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by Paulo A. Lopes

In 2005, CEZ Power Company ("CEZ") announced plans to completely rebuild a lignite (brown coal) fired power plant in Prunéřov, Czech Republic.[1] Shortly before the expected approval of CEZ's Environmental Impact Assessment ("EIA"),[2] the Federated States of Micronesia ("FSM") sent two letters to the Czech government.[3] In December 2009, FSM requested the Czech government to conduct a Transboundary EIA,[4] which was followed in January 2010, by an additional request for the government to review the Best Available Technology ("BAT") on the proposed modernization of the Prunéřov II plant.[5] FSM's petition represents the first time that a Non-Member State of the European Union ("EU") has brought a claim under EU Directive[6] and Czech law requesting a review of the environmental impacts of an EU Member State project on a Non-Member State country.[7] However, does FSM have standing to bring these claims?

FSM's first claim is that CEZ's EIA failed to consider the climate affects of Prunéřov II and evaluate all possible alternatives.[8] FSM asked the Ministry of the Environment to issue a negative ruling on the EIA because it ignored transboundary impacts.[9] Although FSM agrees with the modernization of the Prunéřov II plant, FSM takes issue with CEZ's assertion that Prunéřov climate impacts are "entirely marginal and unprovable."[10] FSM proposes that the Czech government perform a Transboundary EIA, which is required under Czech law.[11]

The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context addressed transboundary impacts on state parties[12] and EC Directive 85/337 integrated the Espoo Convention into EU law.[13] In 2001, the Czech Republic ratified the Espoo Convention and implemented the EC Directive under the Czech legal Act No. 100/2001 Coll., on Environmental Impact Assessment.[14] According to Greenpeace, FSM has standing under Czech Act No. 100/2001.[15] The EC Directive indicates significant effects on the environment "in another Member State."[16] However, section 11(1)(b) of the Czech Act defined "affected state" as a state whose territory "can be affected by significant environmental impacts."[17] Greenpeace argues that, unlike the EU Directive, the Czech Transboundary EIA section includes states that reside outside the EU's borders, which grants FSM standing to bring a claim.[18]

FSM's second claim is that the Prunéřov II lignite fueled power plant violates the BAT[19] required under the EU Integrated Pollution Prevention and Control ("IPPC") Directive 2008/1/EC and Czech legal act No. 76/2002 Coll.[20] In two 2005 press releases, CEZ indicated that it will "completely rebuild" the Prunéřov II plant.[21] Then, in 2007, CEZ stated in a press release that the Prunéřov II plant would undergo a "comprehensive reconstruction."[22] The classification of a plant as "new" or "existing" matters since the BAT under the IPPC requires different levels of efficiency for each.[23]

The Directive established that BAT is required for installations like the Prunéřov II plant.[24] The IPPC Reference Document on Best Available Techniques ("BREF") for Large Combustion Plants emphasizes the importance of efficiency, which not only results in the efficient use of natural fuel resources but also reduces greenhouse gas emissions.[25] The thermal efficiency established by the Czech EIA estimates the proposed Prunéřov II lignite plant at 38%.[26] With CEZ's ongoing attempts to classify the plant as a retrofit, [27] a 38% efficiency falls within the range established by the IPPC BREF for Large Combustion Plants.[28] However, FSM states that the Prunéřov II lignite plant is not a retrofit of an existing plant but a "completely rebuil[t]" plant.[29] Under the BREF BAT, a range from 42%-45% thermal efficiency is required for a new PC lignite plant.[30] FSM notes in their request that the Czech government asked CEZ to have a "new" power plant classification option reviewed in the EIA, but that CEZ failed to comply with that request in the EIA, even though it is required under both EU Directive and Czech law.[31]

After this setback, on January 26, 2010, the Czech Environmental Minister Jan Dusík, unexpectedly announced that the government will request an independent international assessment of the planned expansion of the Prunéřov II plant.[32] The independent assessment would review CEZ's planned use of BAT on Prunéřov II.[33] The minister also announced that the government would now classify the expansion as a "new" plant.[34] However, the minister did not address FSM's concern that the EIA failed to consider and assess the climate affects of Prunéřov II and all possible alternatives.[35] Thus, although FSM has succeeded in preventing an approval of the current EIA, it is unclear if FSM has standing to sue and how the proposed independent assessment will review and rule on the "new" Prunéřov II plant concerning BAT, climate change, and possible alternatives.[36]

Endnotes: FSM vs. Czech: A New "Standing" for Climate Change? *continued on page 59*

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ENDNOTES: FSM VS. CZECH: A NEW "STANDING" FOR CLIMATE CHANGE? *continued from page 24*

[1] Press Release, Ladislav Kriz, Press Officer, CEZ, a. s., CEZ Will Rebuild the Tusimice and Prunéřov Power Plants, and Wants to Build New Plants in Ledvice and Pocerady (Jan. 6, 2005), http://www.cez.cz/en/cez-group/media/press-releases/879.html; Press Release, Ladislav Kriz, Press Officer, CEZ, a. s., Renewal of CEZ´s Brown-Coal Resources? Opportunity for Firms in the District of Usti (Feb. 11, 2005), http://www.cez.cz/en/cez-group/media/nuclear-power-plant-news/2733.html (noting that CEZ Power Company is a subsidiary of the Skupina ČEZ Group).

