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ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Compliance Committee

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in
the case of information requested from Kazatomprom
(Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 7 February 2004, the Kazakh non-governmental organization Green Salvation submitted a communication to the Committee alleging non-compliance by Kazakhstan with its obligations under article 4, paragraphs 1 and 7, article 6, paragraph 6, and article 9, paragraph 1, of the Aarhus Convention.
2. The communication concerned access to information related to the proposed draft act on the import and disposal of radioactive waste in Kazakhstan held by the National Atomic Company Kazatomprom. The communicant claims that its right to information was violated

when a request to Kazatomprom for information purporting to substantiate a proposal to import and dispose of foreign radioactive waste was not answered. Subsequent appeal procedures in courts of various jurisdictions and instances failed, in the communicant's view, to meet the requirements of article 9, paragraph 1, of the Convention. According to the communication, the lawsuits were rejected first on grounds of jurisdiction and subsequently on procedural grounds as the courts did not acknowledge the right of a non-governmental organization to file a suit under article 9, paragraph 1, in its own name rather than as an authorized representative of its members. The communication is available in full at <http://www.unece.org/env/pp/pubcom.htm>.

3. The communication was forwarded to the Party concerned on 17 May 2004, following a preliminary determination as to its admissibility.

4. A response was received from the Party concerned on 27 October 2004, indicating, inter alia, that:

(a) The communicant did not fall under the definition of “the public concerned” within the meaning of article 2, paragraph 5, of the Convention for the type of decision-making process in question;

(b) As of the end of 2002, the information requested by the communicant from Kazatomprom did not relate to any ongoing decision-making procedure, as the matter was not under consideration by the Government;

(c) The National Atomic Company Kazatomprom did not fall under the definition of “public authority” within the meaning of article 2, paragraph 2, of the Convention.

5. The Party alleged that, as a consequence, the communication did not satisfy the formal requirements of admissibility for review of compliance under the Convention. However, it did welcome possible recommendations from the Compliance Committee, which could be used to improve both practice and legislation in Kazakhstan in the relevant field.

6. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the arguments put forward by the Party concerned in its response and having further consulted with both parties at its sixth meeting, the Committee confirms the admissibility of the communication, deeming the points raised by the Party concerned to be of substance rather than related to admissibility.

7. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 1 February 2005. Both were invited to provide comments, if any, by 14 February 2005. Comments were received from both the Party concerned. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations by amending the draft where the comments, in its opinion, affected the presentation of facts or its consideration, evaluation or conclusions.

I. SUMMARY OF FACTS¹

8. In 2001, the President of the National Atomic Company Kazatomprom, Mr. M. Jakishev, proposed for consideration by the Parliament a legislative amendment which would allow the

import and disposal of foreign low- and medium-level radioactive waste in Kazakhstan². Mr. Jakishev's statement in the press referred to a feasibility study justifying the proposed amendments.

9. On 11 November 2002, the Ecological Society Green Salvation requested Mr. Jakishev, in writing, to provide the calculations justifying his statement to the press.

10. Having received no response, the communicant challenged the refusal to provide the information requested, filing a lawsuit with one of the Almaty district courts on 4 February 2003.

11. Between 12 February 2003 and 23 May 2003, seven determinations were issued by judges of various courts in an attempt to determine the jurisdiction of the lawsuit. The case was heard on merit starting from 23 May 2003. At the hearing on 28 May 2003, a representative of the defendant (Kazatomprom) presented the court with a copy of the feasibility study of the disputed project. However, the case was dismissed on 13 June 2003 on procedural grounds for lack of standing. The decision stated, in particular, that, as an environmental non-governmental organization, the plaintiff could represent in court only the interests of its individual members and that it had failed to present a power of attorney from the individuals whose interest it represented.

12. The decision was unsuccessfully appealed to six instances, including three offices of the public prosecutor.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

13. Kazakhstan deposited its instrument of ratification of the Convention on 11 January 2001. The Convention entered into force for Kazakhstan on 30 October 2001.

14. The Convention, as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. All the provisions of the Convention are directly applicable, including by the courts.

15. The issue raised by the Party concerned of whether the draft amendments were still under consideration as of October 2002 (para. 4 (b) above) would have relevance only with regard to the application of article 8 of the Convention. The Committee does not feel, however, that it needs to address this issue, as the facts presented in the communication relate primarily to the matters covered by articles 4 and 9 of the Convention.

