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Sent by e-mail to aarhus.compliance@un.org

Reykjavík, 1 November 2019.

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Iceland with articles 6, 8 and 9 of the Convention in connection with legislation on fish farming (PRE/ACCC/C/2019/168).

This letter is a reply to a letter from Ms. Fiona Marshall, Secretary of the Aarhus Convention Compliance Committee, dated 8 October 2019. Following are replies to questions that were enclosed with that letter:

1. What is the current status of cases Nos. E-525/2019 and E-253/2019?

Cases E-525/2019 and E-253/2019 were dismissed by the District Court of Reykjavik on 10 September 2019 on formal grounds because the temporary operating licenses had expired.

2. What are the main allegations that have been made to the court in each case? Who are the defendants in each case?

The defendants in case no. E-253/2019 were Fjarðalax ehf. and the Icelandic government and in case E-252/2019 Arctic Sea Farm hf. and the Icelandic government.

The main allegations in both cases were the same:

The plaintiffs claimed that the requirements for issuing the temporary licenses were not met. The objective of the Act on fish farming no 71/2008 is, *e.g.* to promote responsible fish farming and ensure the protection of commercial stocks. To achieve this goal, fish farming equipment and practice must meet the highest standards which it did not meet.

The plaintiffs claimed that the requirement of Section 5 of Article 10 of the Act on fish farming that an environmental impact assessment is done has not been met.

The plaintiffs argued that legal requirements for the location of operations and structures were not met. According to Section 2 of Article 8 of the Act on fish farming an application shall include proof that the applicant has secured ownership or permission to use the area where the operations will take place. The applicants did not submit such proof.

According to the same Section an applicant shall also proof that it has permission to build the structures it intends to build for the operation. The applicants did not submit such proof.

The applicants did not submit proof of sufficient funding for the operations that is required by the same section.

The plaintiffs claimed that the Minister for Fisheries and Agriculture did not assess whether there were sufficient grounds for the issuance of temporary licenses as is required in Section 2 of Article 21C of the Act on fish farming. The plaintiffs claimed that the minister's decision to issue the temporary licenses is not lawful if the minister did not make this assessment. The written reasoning for the decision does not show that such an assessment was made.

The plaintiffs claimed that the minister lacked competence to issue the licenses because of previous comments in the media about the operations of the fish farming companies.

The plaintiffs claimed that the minister did not ensure that the matter was sufficiently investigated before he issued the license which is inconsistent with Article 10 of the Act on administrative procedure number 37/1993. The minister did not gather information on social interests affected by the decision and the interests of the plaintiffs and other parties in similar position.

The plaintiffs claimed that the parties to the administrative case, *inter alia,* the plaintiffs, were not given a chance to comment on the case in accordance with Article 13 of the Act on administrative procedure no 37/1993.

The plaintiffs claimed that the minister's written reasoning for the issuance of the licenses did not fulfill the requirements of Article 22 of the Act on administrative procedure number 37/1993. The reasoning only mentioned the relevant rules that the decision was based on in a very limited way. There was no mention of the main views that dominated the minister's assessment.

The plaintiffs clamed that conditions for the issuance of the temporary licenses were not fulfilled. The fish farming companies were required to submit documents within a one week deadline to the ministry showing that they had mended the flaws that the Icelandic Complains Committee for cases regarding environmental matters and natural resources (úrskurðarnefnd umhverfis- og auðlindamála) had stated were on the procedure leading up to the issuance of the operating licenses that it declared invalid.

The plaintiffs claimed that the Act titled Change of law on fish farming, number 71/2008 (temporary operating license), number 108/2018, was unconstitutional because of Article 2 of

the constitution about the separation of powers into judicial, executive and legislative powers. By passing the new act the legislative branch entered the area of the judicial branch by passing a law that puts an end to a legal dispute in a particular case.

The plaintiffs claimed that the Act on fish farming was changed in a retroactive way to put an end to a legal dispute in a particular case.

The plaintiffs claimed that the execution (signature) of the new act number 108/2018 was not in accordance with Article 26 of the Icelandic Constitution because it was not signed by the Icelandic president or the three holders of the presidential power when the president is abroad. It was signed by the chief justice of the Icelandic Supreme Court, the fist vice president of the parliament and the minister of Transport and Local Government.

3. What are the possible remedies if the plaintiffs' claims in cases Nos. E-525/2019 and E-253/2019 are successful? Could the court overturn the temporary operational licenses? Could the court rule Article 21C of the Act on Fish Farming unlawful in these proceedings?

The cases have been dismissed and the deadline to appeal has expired. Therefore, there are no remedies available.

New operating licenses were issued and the temporary operational licenses would expired before it was time for a trial in the cases and therefore there was never a chance to overturn the temporary operating licenses.

The court could have ruled Article 21C of the Act on Fish Farming unlawful if the case would have continued.

In the party's letter dated today, it is stated at the bottom of the first page and top of the second page that "...the plaintiffs opted not exhausting the available legal remedies for their cases." I object to that statement. The plaintiff Náttúruverndarsamtök Íslands had no choice after the temporary operating licenses had been repealed by the Minister for Fisheries and Agriculture when the minister issued new licenses. It is a long-standing legal president as seen in many decisions by the Icelandic Supreme Court that a legal instrument or an administrative decision that is no longer valid cannot be annulled by the courts. Therefore, the plaintiffs obviously no longer had any remedies.

4. If the temporary operating licenses issued to Fjardalax hf. and Arctic Sea Farm hf. on 5 November 2018 were granted for the maximum period of 10 months, they would presumably have expired on 5 September 2019. What is the current status of these two operating licenses? Are the fish farms currently in operation and if so, under what legal basis?

See above. The fish farms are now operating under new operating licenses which are not of the temporary type that Article 21C is about.

5. Is it correct that Natturverndarsamtok Islands was one of the plaintiffs in cases Nos. E-525/2019 and E-253/2019? Is it still one of the plaintiffs?

Yes, Náttúruverndarsamtök Íslands was one of the plaintiffs. The cases have been dismissed by the court as discussed above.

6. Please comment on the statement of the communicants that it will take approximately 18 months before the court of first instance issues its decision in cases Nos. E-525/2019 and E-253/2019 and a decision by the court at the second instance would take an additional 12 months.

This question was only addressed to the party concerned but I must object to the party's answer in its letter dated today because it is probably misleading. The party states that according to information provided by the Judicial Administration a civil court proceeding before the District Court of Reykjavik takes 351 days on average. I do not have the data to check that number, but it is very likely that included in that average are the majority of cases where the defendant does not show up for court and therefore the proceedings take a short time. My estimate of 12 months for the court of second instance seems to be confirmed by the higher end of the numbers given by the party, i.e. 12 months. For both court instances it needs to be noted that the averages seem to include all types of cases, e.g. cases with no complications and cases granted special expedited procedure by law. Therefore, my estimates are good.

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The party's arguments in this case before the ACCC are only aimed at getting the case dismissed on formal grounds because it knows it cannot win on substantive grounds.

I reserve the right to further object to the party's letter dated today, 1 November 2019.

Sincerely,

Magnús Óskarsson,
Attorney-at-Law.