

PART I

IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS



TO THE QUESTION OF COMPLIANCE WITH THE AARHUS CONVENTION IN THE REPUBLIC OF KAZAKHSTAN

Sergey Kuratov,
Alma Omarbekova, lawyer,
Ecological Society Green Salvation,
Almaty, Kazakhstan

The mission of telling the truth becomes an anachronism at the moment when neither the seller, nor the consumer insists that the goods correspond to this quality. And if it's normal, then it's time to die. But it should be remembered that this is our own fault, because we are tolerating this situation.

*—Krzysztof Zanussi, Polish screenwriter,
director and producer for TV and cinema*

In autumn 2017, the Sixth Meeting of the Parties of the Aarhus Convention will take place in the city of Budva, Republic of Montenegro. The Republic of Kazakhstan is a party to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The country prepared a report on implementation of the requirements of the Convention (hereinafter—Report) for the years since the Fifth Meeting of the Parties.

The present material reviews the process of preparing the Report and its sections on public access to information, decision-making, and justice from the point of view of the public concerned.

How the National Report Was Prepared

In 2014, the Ministry of Environment and Water Resources was eliminated. Therefore, the next “Report on the implementation of the Aarhus Convention in accordance with Decision IV/4” for 2014-2016 was prepared by the Ministry of Energy. It was assigned with the main functions of environmental protection.¹ The text of the Report was published on the Ministry’s website on October 17, 2016² and later on the website of the Aarhus Centre of the Republic of Kazakhstan.³

The first section of the Report states that it was prepared on the basis of judicial practice, official reports on compliance with the decision V/9i, websites of the state and non-governmental organizations. The project was “sent out by e-mail to a network of non-governmental organizations on June 5, 2016, and was also

posted for public discussion on the websites of the Ministry of Energy of the Republic of Kazakhstan and the Aarhus Centre. On July 15, 2016, the Report was brought for a discussion” at a round table devoted to the implementation of the Aarhus Convention in Kazakhstan. The Report and other official publications leave it unclear whether the public concerned had any comments and additions to the content of the Report, and how it was taken into account.

On October 26, 2016, the Information and Analytical Centre for Environmental Protection of the Ministry of Energy organized a Skype conference to discuss the Report with the public. Representatives of non-governmental organizations “EcoMuseum” (city of Karaganda), Ecological Society Green Salvation (city of Almaty), and Kokshetau Aarhus Centre took part in the discussion. The Report and official websites do not provide any information on whether the comments and suggestions of the participants of the discussion were taken into account.

In early 2017, the Working Group on Public Participation of the Environmental Forum of Non-governmental Organizations of the Republic of Kazakhstan and the Ecological Society Green Salvation (hereinafter—ES) prepared an alternative report on Kazakhstan’s implementation of the Aarhus Convention. It is planned to be posted on the Convention website in the section of Reports of international and regional non-governmental organizations.⁴

Thus, the process of preparing and discussing the Report on implementation of the Convention in 2014-2016 cannot be called transparent. It was drawn up on the basis of official documents that need careful verification. In fact, only two discussions with the public took place in 2016, and these discussions cannot be considered nationwide. In 2017, the Ministry did not even try to continue the discussion. Access to information about development of the Report, about introduction of changes and its approval is not available. It remains unclear how many versions of the Report exist. It is unclear whether it is completed or not.

The Report was published in Kazakh language on the website of the Convention.⁵ Judging by the date on the first page, it was sent by the Ministry of Energy on November 16, 2016. As in the version mentioned above, it does not have a date and confirmation of official approval. Up until July 10, 2017, the Report was not translated into any of the official languages of the Convention.

General Remarks

The report was carried out in an optimistic manner. The main conclusion that follows from its content can be formulated as follows: “In general, despite of some shortcomings, Kazakhstan is moving in the right direction.”

The authors of the Report do not indicate that for the entire period of its independence, Kazakhstan has not developed the state environmental policy. In the draft reforms “100 Concrete Steps,”⁶ there is not even a mention of the need to take measures to improve the environmental situation. Indirectly,

environmental problems are addressed in paragraphs 94, 97, 99, which talk about improving access to information, increasing participation of citizens in the decision-making process, and strengthening the role of public councils. But this document is not linked in any way to the concept of transition to the “green economy.”⁷

The lack of environmental policy results in numerous contradictions in state programs, inconsistencies in the actions of state agencies, and poor quality legislation that is more in private rather than in public interest. These political “blunders” result in billions in losses for the budget, deterioration of the ecological situation and health of the people of Kazakhstan.

