day of delay and to moral damages in amount of 1 leu (*see Annex 2*). The Minister appealed the decision on 27 November 2009 (*see Annex 3*), and postponed twice the case because he claimed that all information related to the future NPP is not public and they issued a declassification order only for the list of 102 locations analyzed at the beginning, and not for the entire study regarding the establishment of a new NPP (*see Annex 4*)

A third request of public environmental information was made in November 2009 (*see Annex 5*), after a press statement of the Ministry of Economy, made in October 2009, that stated that the NPP is likely to be placed on Somes River, and that there are 4 possible locations on that river. We asked the following information:

- information related to the 4 possible locations that are being analyzed
- what is the quantity of the water that can be used as cooling agent
- what capacity can have the new NPP build on Somes River

The Minister replied that the information requested is not public and that no decision has yet been made. The Minister have also presented the legislation¹ that stipulates that public consultations are mandatory, that such decision must be founded on a

¹ Espoo Convention ratified by Rômania, Law no. 22/2001, Euartom Treaty, Government Ordinance 7/2003 regarding the promotion, development and monitoring of nuclear activities, Law. No 111/1996 regarding safe performance regulation authorization and control of nuclear activities, Law no 13/2007 on electric energy.

strategy and action plan included into a long term economical development plan (despite all these, The Minister has already decided to build a new NPP, they made a study to choose the location of the future NPP, and they decided the technology that is going to be used). They clearly said that they have already decided that the new technology is going to be IVth generation.

They concluded **that the study is secret, and that the public will be informed and consulted after the Government will take the decision regarding the chosen location.** (*Annex 6*)

We sued the Minister again, and we also won the case, Decision no 1040/29.03.2010, Bucharest Tribunal. The court decided that the Minister must communicate the information requested under the sanction of comminatory damages on amount of 100 lei/ day of delay. (*see Annex 7*)

We have to note here that the cases have been pending in court for over one year already. The fact that the first court took a decision is not to be considered, because their decision is not enforceable until the appeal is being finalized. And until now, the court failed to come to a final ruling in both cases².

No **public** decision has been taken in Romania regarding the construction of a new nuclear power plant (NPP). The decision was taken secretly, without public consultation. Not even in the Energy Strategy approved by Governmental Decision no 1069/5 September 2007 a new NPP is mentioned. All decisions to build the new NPP and all studies made to choose the location, the technology, etc. were taken secretly, without any public consultation.

B. The Energy Strategy is the second issue in our communication. No public consultation was done before the Strategy went into force, although such consultation is also mandatory according to SEA Directive of the EU. According to the Environmental Minister, a SEA is being conducted now, 3 years after the decision was taken. This procedure is done only formally, and it started as a result of the requests and petitions send by us, regarding the public consultation for the The Energy Strategy. This procedure is covering the fact that the strategy was approved in 2007 without any previous consultation procedure. Normally the Ministry should have elaborated a new project regarding the energy strategy and this should be submitted to public consultation and only afterwards approved. The Energy Strategy regulates important issues, like building two more reactors at Cernavoda NPP. We have to mention that the Strategy entered into force in September 2007. As a result of our several requests of information, in August 2010 the Ministry of Environment posted on website a document (*see Annex 8*) describing a SEA procedure that started in February 2010, although the energy Strategy has been approved in 2007 by Governmental Decision no 1069/2007.

We asked the Minister of Economy if *any* public consultation took place *before* The Energy Strategy entered into force, but we received no answer, and we took this to

² In Romania access to information cases (that includes environmental information that is also public information) are judged by County Tribunal in first case and by the Courts of Appeal in the second case. The decision of the Courts of Appeal is final.

court. The first hearing was established in September, 3 months after the complaint was submitted at the Bucharest Tribunal, and a final decision will be most probably reached next year. Because of the length of the judicial procedures, access to justice is not fulfilling its purpose, but rather results in becoming a barrier to the proper implementation of the rights of the public as granted under the Aarhus Convention.

Previously, before the Strategy was adopted, Greenpeace Central and Eastern Europe based in Vienna, Austria requested the Strategy in English in order to be studied by their experts, but the Ministry of Economy refused, and the courts rejected the case, arguing that no legislation provides that such documents must be disseminated in other languages than Romanian (Decision no 1560/21.12.2007, Bucharest Tribunal, and Decision no 1493/05.06.2008, of Court of Appeal). (see Annex 9)

All referring to SEA procedure are meant to point that public consultation is taking place after the Strategy went into force, because according to Romanian legislation SEA is the only public consultation procedure available in environmental matters.

IV. Provisions of the Convention relevant for the communication

A. Decision to build a new Nuclear Power Plant and Decisions regarding the location, technology to be used, etc

Violation of art 3 point 2

Romanian authorities did not make any effort to assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making process regarding the new NPP. All information related to this project or plan is classified as secret of service until the authorities will make the final decision regarding the location, the technology that is going to be used, the capacity of the NPP, etc.

Violation of article 4 point 1

The Ministry of Economy gave no answer to the first two requests for access to information. We went to court and won the case in first instance (the appeal declared by Ministry of Economy is still to be heard). In response to the third request for access to information refused to give any access, claiming that everything is classified. We conclude that no access to information was available in this case.

