

## To the Question of Compliance by the Republic of Kazakhstan with the Aarhus Convention

In summer 2014, the Fifth Meeting of the Parties of the Aarhus Convention (AC) will take place in the city of Maastricht (Netherlands). As required by the Convention, the Republic of Kazakhstan prepared a compliance report. The document presented by the country,<sup>1</sup> in our opinion, does not reflect many important aspects which need to be described, in accordance to the reporting requirements.<sup>2</sup>

### 1. General comments

Another report of the Republic of Kazakhstan has the same deficiencies as the report of 2011. Authors paid unreasonably a lot of attention to analysis of the legislation of the country, even in the sections where they needed to describe practical actions of state authorities: sections 5, 9, 13, 17, 22, 26, 30. Obstacles, which impede or block implementation of provisions of the Convention, are analyzed insufficiently: sections 4, 8, 12, 21. The report practically lacks of statistical data and specific facts of application of the Convention, does not give full answers to the set questions, uses outdated information.<sup>3</sup>

As one of the main obstacles to comply with the Convention, the authors correctly name deficiencies and contradictions of the current legislation. Although, at the same time, they state that it conforms to the provisions of the articles 4, 5, 7<sup>4</sup> of the Convention. Based on many years of monitoring of the ecological legislation, the Ecological Society Green Salvation not a single time pointed out numerous deficiencies and contradictions,<sup>5</sup> discrepancies with the provisions of the Convention.

But there are many other obstacles which are not mentioned in the report. The authors do not indicate numerous cases of violation of the laws and Convention by state organs of all levels, their inaction, and abuse of authority. Nothing is said about violations committed by the organs of justice and the

<sup>1</sup> National Reports on Implementation. Kazakhstan. 2014: [http://apps.unece.org/ehlm/pp/NIR/listnr.asp?YearID=2014&wf\\_Countries=KZ&wf\\_Q=QA&Quer\\_ID=&LngIDg=RU&YearIDg=2014](http://apps.unece.org/ehlm/pp/NIR/listnr.asp?YearID=2014&wf_Countries=KZ&wf_Q=QA&Quer_ID=&LngIDg=RU&YearIDg=2014).

<sup>2</sup> Guidance on Reporting Requirements:

[http://www.unece.org/env/documents/2007/pp/ece\\_mp\\_pp\\_wg\\_1\\_2007\\_L\\_4\\_e.pdf](http://www.unece.org/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf).

<sup>3</sup> See, for example: in section 1 – “Analysis of court decisions for the period of 2008-2011”; in section 5 – “From 2007 to 2009, the Program of decreasing of informational inequality was active.”

<sup>4</sup> National Reports on Implementation. Kazakhstan. 2014; section 7, p.10; section 11, p.13.

<sup>5</sup> See, for example: Let us preserve the nature for the future, or Eleven threats to national parks: <http://www.greensalvation.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=515&cntnt01etumid=67>.

Prosecutor's Office. The report does not cover facts of gross ecological crimes committed by business entities of all forms of property, including state and trans-national companies. Not enough attention is drawn to the systemic problems, in particular, endless redistribution of powers of the state organs, extreme decentralization of governance,<sup>6</sup> corruption, which paralyze activity of the environment protection organs.<sup>7</sup>

Authors of the report indicate that there are contradictions in different legal acts.<sup>8</sup> But they do not mention that, in a number of cases, these contradictions can be solved by a correct application of the Law "About Normative Legal Acts" and the Aarhus Convention. But there is not only a unique application of the Convention in the country, many authorities consider its provisions as recommendations, many are still not familiar with the document.

