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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

Twelfth meeting
Geneva, 14–16 June 2006

REPORT OF THE MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of access to justice in the court of Medeuski region of Almaty (Communication ACCC/C/2004/06 by Ms. Gatina, Mr. Gatin and Ms. Konyushkova (Kazakhstan))

Adopted by the Compliance Committee on 16 June 2006

INTRODUCTION

1. On 3 September 2004, Ms. Gatina, Mr. Gatin and Ms. Konyushkova of Almaty, Kazakhstan (hereinafter the communicant), submitted a communication to the Compliance Committee alleging non-compliance by Kazakhstan with its obligations under article 9, paragraphs 3 and 4, of the Aarhus Convention.

2. The communication concerns access to justice in appealing the failure of the Almaty Sanitary-Epidemiological Department and Almaty City Territorial Department on Environmental Protection to enforce domestic environmental law with regard to operation of an industrial facility for storage of cement and coal and production of cement-based materials (hereafter "the facility"). The communicants claim that their right of access to administrative or judicial review procedures guaranteed under article 9, paragraph 3, of the Convention were violated when a court repeatedly failed to consider a part of a lawsuit related to the failure to act by the public authorities. The communicants further claim that unjustified delay in review of the claim, failure to notify the plaintiffs of the scheduled court hearing, review by the court of the claim in absence of the parties and failure by the court to inform the plaintiffs of its decision in the case constituted breach of the requirements of article 9, paragraph 4, of the Convention with regard to fair, equitable and timely procedures providing adequate and effective remedies. 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 22 October 2004, following a preliminary determination by the Committee as to its admissibility.

4. A response was received from the Party concerned on 18 March 2005, indicating, *inter alia,* that:

(a) By purchasing their residential property in the vicinity of the facility in 1996, the communicants had accepted to reside in an industrial zone;

(b) The environmental inspectorate had been carrying out regular monitoring of the facility in response to the communicant's complaints;

(c) The monitoring had established that since the latest change in ownership of the facility (which occurred earlier in 2004), several pieces of clean-up equipment had been installed in the facility;

(d) The new management of the facility had developed and submitted for approval to the environmental authorities a draft environmental protection plan in 2004;

(e) Administrative penalties in the form of fines had been imposed on the facility for failure to comply with environmental legislation;

(f) Contrary to the communicants' claim, the court decision of 27 June 2002 stated that the parties had been notified of the date and time of the hearing; and

(g) The failure of the court to notify the communicants of the decision in their case fell outside the competence of the Ministry of Environment.

5. In addition to the comments in writing, the representatives of the Party concerned further pointed out, during the discussion at the Committee's eighth meeting, that judicial procedures and the performance of the courts were outside the scope of the authority of the Ministry of Environment.

6. The Committee at its fifth meeting (MP.PP/C.1/2004/6, para. 26) determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned. Having reviewed the response of the Party concerned and having further consulted with both parties at its eighth meeting, the Committee hereby confirms the admissibility of the communication.

7. The Committee discussed the communication at its eighth meeting (22–24 May 2005), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

8. In accordance with paragraph 34 and with reference to paragraph 36 (b) of the annex to decision I/7, the Committee prepared draft findings and recommendations at its ninth meeting were forwarded for comment to the Party concerned and to the communicant on 18 October 2005. Both were invited to provide comments, if any, by 17 November 2005. Comments were received from the communicant on 9 November 2005. At the request of the Party concerned, the Committee extended the commenting deadline to 1 February 2006. The Party concerned provided its comments on 7 February 2006. The Committee, having reviewed the comments, took them into account in further developing the draft findings and recommendations at its eleventh meeting. It then allowed a further period for comments for the Party concerned before finalizing and adopting them at its twelfth meeting.

I. SUMMARY OF FACTS[1]

9. An industrial facility for storage of cement (6 stationary containers of 25 metres in height and 4,000 tons in volume) and coal (a warehouse with the annual cargo turnover of 48,400 tons) and production of construction materials resumed its operation in 1998, following seven years of inactivity. Tsentrbeton Ltd. facility is located in the immediate proximity of the residential area where the communicants live (with some of the installations within 50 metres of residential houses) in the Djetysuiski district of Almaty.

