

Report:

«On judicial practice in civil cases in the field of environmental legislation in the Republic of Kazakhstan in 2104-2015. The changes in the environmental legislation of the republic»

June 14, 2016

Geneva

Ladies and Gentlemen!

In June 2014 at the fifth session of the Meeting of the Parties to the Aarhus Convention (UNECE, the Netherlands) a resolution V/9L «On non-compliance of its obligations by Kazakhstan under the Aarhus Convention» was taken, and in the next session in 2018 Kazakhstan is recommended to carry out the improvement of the legal framework for access the public to environmental information and participation in decision-making on the protection of environmental issues. Annual report on the measures taken should be submitted each year to the Compliance Committee of the Aarhus Convention by 2018.

So what has happened since then and what is the situation in Kazakhstan for today?

As it is known, Kazakhstan is a member and active participant in various international commissions and processes aimed at the development and implementation of international agreements on environmental protection and sustainable development at the global and regional level - the UN Commission on Sustainable Development; Interstate Commission for Sustainable Development in Central Asia; regional Eurasian network of the World Business Council for Sustainable Development; CIS Interstate Council for Hydrometeorology of the Council; the «Environment for Europe» and «Environment and Sustainable Development for Asia», the United Nations Development Program, the World Wildlife Fund (WWF) and other international organizations.

One of the global international initiatives of Kazakhstan in the sphere of environmental protection is a partnership program «Green Bridge». The program was presented and had an international support at the III Astana Economic Forum (Astana, 2010); VI Conference of the Ministers of the Environment and Development in Asian and Pacific region (Astana, 2010); within the framework of the UN General Assembly (2011), and then - on UN Sustainable Development Conference «Rio + 20» (Rio de Janeiro 2012). The program was supported by members of the UN Economic and Social Commission for Asia and the Pacific (ESCAP) and the UN Economic Commission for Europe (ECE).

In September 30, 2013 in Astana an International Conference on Partnership Program «Green Bridge» was organized by the Ministry of Environmental Protection of Kazakhstan (now its powers transferred to the Ministry of Energy) in partnership with the UN Development Program. According to its results 8 countries - Kazakhstan, Russia, Kyrgyzstan, Belarus, Mongolia, Georgia, Germany and Montenegro signed a Charter of the partnership program «Green Bridge». Subsequently, Latvia and several other countries are considering joining the Charter.

The Charter provides, among other things, a creation of an international association for the purpose of implementation of the Partnership Program «Green Bridge» and an establishment

of Informational-Analytical Institute in the territory of the Republic of Kazakhstan for research, development and technology transfer and development of incubators.

Overall, more than 60 international treaties of the Republic of Kazakhstan directly or indirectly affect the scope of protection of the environment.

In accordance with the decision of the Constitutional Council «On official interpretation of subparagraph 7) of Article 54 of the Constitution of the Republic of Kazakhstan» dated May 18, 2006, the Acts of the Republic of Kazakhstan on ratification of international treaties and acts of the Republic of Kazakhstan on acceding to international treaties are equal in their legal force and legal consequences. In this regard, international treaties, which are obligatory for the Republic of Kazakhstan by normative legal acts on accession to international treaties adopted by the Parliament of the Republic, are equated with the international treaties ratified by the Republic of Kazakhstan.

The paragraph 3 of Article 4 of the Constitution of the Republic of Kazakhstan stipulates that «international treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases where it follows from an international treaty that its application requires the promulgation of the law».

This means that the Republic of Kazakhstan expresses its consent to override legal effect of those international treaties concluded by it over national law, which have been ratified by the Parliament of the republic by adoption of the relevant law.

By virtue of paragraph 2 of Article 2 of the Environmental Code the priority of international treaties is established ratified by the Republic of Kazakhstan, over the provisions of this Code.

In accordance with Article 11 of the Law «On International Treaties of the Republic of Kazakhstan» international treaties shall be subject to ratification the subject of which are the rights and freedoms of man and citizen; implementation of which requires a change in the existing or adoption of new laws; establishing rules other than those stipulated by the laws of the Republic of Kazakhstan and some others.