In the past 3-4 years, a noticeable trend of weakening of the nature protection legislation appeared under excuse of improvement of investments climate, support of development of small and medium business,<sup>9</sup> diversification of economy. But the authors of the report do not explain the reasons behind introduction of numerous amendments into legislation which, in a number of cases, multiply contradictions and paralyze the laws. For example, amendments introduced into the Law "About Specially Protected Natural Territories" in 2008-2013 under excuse of improvement of conditions for tourism development opened ways for plunder and destruction of the most valuable natural territories of our country.<sup>10</sup> Finally, there is no mention that the current environmental protection legislation contradicts more and more to the requirements of the international conventions ratified by the

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<sup>6</sup> The report "Avenues for Improved Response to Environmental Offences in Kazakhstan" published by the Organization for Economic Co-operation and Development in 2009, states the following: "... a poorly orchestrated decentralization creates the danger of institutional over-fragmentation and inconsistency, as well as raises concerns over the capacity of sub-national bodies to undertake roles given to them". Avenues for Improved Response to Environmental Offences in Kazakhstan. – OECD, 2009, p.15: <http://www.oecd.org/dataoecd/2/20/42072582.pdf>.

<sup>7</sup> Nazarbayeva called ministries helpless. According to the deputy, this is caused by decentralization of power in Kazakhstan:

<http://kapital.kz/gosudarstvo/25798/nazarbaeva-nazvala-ministerstva-bessilnymi.html>; January 21, 2014.

<sup>8</sup> For example: "According to the new edition of the Law "About earth deposits and deposit exploitation", only terms of competition for the right to develop deposits are open to public, while terms of contracts, including the part of environmental protection, are kept in secret. The provision that "all interested public associations have a right to receive information related to environmental impact from conducted or planned operations on deposits development" is excluded. National Reports on Implementation. Kazakhstan. 2014; section 5, p.7.

<sup>9</sup> Kazakhstan develops a new law about consumers rights protection:

<http://panoramakz.com/index.php/authority/establishments/item/35150-kazakhstan-razrabatyvaet-novyy-zakon-o-zashchite-prav-potrebitelej>; May 6, 2014.

<sup>10</sup> As a result of the amendments introduced into the law during 2008-2013, it became possible to expropriate lands from the national parks (Article 23, p.2), and rent lands for 49 years (Article 46, p.2).

Republic of Kazakhstan: the World Heritage Convention, Convention on Biological Diversity, Convention on Environmental Impact Assessment in a Transboundary Context, Convention on the Conservation of Migratory Species of Wild Animals, the Aarhus Convention, and others. Meantime, the Ministry of Environment and Water Resources (MEWR) is directly related to the weakening of the environmental legislation.<sup>11</sup>

Authors of the report do not indicate that the right of the public to participate in decision making process, proclaimed in the Environmental Code (EC), cannot be realized because mechanisms for its realization are still not created. In section XXV of the Second National Report (2011), this fact was partially admitted: “The right of the public of the RK to participate in lawmaking process is declared in the legislation... Life shows that as for today, in Kazakhstan, many aspects of participation of the public in the lawmaking process do not have a legal basis... As a result, often the public does not have a real opportunity to participate in the process of lawmaking, except for some single cases.”<sup>12</sup> For the last three years, the situation did not change. In the Constitution of the country, the rights of the citizens on favorable environmental are not declared. The country did not sign the Convention for the Protection of Human Right and Fundamental Freedoms (1950), as a result, the citizens of Kazakhstan, do not have an access to the European Court on Human Rights.<sup>13</sup>

State organs, including courts, still make their decisions based on outdated legal norms incompliant to the requirements of the Convention, do not use or use incorrectly its provisions, basically, bring it out of the law-enforcement practice. This leads to violation of the rights given to the citizens by this international agreement. Although, authors of the report indicate that in the nearest time,<sup>14</sup> it is planned to bring the national legislation in conformance with the requirements of the Convention. But such promises are being announced practically from the moment of adoption of the Environmental

<sup>11</sup> Nazarbayev signed amendments which reduce the fines for excess emissions in half: <http://www.zakon.kz/4618493-nazarbaev-podpisal-popravki-vdvoe.html>; April 21, 2014. Fines for greenhouse gases emissions will be reduced – Nurlan Kapparov; March 5, 2014: <http://www.zakon.kz/4607534-shtraf-za-vybrosy-parnikovykh-gazov.html>.

