Legal arguments for an appeal against the acceptance of the Environmental Impact Assessment report on the Visaginas NPP project

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07/05/2009

Relevant Lithuanian law:

Republic of Lithuania Law on the assessment of the impact of proposed economic activities on the environment of 21 June 2005 No. X-258 (Official Gazette, 1996, No. 82-1965; 2000, No. 39-1092; 2005, No.84-3105)

Relevant binding EU Directives:

DIRECTIVE 2003/35/EC of the European Parliament and the Council of Europe of 26 May 2003 on
public participation

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain
public and private projects on the environment

DIRECTIVE 2001/42/EC on environmental impact assessment

DIRECTIVE 2008/871/EC on the Espoo Convention

Relevant binding international treaties:

The Aarhus Convention

The Espoo Convention

1. DEFINITIONS

The competent authority in the case of the EIA is the Lithuanian Ministry of Environment. The preparer of the EIA report is the Pyory consultancy. The developer of the project is LEO Lt.

2. NON-INCLUSION OF WASTE STORAGE AND DECOMISSIONING

Art. 4 (1). The EIA's purpose is to determine, describe and evaluate any potential direct and indirect impact of a proposed economic activity. We argue that the report has not described all potential direct and indirect impacts of the economic activity, as aspects of the economic activity that are irreversibly linked to the

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described activity, and are to be undertaken by the same investors or under their responsibility, have not been included in the assessment. These include among others storage of nuclear waste and decommissioning, but also uranium mining, fuel production and necessary transport of nuclear materials. Annex 1 of the Law explicitly mentions that economic activities subject to assessment include "*3.2 Installation of nuclear power stations and other nuclear reactors* ***including the dismantling or decommissioning of such power stations or reactors***" [emphasis added, JH].
The reason why these elements should be integral part of this EIA can easily be understood if one would look at the case of a separate EIA procedure for waste storage or for decommissioning. When a nuclear power station is built, nuclear waste will inevitably be created and at some time the nuclear power station inevitably will have to be decommissioned. If the decision to build the nuclear power station is taken, the need for nuclear waste storage is irreversibly there as is also the need for a decommissioning programme. At that moment, it is impossible to carry out an Environmental Impact Assessment that would be able to fulfil article 4(3) of the EIA law, which seeks to determine whether a proposed economic activity is permissible in the chosen location [...]. It also is in direct breach with the EU Directive 2003/35/EC on public participation that requires that public participation has to be taken into due account in the final decision (art. 2(2c)) as well as the Aarhus Convention art. 6(8).
The above mentioned omissions were communicated to the preparer of the EIA report as well as to the competent authority. In breach with art. 9(3), the developer did not update the report presented with a full analysis of these activities that are intrinsically and irreversibly linked with the economic activity. The competent authority furthermore accepted the final report without these adaptations and therefore acted in breach with art. 4(1).

3. LACK OF ACTION FROM THE COMPETENT AUTHORITY IN DEMANDING ADAPTATION OF THE EIA REPORT

Art. 8 (4.1) - The competent authority as well as the developer and the preparer of the EIA report have received during the screening phase as described under article 7 remarks from the public concerning the lack of alternatives as mentioned under art. 8 (4.1), among others from the complainants. Nevertheless, the Ministry of Environment has not demanded from the investor to adapt its programme in this respect. With that, the competent authority has breached art. 8(4.1) and art. 9(3) because the report was not updated in accordance with grounded proposals received from the public. The public, among whom the complainants, have pointed out this issue during the public participation in the EIA phase, but the competent authority failed once more to require the uptake of alternatives in the final report.

4. LACK OF ALTERNATIVES

Art. 9 (1) - The preparer of the EIA report should have included an analysis of alternatives. The fact that the law states that this only concerns alternatives identified by the preparer of the environmental impact assessment documents does not mean that the preparer can pick and choose according to his own wish. During the according art. 7 executed screening phase, the preparer has been informed by the public, among other by the complainants, that more alternatives exist and should be included and also about the form of these alternatives. With that, the preparer has identified more alternatives than the alternatives taken up in the report.