Violation of article 4 point 4 and point 7

The refusal to disclose the information is not motivated and related to any of the exceptions stipulated by the Aarhus Convention. The Ministry of Economy did not explain at any moment why is so important for our democratic society to maintain all the information related to the new NPP classified and not to consult the public in any way before the decision of building a new NPP was taken. We have no information regarding the moment when such decision was taken, and through what administrative or normative act.

The Minister failed to motivate why it is so important not to disclose any information before the decision regarding the location, technology used, capacity etc. is taken. We consider that such a motivation should have been given with the refusal communicated to us by Ministry of Economy, or at least in court.

Violation of article 4 point 6

If there were to be important information that must be reasonably classified in such a procedure, then the Ministry of Economy should have separated out the classified information and make available the remaining part of public information. Also, the Ministry should have presented reasons for classification of the refused parts of the material. Obviously the Ministry didn't try to assess such methods, because in Romanian legislation this point of art. 4 is not even enforced. The Ministry should have taken the effort to apply directly this point of Aarhus Convention, because such possibility is regulated by Romanian Constitution art. 20³

We consider that the authorities should have taken into account the public interest served by disclosure of the information requested, rather than to apply the Law for classified information 182/2002. The necessity to inform and consult the public in such an important and environmental controversial issue like building a new NPP is more important in a democratic society than any other internal regulations regarding secrets of service.

Violation of art 6 and 7

Due to the opacity of the proceedings we don't know if the decisions are policies, plans, programs, or projects. We think that *the decision to build a new NPP* could be more a policy than a project, and *the decision regarding the location, the technology to be used etc. could already be a project.*

Therefore, unless the contrary is proven, we ask you to analyze our complaint in this manner:

- the decision regarding the details of the construction (location, technology etc) as a project in accordance with art 6, analyzed below
- the decision to build the NPP - violation of art. 7 combined with art 6 point 3, 4, 8

Violation of art. 6 point. 1.a

We consider that The Minister already has a project that is secret, and that this project should have been submitted to public consultation.

The Aarhus Convention must be applied in all activities provided by Annex 1. The construction of a new NPP clearly falls under the requirements of Aarhus Convention. It appears that this was not considered by the Ministry of Economy.

Violation of art. 6 point 2

The Ministry of Economy made no formal public announcement neither regarding the decision making process to build the NPP, nor regarding the decision making process

³ **ARTICLE 20** (1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.

related to the location of the future NPP, the technology that is going to be used, the capacity, etc. The press releases are not to be considered in compliance with art. 6 point 2 of the Aarhus Convention, because they do not contain the mandatory stipulations described in art. 6 point 2 letters a, b, c, d, e.

There were no individually notifications done in any case.

Violation of art. 6 point 3, 4

There is no public consultation going on. The Ministry repeatedly mentioned that the public will be consulted *after* the decision regarding the location, the technology, etc. will be taken. (see Annex 10)

Related to the decision to build a new NPP in Romania, there was no public consultation realized before the decision was taken – neither directly nor as part of the formulation of the Romanian Energy Strategy.

Therefore, we consider that the Aarhus Convention's provisions regarding early public participation, "*when all options are open and effective public participation can take place*", as well as the provisions regarding "*reasonable time-frames*", "*sufficient time for informing the public*", and "*for the public to prepare and participate effectively during the environmental decision-making*", were violated.

Violation of art 6 point 6, 7, 8

Since there was no access to information in the case of the new NPP and no public consultations, also, there is no information available according to art 6 point 6, letter a, b, c, d, e, f.

As a consequence of no access to information and no procedure of public consultation, there is no possibility for "the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity".

.We consider this to be a clear violation of Aarhus Convention.

Violation of art 6 point 9

The decision to build a new NPP and the project itself was never communicated to the public, there is no formal text available, nor were the reasons or considerations on which the decision is based.

Regarding the violation of art 7 combined with art. 6 point 3, 4, 8

The decision to build a new NPP should be a plan or a policy that should have been submitted to public consultation according to art 6 point 3, 4, 8, within a transparent and fair framework, having provided the necessary information to the public. In this case the Romanian authorities failed to provide any information, or opportunities for public participation, and obviously failed to identify relevant public according to the Convention. This failure is proved by the fact that any information is classified, as the Minister of Economy declared.

Violation of art. 9 point 4

We consider that the Aarhus Convention is violated because the first court case started after we received no answer from the Ministry of Environment to the second request

made in 24 March 2009 (the first request was done in February 2009). The case was submitted in April and the decision of the first court was taken in October 2009. The decision in writing came in November 2009. The Ministry of Economy appealed the decision, and now the case is still pending in court. According to the Romanian Law the appeal suspends the decision of the first court. So that after one year and a half we still have no right to obtain the information, even if we won the case in the first court.

In the second case, that started in December 2009, after the third request of public information (done in November 2009), the first court took the decision in March 2010, and ruled in our favor. We received the written and motivated decision in August (see *Annex 7*), and we are expecting for the Ministry of Economy to appeal again. According to the Romanian law, until the decision is not motivated and communicated to the parties, it cannot be executed because is not final. Only if the Ministry would not appeal it in the procedural term stipulated by the law (15 days since they received it) it can be executed.