<sup>12</sup> Second National Report on Implementation of the Aarhus Convention, p.40: <http://www.eco.gov.kz/sotrudnichestvo/index.php>.

<sup>13</sup> Status as of: 04.05.2014: <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

<sup>14</sup> “Draft law on the matters related to the Aarhus Convention intends to bring the norms of the Law “About administrative procedures” and the Law “About the order of reviewing statements from physical and juridical persons” (Article 8) into the full compliance with the norms of the Aarhus Convention (p.2, Article 4).” National Reports on Implementation. Kazakhstan. 2014; section 7, p.10: [http://apps.unece.org/ehlm/pp/NIR/listnr.asp?YearID=2014&wf\\_Countries=KZ&wf\\_Q=QA&Quer\\_ID=&LngIDg=RU&YearIDg=2014](http://apps.unece.org/ehlm/pp/NIR/listnr.asp?YearID=2014&wf_Countries=KZ&wf_Q=QA&Quer_ID=&LngIDg=RU&YearIDg=2014).

Code in 2007. Already in two years, in the Concept of legal policy of the Republic of Kazakhstan for the period of 2010-2020, it was stated: “For our country, where a complicated environmental situation is observed in a number of regions, it is quite urgent to develop and further improve the environmental legislation, including the context of its harmonization with the international obligations and standards.”<sup>15</sup> Hundreds of amendments introduced into the Environmental Code beginning July 27 2007<sup>16</sup> did not improve the situation.<sup>17</sup>

## **2. Comments on specific sections of the report Implementation of the paragraph 8 of the Article 3**

In the section 3 of the report, it is said: “As for today, there are no documented facts of persecution of representatives of the public who realize their rights in accordance with the Convention.”

The authors either do not know, or intentionally veil the facts, some of which were documented and became known by the wide public. Since 2011, the following facts of persecution and oppression of activists took place: hooligan attack on residents of Irgali village with damage to their property (photos made, statements filed to the police and Prosecutor’s Office); numerous calls of the activists to the police organs; threats of being fired; numerous publications in the mass-media containing insulting and untrue information. One of such publications was included in the news line of the website of the National Aarhus Center of the Republic of Kazakhstan. After a protest from the public, the Minister of Environmental Protection, made official apologies,<sup>18</sup> and the link was deleted. An opened pressure was organized over a citizen of Germany, participant of the movement “Protect Kok-Jailau!”<sup>19</sup>

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<sup>15</sup> Concept of legal policy of the Republic of Kazakhstan for the period of 2010-2020. Adopted by the Decree of the President of the Republic of Kazakhstan No.858, dated on August 24, 2009, sub-section 2.6: [http://adilet.zan.kz/rus/docs/U090000858\\_#z7](http://adilet.zan.kz/rus/docs/U090000858_#z7).

<sup>16</sup> Environmental Code of the Republic of Kazakhstan:  
[http://online.zakon.kz/Document/?doc\\_id=30085593#pos=1;-8](http://online.zakon.kz/Document/?doc_id=30085593#pos=1;-8).

<sup>17</sup> See: Dagmar Shraiber: Do not pay silence in exchange for raw materials:  
<http://rus.azattyq.org/content/dagmar-shraiber-disput-v-bundestage-o-kazakhstane/25292998.html>;  
March 11, 2014.

<sup>18</sup> Official blog-platform; [http://blogs.e.gov.kz/ru/blogs/kapparov\\_n/questions/179835](http://blogs.e.gov.kz/ru/blogs/kapparov_n/questions/179835); May 8, 2014.

<sup>19</sup> German activist was asked not to interfere into the dispute around Kok-Zhailau:  
[http://i-news.kz/news/2013/10/26/7242098-nemeckuyu\\_aktivistku\\_poprosili\\_ne\\_vmeshi.html](http://i-news.kz/news/2013/10/26/7242098-nemeckuyu_aktivistku_poprosili_ne_vmeshi.html);  
October 26, 2013.