National legislation is constantly being improved, including as a result of bringing it into conformity with international law recognized by the Republic. The country consistently solves environmental problems and is now quite feasible in near future, the implementation of the program «Kazakhstan 2030», which noted that «Kazakhstan should be clean and green country with fresh air and clear water. Industrial waste and radiation would no longer penetrate into our houses and gardens. Our children and grandchildren will live a full life in a healthy environment».

In VI Congress of Judges of Kazakhstan (November 21, 2013) the President of the Republic of Kazakhstan Nursultan Nazarbayev in his report said that «National judicial system should be a reliable guarantee of stability in the society, the rule of law, strict observance of the interests of society and the state, protection of rights and freedoms Kazakhstan". Among the measures to implement the goals the nation Leader highlighted the need to ensure access to justice to the wider citizens, introduction of e-fixing lawsuits, exclusion of any formal requirements to sue claims.

Also, the country's President set an ambitious goal to the judicial community: the judicial system needs to raise its rate on the criterion of «Independence of the courts» in the Global competitiveness ranking for another 60 positions. The Concept of Kazakhstan on joining the top 30 most developed countries of the world was approved by the Decree of the President of the

country № 732 in January 17, 2014. The Concept was developed in order to implement the President's Address of December 14, 2012 «Strategy» Kazakhstan-2050»: a new policy of the established state" and his instructions on the basis of the Eurasian Emerging Markets Forum, held in September 10, 2013. It lays the foundations for a gradual improvement of the social, economic and institutional environment in the country with a view to becoming one of the 30 most developed countries in the world by 2050.

Further, at the enlarged session of the Government in Astana in May 6, 2015 the President of Kazakhstan Nursultan Nazarbayev outlined 100 concrete steps, including Section II «The rule of law» for the implementation of five institutional reforms in the judicial system.

This is, above all, a simplification of legal proceedings. So, from January 1, 2016 an optimization of the judicial system instances was carried out to facilitate citizens' access to justice by moving from a five-justice system (first, appeal, cassation, supervisory and repeated) to an only three-level (first, appeal, cassation). For disputes involving large investors and associated investment contracts in the Supreme Court it was created a specialized panel of judges acting as the court of first instance. This means that if the result of the execution of the investment contract and any issues in the field of environmental legislation, such cases will be considered in this board. The appeal of court acts by specialized board will only be considered in the appeal board of the Supreme Court. As we see, there are only two court instances. That is, an access to justice was realized.

Within the Supreme Court an International Council was established with the participation of authoritative international judges and lawyers to implement the best international standards, to give consultations on improvement of Kazakhstan justice.

Wholly audio, - and video recording of all processes was introduced and conducted, in the courts there are observation rooms, where everyone can track controversies. An electronic document management system was installed and is running. For example, the claimant may apply to the court with the help of e-mail by using any gadget. It is enough to «attach» to the letter of claim and to pay the state fee by payment card. The applicant can prove his/her identity by means of the electronic digital signature. Each judge has a digital signature, so the judicial acts may be obtained electronically. When the application arrives to the court, the applicant receives an SMS-message with the notification of his/her registration. For five days, the judge shall decide on the acceptance or rejection of the application to the court proceedings, on this decision the plaintiff shall also be notified via SMS. Further indicated that the application is accepted, it is in proceeding of the judge, as well as a notice of the time, place and date of the meetings shall be sent.

In practice, the courts also use a «hybrid mail»: summons or judicial act shall be forwarded by email to the recipient's post office, where they are printed out and delivered in a single day.

An accountability of judges was enhanced, a possibility of appeal by citizens to judges' actions in a specially created Judicial judges at the Supreme Court of the country was introduced. Since the summer of 2015 many laws had significant amendments and additions or radically new legal acts were adopted. In particular, a new Code of Civil Procedure was adopted, which reflected changes in the judicial system. As well the changes affected the environmental legislation, which I will report below.