10. Since 1998, the communicants repeatedly requested the Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection to enforce environmental standards pertaining to the operation of the facility. The communicants maintain that the authorities failed to take successful enforcement measures.

11. On 6 August 2000, seven residents of the area, including the communicants, filed a lawsuit with the district court of Medeu alleging a failure of the Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection to enforce environmental legislation with regard to the facility. The plaintiffs requested the court to, *inter alia:*

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

1) Require the defendants to develop a proper environmental management plan for the facility that would take into account all the relevant requirements of the environmental legislation;
2) Revoke the conclusions of the governmental environmental assessment ("expertise") and the environmental permit issued to the facility as failing to satisfy the requirements of environmental, sanitation and construction legislation; and
3) Require the defendants to provide compensation for pain and suffering caused by their failure to act.

12. On 20 June 2001, the court of first instance rejected the plaintiff's second and third claims, pointing out that as of July 2000, the facility complied with the conditions of its permit, that the authorities in question had addressed all the complaints of the plaintiffs and had taken administrative and other enforcement measures and that therefore no compensation was to be awarded to the plaintiffs. It is not address the first claim.

13. On 7 September 2001, the appellate court reversed the decision of the district court, noting its failure to address the first claim of the plaintiffs. The decision of the appellate court also noted that the district court had failed to properly investigate the matter with regard to both the actual enforcement measures taken by the authorities and the actual environmental performance by the facility and its compliance with the legislative requirements. The case was returned to the district court for review.

14. On 27 November 2001, the district court suspended the review with regard to the third claim pending the outcome of a civil case filed by the communicants against the facility with a different district court. The court's decision again failed to address the first claim and also did not resolve matters raised in the second claim. The appellate court reviewed the case in February 2002 but this time left the decision of the district court standing.

15. On 27 June 2002, despite the fact that the civil case was still pending with a different court, the judge of the district court on her own initiative resumed the hearing of the case with regard to the third claim. It dismissed the case without considering it due to the failure of both parties to appear in court. The court decision refers to multiple notifications of the place, date and time of the hearing being sent to the parties. The communicants however maintain that no such notification was received by any of the seven plaintiffs. The communicants also did not receive a copy of the court's decision until May 2004 when they filed a petition with the district court to resume the hearing of the case. In the course of discussing the communication at the Committee's eighth meeting on 24 May 2005, the representatives of the Party concerned indicated that they were not in a position to verify whether or not the notifications or the decision had been indeed delivered to the communicants in a timely manner.

16. Despite suspension of its environmental permit in 2001, the facility continued to operate. In February 2003, a new environmental assessment of the facility's operation was approved by the environmental authorities. Its conclusions established multiple breaches of Kazakh environmental legislation: e.g. the level of cement dust content in the air exceeding maximum allowed concentration by 114 times, background air pollution exceeding permissible levels (paras. 17.4 and 17.5 of the Conclusions) and existence of residential houses within the prescribed buffer zone (para. 17.1 of the Conclusions). Despite this, the conclusions

conditionally approved operation of the facility subject to effective implementation of measures foreseen in the proposed environmental management plan. The facility however still failed to obtain an environmental permit. In May 2004, the communicants appealed to the Ministry of Environment to take steps to stop the pollution by the enterprise.

17. On 20 July 2004, the communicants filed another lawsuit with the Medeu district court. In the lawsuit they petitioned for a writ to require the Almaty City Territorial Department on Environmental Protection and the City Sanitary-Epidemiological Department to bring a court action for suspension of the facility's operation. The communicants maintain that they were not in a position to directly request injunctive relief for fear of an expensive counter-claim by the facility.

18. On 29 July 2004, the district court rejected the claim, pointing out that while article 77 of the Environmental Protection Law granted the public authorities a right to file a lawsuit to restrict or suspend an activity, it did not establish an obligation to do so. The court considered, *inter alia,* that imposing an administrative fine on the facility provided an alternative course of action for the public authorities in fulfilling their obligations. The decision was subsequently unsuccessfully appealed to the court of second instance and the office of the public prosecutor.

II. CONSIDERATION AND EVALUATION BY THE COMMITTEE

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

20. The Convention, as a treaty ratified by Kazakhstan, is part of the Kazakh legal system and is directly applicable, including by the courts.

21. Noting that some of the activities described in the communication took place prior to the Convention's entry into force for Kazakhstan, the Committee will only address the activities that took place after 30 October 2001.