Authors of the Report describe carelessly the laws adopted during the reporting period. Many of these normative legal acts were adopted long before the reporting period. It seems that the authors use numerous excerpts from the laws to fill out the report and give it a more solid look. They did not point out that changes in environmental legislation are made very often. As a result, there are numerous contradictions between various regulatory legal acts; difficulties arise in their practical application. And the national legislation is not well coordinated with the requirements of international conventions.

A serious obstacle to resolving environmental issues is the continuing redistribution of environmental functions between various agencies: from concentration of power in local executive bodies, to liquidation of the Ministry of Environment and Water Resources.

In this regard, the speech of the Minister of Energy at a meeting of the Ministry’s collegium on February 16, 2017, was very indicative. It summed up the results of 2016 and announced plans for 2017. In the published speech of the Minister, there is not a single word about preparation of the Report and the planned participation of the representatives of Kazakhstan in the work of the Sixth Meeting of the Parties.⁸

In general, the Report suffers from a lack of materials on practical application of the Convention. For example, in its first section, it is said that the data used in preparation of the Report includes materials on judicial practice. However, the Report provides no analysis of specific cases. Much of the information relates to 2009-2010, that is, to the period covered in the previous report. This testifies to the absence of more recent statistics and poor preparation of the Report.

Compliance with the Article 4

The authors of the Report do not provide convincing evidence supporting the improvement of access to information. In Section VIII “Obstacles encountered in the implementation of Article 4,” the authors of the Report only say that the “Kazgidromet” issues newsletters in which “the data is presented in an aggregated form.”

Section IX of the Report on practical application of the Article 4 and on availability of any statistical data, includes only a few general phrases. There is no analysis of statistics of replies and denials to public requests and reasons for them. Question of the quality of information is not touched by the authors either. Apparently, they do not doubt that state bodies are always perfect. References to the adopted laws as evidence of improvement of the situation with access to information do not sound convincing.

The ES experience shows that the law “About Access to Information,” adopted in November 2015, did not bring a noticeable improvement to the situation. The state standard of the service for provision of environmental information did not affect the speed, nor quality of the information received.⁹ Officials, knowing well that organs of justice protect them in all situations, do not hesitate to hide, distort, and provide the public with untrue information.

The ES experience shows that it is especially difficult to obtain information about boundaries of land plots, in particular, about sanitary protection zones of industrial enterprises. Even information about the exact boundaries of national parks and results of forest management works is being hidden, probably, in the interests of influential tenants.

Refusals to provide information by the state bodies are becoming increasingly cynical and provocative. Some agencies state that they do not consider themselves to be state bodies and, therefore, are not required to provide information. Others refer to large volumes of information that are, allegedly, practically impossible to provide. Some tell the public that no accurate information was provided about the offenders, and therefore, the authorized body cannot begin the audit. And some say that no agreements were signed with the public to provide the information.¹⁰

Hiding information by public authorities and provision of false information are serious obstacles to effective public participation in the decision-making process.¹¹

Compliance with the Article 6

The sections of the Report on public participation in decision-making contain a number of serious criticisms, which partially repeat the comments made in the 2014 Report. For example, in the section XVI, the authors acknowledge the lack of a legal mechanism for “involving the public at the very beginning of the process of making environmentally significant decisions—selecting and reserving land plots for planned economic activities” to be an obstacle to public participation.

“The Land Code does not provide for public participation at this stage (paragraph 1, Article 43).

The lack of coordination between the basic national legal norms of land legislation and the norms of environmental legislation—Chapter 6 of the EC [Environmental Code] and the Rules for conducting of the SEA [State Environmental Assessment] can make it difficult to implement the provisions of the paragraph 4, Article 6 of the AC [Aarhus Convention]. The rules set out the requirements for the content of the materials submitted to the SEA. In accordance with the subparagraphs 2 and 5.11.1 and paragraph 18 of these Rules, the act of choosing a land plot and land management in itself is not a part of SEA, these documents are submitted to the SEA together with other documentation. Materials of documented public participation (protocols) at the stage of selecting a land plot as an integral part of the EIA [Environmental Impact Assessment] are also not mentioned as a part of the documentation.

At the later stages of project development documentation, all design decisions are already tied to the specific characteristics of a particular land plot.”

The authors of the Report should have given concrete examples of such “neutralization” of the public. It should have been pointed out that public hearings are not held even for large sites. Often, public hearings are held formally, with violations of legal requirements. By the way, this was mentioned in the Report of 2014 in the section XVI.¹² Over the past years, the situation did not change.