[2] *See* Leos Rousek, *Micronesia Wants Czechs to Scrap Coal-Fired Plant Renewal*, WALL ST. J. (Jan. 15, 2010), http://blogs.wsj.com/new-europe/2010/01/15/micronesia-wants-czechs-scrap-coal-fired-plant-czechs-may-want-more-warmth/tab/article/ (relaying the Czech Republic's intention to complete the project by the end of January 2010).

[3] *See* Letter from Andrew Yatilman, Dir., Office of Env't and Emergency Mgmt, F. States of Micr., to Ministry of the Env't of the Czech Rep. 1 (Dec. 3, 2009), *available at* http://www.climatelaw.org/cases/country/case-documents/cz/FSM.request.TEIA.pdf; Letter from Andrew Yatilman, Dir., Office of Env't and Emergency Mgmt, F. States of Micr., to Ing. Karel Bláha, CSc., Deputy Minister, Dir. Gen. of the Directorate of Technical Prot. of Env't, Ministry of the Env't of the Czech Rep. 1 (Jan. 4, 2010), *available at* http://www.pohodacez.cz/files/file/Viewpoint %20of%20FSM%20on%20renovation%20of%20Prunerov%20II%20Plant.pdf.

[4] *See* Letter from Andrew Yatilman, *supra* note 3, at 1.

[5] *See Id*.

[6] *See* Council Directive 85/337, On the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) (EEC) as Amended in Council Directive 97/11, 1997 O.J. (L 73) (EC) and 2003/35, art. 3 (5), 2003 O.J. (L 156) 17, 19 (EC) (requiring Member States to consider a project's "significant effects" on the environment in another Member State).

[7] *See* GREENPEACE, BACKGROUND FSM / CZECH REPUBLIC TEIA 2, http://www.greenpeace.org/ raw/content/international/press/reports/teia_fsm.pdf (last visited Feb. 4, 2010) [hereinafter GREENPEACE] (noting that while EIAs frequently consider environmental impact on adjacent states, FSM's claim is also unique in its request for such an assessment even though it is far from the source of the emission).

[8] *See* Letter from Andrew Yatilman, *supra* note 3, at 1.

[9] *See id*. at 1.

[10] *See id.* at 1, 4.

[11] *See* Letter from Andrew Yatilman, *supra* note 3, at 1.

[12] *See generally* United Nations Economic Commission for Europe [UNECE], Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), Feb. 25, 1991, 1989 U.N.T.S. 309.

[13] *See* Council Directive 85/337, On the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) (EEC), *amended by* Council Directive 97/11, 1997 O.J. (L 73) (EC) and 2003/35, art. 3 (5), 2003 O.J. (L 156) 17, 19 (EC).

[14] *See* zákon č. 100/2001 Sb., Posuzování Vlivů na Životní Prostředí [EIA Environment] ve znění [as amended by] zákon č. 93/2004 Sb. (based on a translated version).

[15] *See* GREENPEACE, supra note 7.

[16] *See* Council Directive 85/337, On the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) (EEC), *amended by* Council Directive 97/11, 1997 O.J. (L 73) (EC) and 2003/35, art. 3 (5), 2003 O.J. (L 156) 17, 19 (EC).

[17] zákon č. 100/2001 Sb., Posuzování Vlivů na Životní Prostředí [EIA Environment] ve znění [as amended by] zákon č. 93/2004 Sb. (based on a translated version).

[18] *See* GREENPEACE, supra note 7.

[19] *See* Letter from Andrew Yatilman, *supra* note 3, at 2.

[20] *See* Directive 2008/1, Integrated Pollution Prevention and Control [IPPC], (18), 2008 O.J. (L 24) 8, 9 (EC), *amending* Council Directive 96/61 IPPC 1996 O.J. (L 275) (EC); *see also* zákon č. 76/2002 Sb., Integrovaná Prevence a Omezování Znečištění (IPPC) [Integrated Pollution Prevention and Control (IPPC)] (based on a translated version).

[21] *See* Press Release, Ladislav Kriz, *supra* note 1.

[22] *See* Press Release, Ladislav Kriz, Press Officer, CEZ, a. s., CEZ Group Wants to Reduce Greenhouse Gases Emissions by 15 per cent (Mar. 16, 2007), http://www.cez.cz/en/cez-group/media/press-releases/779.html.

[23] *See* European Commission, IPPC, *Reference Document on Best Available Techniques for Large Combustion Plants* 269 (July 2006) [hereinafter IPCC Reference Document].

[24] Member States, under Article 3 of the IPPC shall implement the application of BAT. Article 9 applies at the installation level, such as the Prunéřov II plant, and requires the use of BAT to establish the "emission limit values." In addition, Article 12, requires that Member States take appropriate action to ensure that no "substantial change" proposed by the operator is made unless in accordance with this Directive. *See* Directive 2008/1, IPPC, art. 3, 9, 12, 2008 O.J. (L 24) 8, 9 (EC), *amending* Council Directive 96/61 IPPC 1996 O.J. (L 275) (EC).