22. The communicants' standing was not disputed in any of the court instances. In the Committee's view, this sufficiently establishes that they meet the criteria under Kazakh law for access to review procedures as stipulated in article 9, paragraph 3, of the Convention. The argument of the Party concerned with regard to the communicants' consent to reside in the area (para. 4 above) is not relevant in this consideration. Leaving aside the fact that the purchase of property occurred when the facility was not operational, the communicants do not challenge legitimate operation of the facility, but rather allege failure of the public authorities to bring about compliance with environmental legislation and their own failure to obtain access to justice in the context of the Convention.

23. The Almaty Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection both fall under the definition of a "public authority", as set out in article 2, paragraph 2 (a).

24. With regard to the argument presented by the representatives of the Party concerned that they do not have authority over courts (paragraph 5 above), the Committee notes that judicial independence, both individual and institutional, is one of the preconditions in ensuring fairness in the access to justice process. Such independence, however, can only operate within the boundaries of law. When a Party takes on obligations under an international agreement, all the three branches are necessarily involved in the implementation. Furthermore, a system of checks and balances of the three branches is a necessary part of any separation of powers. In this regard, the Committee wishes to point out that, the three branches of power need each to make efforts to facilitate compliance with an international agreement. So, for example, bringing about compliance in the field of access to justice might entail analysis and possible additions or amendments to the administrative or civil procedural legislation by bodies usually mandated with such tasks, such as, for example, ministries of justice. Should such legislation be of primary nature, the legislature would have to consider its adoption. In the same way judicial bodies might have to carefully analyze its standards and tests in the context of the Party's international obligations and apply them accordingly.

25. While the communication presents a lot of information with regard to violations that continually occur in the operation of the facility, as illustrated in paragraphs 9 and 15 above, it is not within the Committee's mandate to assess these alleged violations or verify the information. The Committee will however consider the judicial procedure in question from the point of view of compliance with article 9, paragraphs 3 and 4.

26. With regard to the court decision of 27 November 2001, the court had in front of it three claims: to require the public authorities to take certain actions (i.e. develop a management plan), to revoke the conclusions of the earlier environmental assessment and the related permit and to award compensation of damages. The decision addressed the third claim but failed to address the request for an environmental management plan to be developed for the facility to bring its operation into compliance with the national legislation. It also did not resolve the matter of appeal against the conclusions of the governmental environmental assessment. Without an in-depth analysis of the domestic legislation the Committee is not able to establish whether an omission to develop such a plan would be in contradiction with environmental legislation and therefore fall under article 9, paragraph 3, of the Convention. Should this have been positively established, the failure by the courts to address this claim would constitute a denial of access to judicial review procedures in the meaning of article 9, paragraph 3. The Committee therefore would like to bring the attention of the Party to this situation.

27. The opinion of the appellate instance issued on 7 September 2001 (see para. 13 above) indeed pointed to an earlier first instance decision's failure to address the same particular claim. It refers to the requirement of the Kazakh Civil Procedure Code that all claims presented in a lawsuit have to be addressed by the court. The failure to comply with the Convention, in this particular instance, does not seem to be embedded in the legislative system but rather points to failures in the judicial system.

28. With regard to the decision of the court of first instance of 27 June 2002 and the subsequent developments described in paragraph 13 above, the Committee is of the opinion that a procedure which allows for a court hearing to commence without proper notification of the parties involved (including a confirmation that notifications have indeed been received), cannot

be considered a fair procedure in the meaning of article 9, paragraph 4, of the Convention. Although the court decision refers to the multiple notifications being sent to the plaintiffs, no evidence was presented in support of this by the Party. In absence of such evidence the Committee considers that the claim of the communicants that they were not duly notified has not been reputed. In the view of the Committee the shortcoming lies with the compliance by the courts with the existing requirements of procedural legislation, rather than the legislation itself.

29. The Committee also finds that the failure to communicate the court decision to the parties, as described in paragraph 15, constitutes a lack of fairness and timeliness in the procedure. At the Committee's eighth meeting, the representatives of the Party concerned argued that even if the decision was not communicated directly to the plaintiffs, they still had a possibility to access the text of the decision in the court records. Clearly, while public accessibility of decisions is commendable, it does not in itself satisfy the fairness of the procedure. A fair and timely procedure requires that a decision should be communicated to the parties within a short time to enable them to take further actions, including filing an appeal.