16. The communicant is a non-governmental organization working in the field of environmental protection and falls under the definition of "the public", as set out in article 2, paragraph 4, of the Convention.

17. The National Atomic Company Kazatomprom is a legal person performing administrative functions under national law, including activities in relation to the environment, and performing public functions under the control of a public authority. The company is also fully owned by the State. Due to these characteristics, it falls under the definition of a "public authority", as set out in article 2, paragraphs 2 (b) and 2 (c).

18. Information requested from Kazatomprom, in particular the feasibility study of the draft amendments, falls under the definition of article 2, paragraph 3 (b), of the Convention.

19. It is, therefore, the opinion of the Committee that, as a public authority in the meaning of article 2, paragraphs 2 (b) and 2 (c), Kazatomprom was under an obligation to provide the environmental information requested by the communicant pursuant to article 4 and that failure to do so was not in conformity with that article.

20. The Committee has noted the information provided by the Party concerned that it is a general practice for an information request to include reasons for which such information is requested. Article 4, paragraph 1 (a), of the Convention explicitly rules out making such justification a requirement. In this regard, the Committee notes with appreciation the Memo on Processing Public Requests for Environmental Information, prepared by the Ministry of the Environment of Kazakhstan and the Organization for Security and Co-operation in Europe (OSCE), issued in 2004. The Memo clearly states that a request for information does not need to be justified. In the Committee's opinion, practical implementation of the Memo would be important for changing the current practice and, furthermore, might bring about compliance with all the provisions of article 4.

21. The Convention, in its article 9, paragraph 1, requires the Parties to ensure that any procedure for appealing failure to access information is expeditious. However, as the time and number of determinations with regard to jurisdiction in this case demonstrate, there appears to be lack of regulations providing clear guidance to the judiciary as to the meaning of an expeditious procedure in cases related to access to information.

22. Finally, as events described in paragraph 11 above demonstrate, the requirement of article 9, paragraph 1, to ensure that any person (including a legal person, as set out in the definition of the public in article 2, paragraph 5, of the Convention) whose request for information under article 4 has not been dealt with in accordance with the provisions of that article has access to an expeditious review procedure, has not been properly transposed into the national legislation. Nor, it appears, was there any guidance issued to the judiciary with regard to the direct applicability of the Convention's provisions.

23. The Committee considers that the underlying reason for non-compliance with the requirements of articles 4 and 9, paragraph 1, as described in paragraphs 16 to 19 and 21 to 22 above, was a failure by the Party concerned to establish and maintain, pursuant to the obligation established in article 3, paragraph 1, a clear, transparent and consistent framework to implement these provisions of the Convention, e.g. by providing clear instructions on the status and obligations of bodies performing functions of public authorities, or regulating the issue of standing in cases on access to information in procedural legislation.

III. CONCLUSIONS

24. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Main findings with regard to non-compliance

25. The Committee finds that, by having failed to ensure that bodies performing public functions implement the provisions of article 4, paragraphs 1 and 2, of the Convention, Kazakhstan was not in compliance with that article.

26. The Committee also finds that the lengthy review procedure and denial of standing to the non-governmental organization in a lawsuit on access to environmental information was not in compliance with article 9, paragraph 1.

27. The Committee further finds that the lack of clear regulation and guidance with regard to the obligations of bodies performing public functions to provide information to the public and with regard to the implementation of article 9, paragraph 1, constitutes non-compliance with the obligations established in article 3, paragraph 1, of the Convention.

B. Recommendations

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

(a) Pursuant to paragraph 37 (b) of the annex to decision I/7, request the Government of Kazakhstan to submit to the Compliance Committee, not later than the end of 2005, a strategy, including a time schedule, for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that would set out clear procedures for their implementation. The strategy might also include capacity-building activities, in particular for the judiciary and public officials, including persons having public responsibilities or functions, involved in environmental decision-making;

(b) Recommend the Government of Kazakhstan to provide officials of all the relevant public authorities on various levels of administration with training on the implementation of the Memo on Processing Public Requests for Environmental Information and to report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties on the measures taken to this end;

(c) Request the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures.

Notes

¹ This chapter includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee

² It is the understanding of the Committee that at the time when the Committee considered the communication, the draft legislative amendment was not anymore under consideration by the Government of Kazakhstan.