Kazakhstan public representatives ask power authorities to take care of a German expert on ecotourism:

[http://i-news.kz/news/2013/10/23/7238465-kazahstanskie\\_obschestvenniki\\_prosyat\\_vl.html](http://i-news.kz/news/2013/10/23/7238465-kazahstanskie_obschestvenniki_prosyat_vl.html); October 23, 2013.

## Implementation of the Articles 4 and 5

In the “Guidance on Reporting Requirements”, prepared by the Compliance Committee back in 2007, it is said that reports must contain more information about practical measures undertaken to comply with the provisions of the Convention.<sup>20</sup>

Authors of the report do not specify that residents of the majority of the cities and villages of the republic still do not have an access to actionable information about environmental conditions. For example, in accordance with the Republic State Enterprise “Kazgidromet”, only 34 cities of the republic,<sup>21</sup> i.e. only 40% of the cities of Kazakhstan,<sup>22</sup> have 104 stationary observation points to monitor conditions of the atmospheric air. The Ministry of Environment and Water Resources (MEWR) publishes monthly Informational Bulletin about conditions of the environment of the Republic of Kazakhstan,<sup>23</sup> which also lacks of actionable information. The State Fund of Environmental Information located on the website of the Aarhus Center of the Republic of Kazakhstan also does not have such information.<sup>24</sup>

Authors of the report do not point out the miserable conditions of the services performing environmental monitoring. For example, the strategic plan of the MEWR says: “In its development, the hydro-meteorological service of Kazakhstan reached its apogee in the 80s of the last century. But since then, the situation abruptly worsened. In the period from 1983 to 1999, “Kazgidromet” had to close about 35% of the surface meteorological stations, 65% of hydrological posts, 55% agro-meteorological observation points, and 47% of air monitoring stations.

Starting from the year 2000, works on recovery of the closed stations and creation of new points of the monitoring network and analytical laboratories have begun. ... The territory of the republic is covered by meteorological monitoring on 61%, agro-meteorological monitoring – 66%, hydrological monitoring – 57%, atmospheric air monitoring – 31%.

Objects of infrastructure (service buildings) almost on the whole territory of the country are in a desperate condition, work conditions of the employees on places are unsatisfactory which combined with low wages creates serious

<sup>20</sup> Guidance on Reporting Requirements, paragraphs 32-33:

[http://www.unece.org/env/documents/2007/pp/ece\\_mp\\_pp\\_wg\\_1\\_2007\\_L\\_4\\_e.pdf](http://www.unece.org/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf).

<sup>21</sup> RSE Kazgidromet: [http://www.kazhydromet.kz/ru/about\\_oksreda/](http://www.kazhydromet.kz/ru/about_oksreda/);

[http://www.kazhydromet.kz/ru/mon\\_oksreda/](http://www.kazhydromet.kz/ru/mon_oksreda/); May 10, 2014.

<sup>22</sup> 86 places of Kazakhstan have a status of a city. “Program Ak-bulak for 2011-2020:”

<http://minregion.gov.kz/rus/%D0%BF%D1%80%D0%BE%D0%B3%D1%80%D0%B0%D0%BC%D1%8B-%D0%B8-%D0%BA%D0%BE%D0%BD%D1%86%D0%B5%D0%BF%D1%86%D0%B8%D0%B8/>; May 10, 2014.

<sup>23</sup> Environmental bulletin: <http://www.eco.gov.kz/new2012/activity-of-state-authority/information-about-the-environmental-situation-in-the-regions-of-kazakhstan/ecobul/>.

<sup>24</sup> The State Fund of Environmental Information: <http://aarhus.kz/1-17/1-3/>; May 10, 2014.

problems for recruitment. Most of the observation points require manual data collection.”<sup>25</sup> Lack of a well operated system of data collection is one of the main obstacles for implementation of the Article 5 of the Convention.