30. The judicial procedures referred to in paragraph 17 above were initiated to challenge the public authorities' failure to act to bring about compliance with national environmental law. In this regard, it is important to distinguish three issues:

(a) Whether the communicant had access to a review procedure in order to challenge the alleged failure of enforcement by the public authorities. The Convention clearly applies here, and it appears that the communicants did have such access, even if the courts' decisions did not go in their favour;

(b) Whether the public authorities were legally obliged (as opposed to merely permitted) to enforce the relevant laws and regulations. The Committee is not in a position to interpret substantive environmental and administrative legislation of the Party where it falls outside the scope of the Convention, nor is it in a position to dispute the court's opinion that the public authority has a right to judge which of the courses of actions available to it are best suited to achieve effective enforcement. The Committee is, generally speaking, reluctant to discuss the courts' interpretations of substantive provisions of environmental or other domestic legislation. However, a general failure by public authorities to implement and / or enforce environmental law would constitute an omission in the meaning of article 9, paragraph 3, of the Convention, even though the specific means proposed by the plaintiff to rectify this failure might not be the only ones or the most effective ones;

(c) Whether the public authorities did in fact effectively enforce the relevant laws and regulations. There is certainly, in the view of the Committee, a freedom for the public authorities to choose which enforcement measures are most appropriate as long as they achieve effective results required by the law. Public authorities of the kind referred to in paragraph 17 above often have at their disposal various means to enforce standards and requirements of law, of which initiation of legal action against the alleged violator is but one. The Committee notes however, that actions with regard to the facility undertaken by the public authorities in the course of the past seven years (e.g. imposing fines) consistently failed to ensure effective results, as demonstrated by the information presented in paragraphs 4 (e), 10 and 16 above.

31. It is the Committee's opinion that the procedures fall under article 9, paragraph 3, of the Convention, triggering also the application of article 9, paragraph 4. Furthermore, it appears that there were significant problems with enforcement of national environmental law. Even though the communicants had access to administrative and judicial review procedures on the basis of the existing national legislation, this review procedure in practice failed to provide adequate and effective remedies and, therefore, was out of compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

32. The Committee notes that the more direct route for the communicants to challenge the contravention of environmental laws would have been to take a lawsuit directly against the polluting company, but the communicants were concerned about the financial risk they could face and therefore opted for the second route of taking a lawsuit against the relevant public authorities. This concern over what is known as strategic lawsuits against public participation also point out to obstacles in access to justice.

33. The Committee also notes with regret that whereas the case taken by the plaintiff could have provided a trigger for more effective enforcement of the laws and regulations relating to the environment, the decisions taken by the judiciary as a whole effectively ensured that this did not happen.

III. CONCLUSIONS

34. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

35. The Committee finds that the failure by Kazakhstan to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken constitutes a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.

B. Recommendations

36. Noting that the Party concerned has agreed that the Committee take the measure listed in paragraph 37 (b) of the annex to decision I/7, the Committee, pursuant to paragraph 36 of the annex to decision I/7, and taking into account the recommendations adopted by the Meeting of the Parties with regard to compliance by Kazakhstan (ECE/MP.PP/2005/2/Add.7), recommends that Kazakhstan:

(a) Additionally include in its strategy, prepared in light of decision II/5a of the Meeting of the Parties, publication of the courts' decisions and statistics related to environmental cases and allocate specific significance to capacity-building activities for the judiciary;

(b) Thoroughly examine, with appropriate involvement of the public, the relevant environmental and procedural legislation in order to identify whether it sufficiently provides judicial and other review authorities with the possibility to provide adequate and effective remedies in the course of judicial review;

(c) Take the findings and conclusions of the Committee into account in further consideration of the specific matter raised by the communicant; and

(d) Include in its report to the Meeting of the Parties to be prepared pursuant to paragraph 8 of decision II/5a of the Meeting of the Parties information on the measures taken to implement these recommendations.

37. The Committee requests the secretariat and invites relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures.

38. The Committee resolves to review the matter no later than three months before the third meeting of the Parties and to decide upon what recommendations, if any, to make to the Meeting of the Parties, taking into account all relevant information received in the meantime.