With regard to statistics, in 2014 - 2015 in Kazakhstan the courts of first instance considered, respectively, 438 and 486 civil cases. Depending on the geographic location each region has a specificity. So, on the west of the country in connection with oil production, it is mainly discussed the case of emergency-limit of gas flaring and oil spills, in the east - soil and water pollution and waste of industrial facilities, in the south - felling of saksaul and other plants.

In general, the Supreme Court was able to develop a uniform approach to the resolution of disputes in the field of environmental protection legislation. Moreover, as a result of the revision of a number of civil cases in the Supreme Court, the changes of judicial decisions of the lower courts became the basis for making the appropriate changes and additions to the Environmental Code and other laws on environmental sphere. For example, the legislation did not have provisions distinguishing between stationary and mobile sources of pollution. In this regard, local courts experienced some difficulties in qualifying environmental offenses. Thus, the Supreme Court was granted supervisory petition of Kyzylorda Region Ecological Department that diesel power and welding unit, use the "KazRos-Munai" LLP in production drilling, are stationary emissions sources. The rig, at least structurally attached to the vehicle that moves this setting does not apply to mobile sources as direct process installation work (drilling) happens when you stop the vehicle, that is in a stationary position, it was considered and then legislated as additions to the Environmental Code.

I note that according to the Constitution of the Republic of Kazakhstan our country is a democratic, secular, legal and social state whose highest values are an individual, his/her life, rights and freedoms (article 1, paragraph 1); everyone has the right to judicial protection of their rights and freedoms (Article 13, paragraph 2); the state aims to protect the environment favorable for life and health (article 31 paragraph 1); Kazakh citizens have the right to freedom of association (article 23, paragraph 1).

In our country, due to the rate on the full development of civil society institutions, harmonization of state and society relations, constitutional prohibitions and restrictions were lifted for more active engagement of government and public institutions (from the Concept of Legal Policy for the period from 2010 to 2020, approved by the Decree of the President of the Republic of Kazakhstan from August 24, 2009 № 858, with amendments dated January 16, 2014).

On matters related to the implementation of the norms of the Aarhus Convention, in court reporting forms up to 2010 a maintenance of a separate statistical graphs was not provided. In 2010, amendments to the statistical forms for civil cases allowed to keep records of cases in the field of the environment on the claims and allegations that were brought by individuals, environmental organizations in the implementation of the Aarhus Convention. Access to justice is the primary means of ensuring compliance with the Aarhus Convention (Article 9). This is the third element of the Convention, which provides for the mandatory nature of compliance with environmental legislation, strengthened enforcement mechanism in the field of domestic environmental law.

Access to justice requires, along with the legislative fixing of the guaranteed right to appeal to the court every citizen also the presence of factors such as: the availability of the courts to the population providing timely reception of applications; reasonable and fair legal costs; reasonable terms of consideration and resolution of cases; timely and high-quality production of judicial acts, court records, smooth provide of the litigation to the parties; timely resolution of appeals and cassations, petitions challenging the judicial acts on supervisory review; simplicity of procedural provisions; the guarantee of free legal assistance to the needy; effective enforcement of judgments.

In Kazakhstan, the public's right to access to justice is guaranteed by the Constitution, rules of laws and regulations of the Parliament of Kazakhstan ratified the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters (Aarhus Convention). The norms of the Constitution and the provisions of the Aarhus

Convention has a direct effect. According to the civil procedural law, everyone is entitled in accordance with the law to apply to the court to protect violated or disputed constitutional rights, freedoms and lawful interests. Legal entities (including environmental associations) and citizens have the right to go to court to protect the rights and lawful interests of other persons or unspecified persons in the cases provided by law. Waiver of right to appeal to the court is invalid if it conflicts with the law or violates someone else's rights and interests protected by law (Article 8 of the Civil Procedure Code).

Particularly public environmental associations are active, for example, in Pavlodar region it is «World of Ecology», and in the city of Almaty - «Green Salvation».