[25] *See* IPCC Reference Document, *supra* note 24, at 11.

[26] *See* SCES–Group, spol. s r. o., Dokumentace Záměru Komplexní Obnova Elektrárny Prunéřov II 3 × 250 MWe dle Zákona č. 100/2001 Sb., v Platném Znění, 11, 13 (Dec. 2008), *available at* http://tomcat.cenia.cz/eia/download.jsp?view=eia_cr&id=MZP221&file=dokumentaceDOC (based on a translated version).

[27] *See* Letter from Andrew Yatilman, *supra* note 3, at 2.

[28] The BREF BAT range for thermal efficiency of an existing pulverized combustion ("PC") lignite plant ranges from 36%-40% or an incremental improvement of more than 3%. The current efficiency level of Prunéřov II lignite plant is 33%. *See supra*, note 24, at 269; Press Release, Jan Dusík, M.Sc., First Deputy Minister and Dir. of the Foreign, Legislative and State Admin. Section, Czech Ministry of the Env't, Ministerstvo Životního Prostředí Nechá Posoudit Obnovu Uhelné Plektrárny Prunéřov Nezávislým Mezinárodním Týmem (Jan. 26, 2010), *available at* http://www.mzp.cz/cz/news_tz100126prunerov_posouzeni_brifink (translation unavailable).

[29] *See* Letter from Andrew Yatilman, *supra* note 3, at 2; Press Release, Ladislav Kriz, *supra* note 1.

[30] *See* IPCC Reference Document, *supra* note 24, at 269.

[31] *See* Letter from Andrew Yatilman, *supra* note 4, at 2.

[32] *See* Press Release, Jan Dusík, *supra* note 29; *see also* Michael Kahn & Jan Korselt, *Micronesia Leads Czechs to Seek Power Plant Review*, Reuters (Jan. 26, 2010), http://uk.reuters.com/article/idUKLDE60P2C520100126.

[33] *Id.*

[34] *Id.*

[35] *See generally* Press Release, Jan Dusík, *supra* note 29; *see also* Michael Kahn, *supra* note 29. *But see* Letter from Andrew Yatilman, *supra* note 4, at 1.

[36] On February 9, 2010, the Czech Environmental Minister Jan Dusík, announced that the ministry selected Norwegian firm DNV to review the planned expansion of the Prunéřov II plant. DNV will review: (1) the BAT as detailed in the BREF for large combustion sources and energy efficiency; (2) the EIA process as it pertains to completeness, accuracy, and transparency; and (3) calculate and evaluate the difference in CO_2 emissions from the proposed plant and the plant conforming to the higher BAT level. The finalization of the EIA final opinion will use DNV's report, expected in mid March of 2010, as an advisory document. *See* Press Release, Jan Dusík, M.Sc., First Deputy Minister and Dir. of the Foreign, Legislative and State Admin. Section, Czech Ministry of the Env't, Mezinárodní Posouzení Záměru,Komplexní Obnova Elektrárny Prunéřov 3 x 250 MWe" Zpracuje Konzultační Firma DNV (based on a translated version) (Feb. 9, 2010), http://www.mzp.cz/cz/news_100208_prunerov; *see also* Jason Hovet, *Czechs tap Norwegian firm for coal plant*, Reuters (Feb. 9, 2010) http://uk.reuters.com/article/idUKTRE6181UV20100209. On March 18, 2010, the Czech Environmental Minister Jan Duskin resigned after Prime Minister Jan Fischer put pressure on him to approve state-owned CEZ's planned expansion of the Prunéřov II plant. Duskin referenced DNV's report indicating CEZ's renovation would not use best available technology ("BAT") and thus refused to approve the project. "I am not convinced that it is possible to give a positive or negative opinion with a clear conscience now, with regards to the situation in which the EIA ("Environmental Impact Assessment") process is presently in," Dusik said. "That's why I decided to resign." *See* Press Release, Jan Dusík, M.Sc., First Deputy Minister and Dir. of the Foreign, Legislative and State Admin. Section, Czech Ministry of the Env't, Elektrárna Prunéřov: Ministr Dusík Odchází Z Vlády (Mar. 18, 2010), http://www.mzp.cz/cz/news_TZ_100318; *see also* Press Release Tisková Zpráva A Studie DNV K Záměru Obnovy Uhelné Elektrárny Prunéřov (Mar. 18, 2010), http://www.mzp.cz/cz/news_TZ_100318_DNV; Czech Enviro Minister Resigns Over Power Plant, Business Week (Mar. 18, 2010), http://www.businessweek.com/ap/financialnews/D9EH85O80.htm; Jason Hovet, Czech Minister Quits Over Controversial Power Plant, Reuters (Mar. 18, 2010), http://uk.reuters.com/article/idUKLDE62H22D20100318.