This "execution" of the decision means that we have to go in court again and ask the judge to fine the Minister for not executing the decision.

No decisions of the court are public except for the parts in the trial. The courts decisions can't be found on public websites, or in any other place, and can't be given on request to the interested public. Sometimes, depending on the court, only journalists can obtain decisions.

Therefore, we consider that the Aarhus Convention is violated because there are no adequate and effective remedies, they are not fair, equitable, timely and publicly accessible.

B. The Energy Strategy

Violation of art 3 point 2

In this case there was no effort of authorities to consult the interested public. The Energy Strategy is a policy that not only is of national public interest, but also for the public in neighboring countries and for international organizations like Greenpeace. Therefore, if not as a consequence of Espoo Convention, at least according to the Aarhus Convention, the authorities should have been making efforts to encourage the public, national as well as international, to participate in public consultations regarding this very significant environmental policy.

Violation of art. 3 point 9

We consider that the foreign public, e.g. Greenpeace in Central and Eastern Europe was discriminated against because the Romanian authorities refused to make the information available in English. We consider that Greenpeace was discriminated against because the center of the activities and the registration place was not in Romania, but in Austria.

Art. 4 pct. 1

There was no answer provided to our request of information and, as we mentioned, the court decided that the information (the Energy Strategy) cannot be communicated in other language than Romanian, even if the interested public is foreigner. Only the text of the Strategy in Romanian language was posted on the Government website. This cannot be considered an effective access to information, since the interested and affected public from abroad had no understanding of this documentation. It is the obligation of the authorities to give the information in a way that is useful to the interested public. This Strategy is a document important for many other organizations and interested public that do not speak or understand Romanian. The most reasonable thing to do for an authority that wants to make public consultations according to Aarhus would have been to provide the document in one international language, like English language. In the past, the Romanian Government also for that reason demanded from the Bulgarian authorities an English copy of the Environmental Impact Assessment report for the Belene nuclear power station, received it and published it on its web-site. In this case – the Romanian Energy Strategy – it refuses to do so. The court was of the opinion that there is no clear specification of Aarhus or any other law that would force the public authorities to translate and disseminate such documentation in a foreign language, e.g. in English.

There are, however, grounds in the Aarhus and Espoo Convention, to come to the conclusion that in case of possible impacts on the environment – something that an energy policy definitely has – information should be provided to the interested public in a language it understands: a) the Aarhus Convention states in article 4(1b), that: *“public authorities, in response to a request for environmental information, make such information available to the public, [...], (b) **In the form requested** unless: (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or (ii) The information is already publicly available in another form.”* Foreign nationals in countries that are impacted by plans or projects fall clearly under the definition of the *“public concerned”* as defined under the Aarhus Convention art. 2(5), and the Aarhus Convention art. 3(9) forbid discrimination of the public concerned on the basis of citizenship, nationality, domicile or place of registration. Taking these points together, we conclude that if foreign citizens or organizations want to be involved in policy making on plans or projects that can affect them (foreign people living/working in Romania or public from other states but likely to be affected by the plan or project), and these foreign citizens or organizations request access to information in a language that enables them equivalent participation in decision making and/or consultation processes as people from the country involved, information should be made available in the form / language requested unless the language request is unreasonable. A request for an English translation or a translation in the language of a neighboring country cannot be considered unreasonable.

Violation of art 7 combined with art. 6 pct. 3, 4, 8

The energy strategy is an environmental policy. Therefore we consider that art. 7 is to be applied.

The authorities made no effort to identify the public that can participate in this procedure, and did not ensure any opportunities for participation *during the preparation of this policy*. The Strategy was only posted on the Government website after it was already approved. No public was consulted according to Aarhus Convention. There were no proceedings of public participation, containing any time frames, according to art 6 (3), no information transpired from the authorities when all options were still open 6 (4). The public's opinion was not taken into due consideration, because there was no procedure that would allow such intervention from the public art. 6 (8).

In conclusion we ask the Committee to assess whether the Aarhus Convention was violated regarding:

1. The decision to build a new NPP
2. The decision regarding the location, technology, etc. of the new NPP
3. The adoption of the Energy Strategy of Romania

In the first two cases, we ask the Committee to require from Romania to stop all studies and procedures regarding the new NPP and start a consultation procedure on the decision to build a second NPP in Romania. This public consultation must lead to a public document justifying the environmental impacts of a decision to build or a decision not to build another NPP, along with proper motivations and explanations.

We ask the Committee to require the Romanian Government to make public the entire documentation related to the decision regarding the selection procedure for a location of a new NPP, the technology chosen, capacity, etc., and to shape this decision only *after and in accordance with public consultation procedure*.

Regarding the Energy Strategy, we ask the Committee to ask the Romanian Government to re-start the elaboration and consultation for a new Strategy including active information to the public and to carry out public consultation according to Aarhus Convention.

Crisanta Lungu, Greenpeace CEE Romania

Catalina Radulescu, CRJ, Romania