In the ES experience, there is an example of falsification of public hearings and misleading of a judge and employees of an authorized body. In cases when no hearings were held, authorities say that, according to the legislation, hearings are not required.¹³ At the same time, officials often interpret the rules of law at their own will. All these facts indicate that no control over organization, conducting, and documenting of public hearings is carried out.

In the section XVII, the authors note that on April 8, 2016, the Environmental Code was amended by the Article 57-2. It identifies projects that are subjected to an obligatory discussion with the public. On June 10, 2016, a “List of Types of Economic Activities Which Projects Are to Be Submitted to Public Hearings” was approved by the order of the Minister of Energy No.240. “The list of economic activities was brought in line with the Annex 1 of the Aarhus Convention.”

Introduction of the Article 57-2 and the List created a contradiction with the paragraph 1 of the Article 35 and subparagraph 14, paragraph 1, Article 41 of the Environmental Code. According to the latter, “environmental impact assessment is mandatory for all types of economic and other activities.” It includes “materials on accounting of public opinion, drawn up by protocols and containing conclusions based on results of public discussion of environmental aspects of a proposed activity.” In other words, it is unclear whether public opinion should now be taken into account when evaluating any kind of activity?

The authors of the Report do not indicate that the changes made to the “Rules for Conducting Public Hearings” on June 21, 2016, significantly limited the opportunity for public participation¹⁴. And introduction of public hearings in the form of a survey created a fertile ground for corruption and formalism.

The general trend of changes can be described as follows. By creation of a variety of public councils, state bodies seek to bring criticism of their activities into an official controlled framework. At the same time, they are working to mitigate environmental legislation in the interests of large exploiters of natural resources and to legislatively restrict public participation in the decision-making process.

It seems that in the case with the List of activities to be submitted to public hearings, the reference to the Aarhus Convention is used more to weaken the national legislation than to strengthen the rule of law. Recall that, according to the paragraph 1b of Article 6 of the Convention, the parties apply “the provisions of this Article to decisions on proposed activities not listed in the Annex 1 which may have a significant effect on the environment” in accordance with their national legislation. In the paragraph 20 of the Annex 1, it is stated that for any activities not covered by the paragraphs 1-19 of the Annex, “public participation is provided for under an environmental impact assessment procedure in accordance with the national legislation.” In other words, the Convention allows stricter national requirements. In 2005, based on these provisions specifically, the Aarhus Convention Compliance Committee made a decision recognizing the arguments in the statement of the Ecological Society Green Salvation to be justified.¹⁵

Compliance with the Article 7

In the section XXI of the Report, the authors point to the obstacles encountered in the implementation of Article 7, partially repeating the text of the 2014 Report. “The Rules for Conducting of Public Hearings do not cover all the variety of forms and criteria for effectiveness (timeliness, completeness, and adequacy) of public participation in the process of making decisions significant for the environment during preparation of state, sectorial, and regional programs of development for industries, schemes for allocating production forces.”

But the authors of the Report did not mention anything about the appeal from the public of the city of Almaty sent on May 31, 2013, to the Aarhus Convention Compliance Committee regarding violations of the Articles 6 and 7.¹⁶ The statement was filed in connection with the fact that the public was not given an opportunity to participate in the discussion of the “Plan for Development of World Class Ski Resorts in the Almaty Region and Near the City of Almaty.” Nevertheless, it was approved by the Governmental Decision No.1761 dated on December 29, 2012. After this, the development of the project for construction

of the ski resort “Kokzhailau” began. This led to a formation of a large social movement against construction of the resort.

The Report does not indicate that a month after the public filed the statement to the Committee; the Environmental Code was amended.¹⁷ In particular, the paragraph 1.2 was removed from the Article 47 “Objects of State Environmental Assessment.” It stated that “... the following are subject to mandatory state environmental assessment:

2) projects of state, sectorial, and regional programs with accompanying materials of environmental impact assessment.”