Because this is an essential part of the sense of the EIA procedure – comparing planned economic activities on their environmental impacts in comparison with reasonable alternatives so that a good decision can be taken about the economic activity, including a qualitative decision about its possible effects on the environment – the competent authority has been in breach with art. 9 (1) by accepting an EIA report without more alternatives.

This point is furthermore in violation with Article 5 of EU Directive 85/337/CEE as amended in Directive 97/11/EC on Environmental Impact Assessments, which prescribes an outline of the main alternatives in order to underline the main reasons for his choice, taking into account the environmental effects.

5. LARGE ACCIDENT

Art. 9 (1) - information about potential emergencies as well as relevant prevention measures and emergency response measures. The preparer was informed during the screening phase that it needed to include a worst possible accident scenario. During the public participation phase of the EIA, the preparer was informed by the public, among others by the complainants, but also by Austria (see final EIA report), that the source term chosen for the worst possible accident was too low. This omission was not corrected in the final version of the EIA report. Still, the competent authority has accepted the final report and with that breached the provisions in art. 9 (1).

6. INSUFFICIENT ACCESS TO PART OF THE FINAL REPORT

Art. 10(7) - The competent authority and the developer should provide opportunities for the public to get conversant with the decision. The competent authority and the developer published the final EIA report and the decision on the internet. However it published the '*APPENDIX: documents on public informing and public participation in the EIA process, official letters and conclusions from EIA relevant parties* ***and EIA developer's responses to comments from public and EIA parties***' initially only in the Lithuanian language and only in the second week of May in the English language. This means that the public and especially those participating in the EIA procedures outside of Lithuania have no access to the reactions on their own submissions and therefore could not get conversant with the decision in a meaningful way before the appeal period against the administrative decision of the competent authority to accept the final report is running out on 22 May 2009. By publishing the Appendix two weeks after the decision of the competent authority, the preparer has been in breach with Art. 10(7), as well as art. 2(2d) of the EU directive 2003/35/EC.

7. VALIDITY OF INTERNATIONAL TREATIES

Art. 11(4) - Because in this case the economic activity may have significant negative transboundary impact [...], the EIA shall be carried out in accordance with the provision of the Espoo Convention and treaties signed by the Republic of Lithuania and the state. This includes not only the Espoo Convention, but also the Aarhus Convention and the relevant directives of the EU.

8. INSUFFICIENT STUDY OF ZERO STATE

In order to meet the requirement of Article 9(1) and EU Directive 97/11/EC Article 5(3) (Information to be provided shall include the data required to identify and assess the main effects which the project is likely to have on the environment), the EIA report should include a zero base for comparison. The preparer,

however, chose as zero base not the situation of the environment on the moment that the construction is likely to start and that is the natural situation of the surrounding NATURA2000 area. It chose the situation that exists currently, including the environmental influences and damages of the still running Ignalina nuclear power plant, that is, however, to be closed this year, so that it can be assumed that at the time of start of construction, original natural values of abiotic and biotic indicators will have been reached again. The current situation is therefore not an acceptable zero base for comparison, as the influence of the new nuclear power station is not to be compared to the damaged situation caused by an activity in the past, but to the objective environmental damage that occurs because of the economic activity that is being planned. By accepting this inadmissible zero base, the competent authority is in breach with Article 9(1) and EU Directive 97/11/EC article 5(3).

On the basis of the arguments above, the complainants ask the court for nullification of the decision of the Ministry of Environment to accept the EIA report and order an update of the report, including a full round of public participation, repairing the above mentioned issues.

9. INSUFFICIENT INFORMATION BECAUSE OF LACK OF CLARITY ABOUT DESIGN

The public, among whom the complainants, indicated both in the screening phase as well as during the period of public participation, that the analysis prescribed in article 9(1) often lacks sufficient detail to make a relevant assessment because of lack of clarity about the design of the nuclear power station. The preparer of the EIA report acknowledged that for several of the analysed designs insufficient information is available. By accepting this situation, the competent authority breached article 9(1).

In order to repair this situation, the complainants ask the court to order the competent authority to require a update of the Environmental Impact Assessment after the reactor design has been chosen, including a full round of public participation.