On the other hand, there is a passivity of public associations in the Karaganda region. Despite the fact that every year, the district court hold seminars with the participation of state bodies, including the authorities in the field of environmental protection, non-governmental organizations in the development of the Aarhus Convention, and the courts of first instance are focused on creation of favorable conditions for the implementation of population and public associations of their rights in this part, the situation is not changed for the better. For this reason, it is necessary to state that initiators of lawsuits in court for the protection of nature, as always, are the competent authorities of the state, in rare cases, a specialized environmental prosecutor's office of Karaganda region.

According to article 4 of the Aarhus Convention, public authorities on public request on environmental information must provide it with the light of the rules of national law. On the basis of Article 14 of the Environmental Code, environmental associations are entitled to receive from the state bodies and organizations a timely, complete and reliable environmental information, and the Articles 163-167 of this Code regulated the procedure for obtaining such information. By virtue of Article 17 of the Law «On State Secrets», information about the state of the environment can not be kept secret. In November 16, 2015 a new law «On access to information» was adopted according to which it was finally stated that an access to the following information on the state of the environment (point 4 of Article 6) shall not be intended to be limited.

For individuals in the field of environmental protection have the right to: an environment favorable for their life and health; implement environmental protection and rehabilitation measures; create associations and foundations of environmental protection; participate in decision-government bodies on issues related to environmental decision in the manner prescribed by law; take part in meetings, rallies, pickets, marches and demonstrations, referendums in the field of environmental protection in accordance with the law; contact the state authorities with letters, complaints, applications and proposals on the protection of the environment and require their consideration; receive from state bodies and organizations timely, complete and reliable environmental information; participate in the discussion of draft laws and regulations on the protection of the environment at the stage of their preparation and submit comments to the developers; participate in the preparation of plans and programs relating to the environment; make proposals for public environmental review and take part in it; demand the abolition of the administrative or judicial procedure on establishment, construction, reconstruction and commissioning of enterprises, structures and other environmentally hazardous facilities, as well as the limitation and termination of economic and other activities of individuals and entities that have a negative impact on the environment and health person; bring an action in court for damages caused to their health and property as a result of violations of the environmental legislation of the Republic of Kazakhstan.

By the law of April 8, 2016 an Article 57 of Environmental Code was amended according to which individuals and legal entities received a long-awaited right to appeal the conclusion of the state ecological expertise. Perhaps, a lack of a legal possibility of appealing the state ecological expertise was one of the main demands of the international community to Kazakhstan on issues of access to justice. On the one hand, it opposed the economic entities involved in large-scale projects on subsoil use and often permitted instances of unauthorized and irrational use of natural resources or environmental pollution, including emergency, uncoordinated salvo emissions and discharges, placement of production and consumption waste, or excess pollution environment. On the other - outdated views of jurists in the field of procedural law prevented, who believed that the conclusion of ecological expertise was one of the proofs of species, which in itself is not subject to an individual contesting in court, but is the subject to assessment by the court along with the other evidence in the case, as in force of Code of Civil Procedure (Article 18) no evidence has a pre-determined force to the court. It is noteworthy that in the absence of a legal possibility of appealing against the conclusion of the state legal expertise in November 2015 a specialized inter-district economic court of Almaty city considered a statement of the Public Association «Green Salvation» on the recognition of the state ecological expertise of the project «*Evaluation of the Impact on the Environment*», the construction of the road to the ski resort «Kokzhaylau». However, the court upheld this claim without satisfaction, believing that the applicant was wrong.

Now this problem is solved at the legislative level.

In addition, I have developed and in the end of May of this year I have listed for the discussion a draft of the new regulatory Decree of the Supreme Court on disputes concerning the application of environmental legislation, instead of the obsolete regulatory Decree of December 16, 2000. By the way, this document changed and amended in 2010 for the last time.