The removal of this provision from the Environmental Code clearly contradicts the requirements of the Aarhus Convention and creates serious obstacles to implementation of the Article 7. The amendments resulted in contradictions with the paragraph 9, Article 13, and paragraph 10, Article 14 of the Environmental Code. They recognize the rights of individuals and public associations “to participate in the process of preparing plans and programs related to the environment.” But recognition of a right without a real mechanism for its implementation cannot ensure compliance with the Article 7 of the Convention.¹⁸

Compliance with the Article 9

Since the work on the Report was, apparently, completed in October 2016, the section XXVIII does not mention the Supreme Court’s regulatory decision of November 25, 2016 No.8 “About Some Questions of Application of the Environmental Legislation of the Republic of Kazakhstan by the Courts on Civil Cases.”¹⁹ It was adopted not only to improve the work of the courts, but also to improve the country’s image before the Sixth Meeting of the Parties to the Aarhus Convention. For this reason, it does not mention other international conventions ratified by the country, which provisions are also poorly integrated into the national legislation.²⁰

The authors of the Report did not find any obstacles to public access to justice! Therefore, the section XXIX in the Report remained unfilled. And the Supreme Court believes that Kazakhstan’s judicial practice on application of the Aarhus Convention should be recommended for study by the countries-participants of the Convention.²¹

The authors should have, at least, mentioned that utilization of the same deadlines for appealing to courts with environmental cases as with other civil cases is a serious problem. According to the Article 294 of the Civil Procedural Code: “A citizen and a legal entity are entitled to apply to a court within three months from the day they become aware of violations of rights, freedoms, and lawful interests.” Ecological violations can be long-term, and the impact of pollution on the environment and human cannot be determined immediately.

Therefore, the three-month term contributes to the fact that offenders tend to avoid punishment.

It should also be noted that, according to the paragraph 3, Article 455 of the Civil Procedural Code, decisions of the Compliance Committee and the Meeting of the Parties are considered to be neither newly discovered, nor new circumstances for the courts of the country. That is, the public cannot use the decisions made in its favour by the Compliance Committee, even for resumption of a trial. Although, according to the paragraph 3, Article 4 of the Constitution, paragraph 3, Article 2 of the Civil Procedural Code, paragraph 2, Article 2 of the Environmental Code, and other laws, ratified international agreements take precedence over the laws of Kazakhstan.

When comparing the section XXX with the similar section of the Report for 2014, it is apparent that the texts are almost identical. Thus, one of the main sections²² of the Report is underdeveloped. It is interesting to note that on February 27-28, 2017, a representative of the Supreme Court participated in the 10th Meeting of the Task Force on Access to Justice under the Aarhus Convention. “During the meeting, participants were presented reports of a group of international experts on the situation with access to justice within the framework of implementation of the Aarhus Convention in Central and Eastern Europe, Central Asia, and Kazakhstan. The experts accepted the remark of the judge of Kazakhstan about their use of obsolete data in the reports for 2016.”²³

General Comments in Relation to the Goal of the Convention

Analysis of the situation shows that no noticeable improvements towards implementation of the Aarhus Convention in Kazakhstan take place. Lack of environmental policy, contradictory regulatory legal acts and their poor observance significantly limit implementation of the Convention requirements in the country.

The authors of the Report should have taken into consideration opinions of international experts in regards to the environmental situation in the country. For instance, the Organization of Economic Collaboration and Development prepared a review of the situation in Kazakhstan, including the existing environmental problems.²⁴ The authors of the review are fairly sceptical about the grandiose plans of transition to the “green economy” and sustainable development at the existing economic policy.

1 “An authorized organ in implementation of the Aarhus Convention is the Ministry of Energy of the RK and the ‘Information and Analytical Center of Environmental Protection’ of the Ministry of Energy.” Report on implementation of the Aarhus Convention in accordance with the Decision IV/4. Published on October 17, 2016. Section II, <http://energo.gov.kz/index.php?id=8340> (last visited June 7, 2017).

- Deadline to submit the reports by the Parties—March 15, 2017.
- 2 Report on implementation..., <http://energo.gov.kz/index.php?id=8340> (last visited June 7, 2017).
 - 3 Report on implementation..., <http://aarhus.ecogofond.kz/2-1/1-7> (last visited June 14, 2017). Aarhus Center of the Republic of Kazakhstan was founded on March 20, 2009, on the basis of the “Information and Analytical Center of Environmental Protection” in order to implement the provisions of the Aarhus Convention, <http://aarhus.ecogofond.kz/ru/1-8/>.
 - 4 UNECE. 2017 Reports by international, regional and non-governmental organizations, http://www.unece.org/env/pp/reports_organisations_2017.html (last visited July 1, 2017).
 - 5 UNECE, http://www.unece.org/env/pp/reports_trc_implementation_2017.html.
 - 6 Nation plan—100 Concrete Steps to Implement Five Institutional Reforms of the Head of the State, Nursultan Nazarbayev (May 2015), https://online.zakon.kz/Document/?doc_id=31977084#pos=0;0.
 - 7 Concept of Transition of the Republic of Kazakhstan to the “Green Economy.” Adopted by the Decree of the President of the Republic of Kazakhstan No.577 on May 30, 2013.
 - 8 Environmental Issues Reviewed at the Collegium of the Ministry of Energy of the Republic of Kazakhstan. Republic’s specialized newspaper “Ecology of Kazakhstan,” No.1 (036) March 2017, <http://aarhus.ecogofond.kz/wp-content/uploads/2015/12/20170331.pdf> (last visited June 16, 2017).
 - 9 Standard of the state service “Provision of Environmental Information.” Adopted by the order of the Minister of Energy No.301 on April 23, 2015.
 - 10 Yevgueniy Zhovtis. Interested in Nature Protection? Sign an Agreement!, http://212.154.211.85.dial.online.kz/outlook/interesuetes_ohranoj_prirody_zakljuchajte_dogovor (last visited June 21, 2017).
 - 11 For more details, please, see the material titled “Public Access to Environmental Information in Kazakhstan” in this issue of the Herald, p.80.
 - 12 Report on implementation of the Aarhus Convention for 2014. Section XVI.
“An updated version of the Rules for conducting public hearings (Order No.50-o of the Ministry of Environmental Protection of the Republic of Kazakhstan of March 26, 2013), which excludes paragraph 21 (“Public hearings are conducted regardless of the number of public representatives present, including the public concerned, who arrived at the appointed time”), does not exclude the possibility of formal public hearings without comprehensive consideration of all possible consequences of the planned economic activity, i.e. basic principles of the EIA”, <http://aarhus.ecogofond.kz/2-1/1-7/>.
 - 13 Reply of the Department of Passenger Transportation and Autoroads of the City of Almaty dated on June 19, 2017, No.3m-K-129, to the request of the Ecological Society Green Salvation.
 - 14 Rules for Conducting Public Hearings (with amendments as of June 21, 2016), http://adilet.zan.kz/rus/docs/V070004687_#z6.
 - 15 UNECE. Communication from the Ecological Society Green Salvation ACCC/C/2004/02, <http://www.unece.org/env/pp/compliance/Compliancecommittee/02TableKazakhstan.html>.
 - 16 UNECE: Communication from the Public of the City of Almaty ACCC/C/2013/088, <http://www.unece.org/env/pp/compliance/compliancecommittee/88tablekaz.html>.
 - 17 Law “On Introduction of Amendments to Certain Legislative Acts of the Republic of Kazakhstan Related to Brining them in Compliance with the System of State Planning of the Republic of Kazakhstan” dated on July 3, 2013, No.124-V, Article 1, paragraph 5.
 - 18 The letter of the Ministry of Environment and Water Resources dated on April 3, 2014, sent to the Compliance Committee, refers to public councils. Their task is to engage the public in developing recommendations on improving the legislation and participation in conservation activities. Article 7 of the Convention does not stipulate that public participation shall be limited by a framework of specially created structures similar to the public councils, http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2013-88/Correspondence_Party_concerned/Response_to_communication/Response_to_communication.pdf.
 - 19 The authors of the Report do not mention that the courts do not follow the Supreme Court’s normative resolutions regulating application of international agreements, namely: the Supreme

Court's regulatory resolution No.1 of July 10, 2008, "About Application of the Norms of International Agreements of the Republic of Kazakhstan," the regulatory resolution No.8 of November 25, 2016, "About Some Questions of Application of the Environmental Legislation of the Republic of Kazakhstan by the Courts on Civil Cases."

- 20 In this regard, the ES submitted a statement to the Supreme Court with a suggestion to adopt a normative resolution on application of other nature protection conventions by the courts.
- 21 Judicial Practice of Kazakhstan in Implementation of the Aarhus Convention Will Be Recommended to the Countries-participants of the Convention, <http://sud.gov.kz/rus/news/sudebnaya-praktika-kazahstana-po-primeneniyu-orhusskoy-konvencii-budet-rekomendovana-stranam> (last visited June 7, 2017).
- 22 Aarhus Center of the Republic of Kazakhstan, <http://aarhus.ecogofond.kz/2-1/1-7/> (last visited June 26, 2017).
- 23 Judicial Practice of Kazakhstan in Implementation of the Aarhus Convention...
- 24 "Multi-dimensional review of Kazakhstan—Volume 1—Initial Assessment," OECD, 2016, <http://www.oecd.org/development/mdcr/>; http://www.oecd-ilibrary.org/development/multi-dimensional-review-of-kazakhstan_9789264269200-en.