The Global Judges Symposium, in Johannesburg, South Africa, in August 18-20, 2012 (known as the Johannesburg Principles on the Role of Law and Sustainable Development), it was said that an independent judiciary and judicial process is vital for the implementation, development and enforcement of rights of the environment. Members of the judiciary and those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance, implementation and enforcement of international and national environmental law.

In this regard, I note that the above-mentioned positive changes in the legislation began to occur due to the active role of the Supreme Court headed by its Chairman Kairat Mami, the entire judicial community. Kairat Mami became one of the initiators of the speedy implementation in the field of environmental protection of international law, including the Aarhus Convention, in the environmental legislation of the Republic of Kazakhstan on the issues of access to justice. I also note the merit of judge of the Supreme Court Vladimir Borissov, who is now retired, who was actively involved in this work.

Ladies and gentlemen, the environmental community and the judicial community exist in a social environment, legal environment in general, performing a single task of serving society through the protection of the rights and legitimate interests of everyone in the field of environmental protection. Activities for the implementation of the Aarhus Convention in civil society depend on the effective interaction between government agencies and the public. At the national level in its implementation there are involved:

- The authorized body in the field of environmental protection (Ministry of Energy and its subordinate bodies in the regions);

- The court system (in the form of specialization of judges, training centers of regional courts, training judges, mentoring, coaching, and the activities of the Institute of Justice, including a master's degree, training courses of judges);
- Government departments;
- Legal community;
- Community mediators in mediation efforts to resolve disputes between individuals and non-state economic entities;
- The public, citizens, Aarhus Centers and associations in the implementation of its activities in the field of environmental protection;
- Independent journalists specializing in environmental issues.

The great merit of international organizations in realizing the potential of these government agencies and the general public belongs to the OSCE Office programs, UNDP, EU project («Support of Judicial and Legal System in the Republic of Kazakhstan», the German Foundation for International Cooperation - GIZ, and International Legal Cooperation - NIHD, the US Agency for International Development (USAID), the Venice Commission, a number of European embassies, as well as the Secretariat of the Aarhus Convention and other organizations.

International organizations often act as organizers and co-organizers of events. In our country, since the ratification of the Aarhus Convention, there is a certain positive practice on interaction between public authorities and the public. It should be noted that the most common forms of interaction with the public judges are: conferences, seminars, round tables, workshops with the participation of international experts, NGOs and other stakeholders to provide recommendations for the implementation of the Aarhus Convention. These activities, as a rule, are attended by, except judges, the representatives of NGOs, prosecutors, advocates, mediators, who recently began to take an interest and participate at them. Thus, the use of recommendations made at conferences, seminars, round tables and workshops, held with the participation of the public, as well as in the results of the judicial practice, led to the above-mentioned significant changes in environmental legislation.

At the end of the report, I note that in the Republic of Kazakhstan on a regular basis, a training for judges was organized on the topic of «Environmental Law» where the provisions of the Aarhus Convention were studied in detail in addition to the standards of environmental legislation. This is very important, since for years of independence of Kazakhstan the judicial corpus was substantially updated. It should be noted that up the previous training programs were held without the participation of the public, and the speakers brought to the audience, who were only judges, the information on the reports of the Meeting of the Parties to the Aarhus Convention in Kazakhstan, on legal position and jurisprudence. Now, under support of the OSCE Office programs, practical trainings in the field of environmental protection have being held in training centers with the participation of NGO representatives.

Immediately the following forms of study on environmental legislation are applicable to the judges:

- Training programs for graduate students in the Institute of Justice;
- Training programs for judges in the training courses;
- Training of judges in the Supreme Court;
- Training of judges in the training centers of the regional courts;
- Coaching and mentoring.

Educational and practical guide for the application of the Aarhus Convention provisions by the courts are widely used as aid trainings and methodological materials for students. The

website of the Supreme Court in the section of «Cooperation» there is a page posted on «The Implementation of the Aarhus Convention», which has the websites' of the social organizations and Aarhus Centers, where one can get acquainted with the necessary information, draft laws and regulatory decisions.

Thank you for attention!