Section 9 of the report does not take a look over the practice of providing of information by various state organs. It does not analyze quality of the provided information, does not tell about the fact that many authorities provide the public with untrue or incomplete data or even ignore public statements at all. State organs ignore even statements from international non-profit organizations. For example, on April 12, 2012, honorary president of the Nature Protection Union of Germany (NABU), laureate of the alternative Nobel Prize, professor, doctor Michael Succow and vice president of the NABU, chairman of the NABU International Fund, Thomas Tennhardt addressed the president of Kazakhstan with a request to reject construction of a mountain ski resort in Ile-Alatau National Park. Copies of the petition were submitted to the Minister of the Environment, Kapparov N.D., Minister of Agriculture, Mamytbekov A.S., and Minister of Industry and New Technologies, Issekeshov A.O.<sup>26</sup> None of the addressees replied the petition.

The Ecological Society Green Salvation sends more than hundred inquiries to state organs annually; its experience shows the following numbers. In 2010, there were 173 letters sent. Only 123 (71%) were replied, including 8 (6%) containing poor quality information, insufficient to make a decision. The other 50 inquiries (29%) were ignored. In 2013, the organization sent 136 letters to different organs. 73% of the letters were replied. Poor quality information, insufficient to make a decision was contained in 72% of the received replies. 27% of the inquiries were ignored.<sup>27</sup> Compare to 2010, the quality of the provided information significantly decreased. Failure to provide information became a regular practice for the state authorities. Even by addressing a court,

<sup>25</sup> Strategic Plan of the Ministry of Environmental Protection of the Republic of Kazakhstan for 2011-2015;

Adopted by the Decree of the Government of the Republic of Kazakhstan No.98 dated on February 8, 2011. Section 2. Analysis of the current situation and trends of development of related areas of activity: [http://www.eco.gov.kz/files/strat\\_pl12.02.htm](http://www.eco.gov.kz/files/strat_pl12.02.htm); May 10, 2014.

<sup>26</sup> Statement of the Nature Protection Union of Germany to the President of Kazakhstan in relation to the project “Kok-Zhailau”: [http://www.greensalvation.org/index.php?page=NABU\\_KJ](http://www.greensalvation.org/index.php?page=NABU_KJ); April 12, 2012.

<sup>27</sup> Since 2008, the situation practically did not change. In 2008, the public funds “Medialife” (Karaganda) and “Decenta” (Pavlodar) conducted a survey on access to information provided by state organs. As a part of the research, inquiries were sent to state organs of the state level. “Replies were received for 52 requests, which is 62% of the total amount... 20 requests were ignored, which makes 27%. In other cases, the information was incomplete.” Situation with requests to the local authorities is even worse. “...There were 1038 requests sent. Replies were received for 476 requests, which makes 45.9% of the total amount... The rest 562 requests (54.1%) were left without a reply.” Realization of the right on access to information in Kazakhstan. – Astana, 2008, p.56, p.64: <http://www.internews.kz/node/5488>.

the public is not guaranteed to receive information. Often, state authorities ignore court decisions.<sup>28</sup> The report says nothing about failure to meet deadlines for providing information by the state organs, about continuing provision of incomplete and untrue information.

At the same time, the report authors note that changes introduced into the legislation create obstacles for receiving information, hiding of information is taking place under excuses of commercial secret.<sup>29</sup> For example, in accordance with the Article 130, p.2, sub-p.9 of the Environmental Code, results of industrial environmental control are open, and companies are obliged to provide public access to them. But usually, these requirements are not met.

### **Implementation of the Article 6**

In 2005, the Second Meeting of the Parties adopted a decision II/5a “Compliance by Kazakhstan with its obligations under the Aarhus Convention.” In particular, it notes that the public is not provided with a full spectrum of opportunities to participate in decision making process in the country.<sup>30</sup> Despite of the opinion of the Meeting of the Parties, filed lawsuits of the public, complaints of non-profit organizations, specialists, and regular citizens, for the past nine years, the state organs did nothing to create mechanisms for implementation of the public right on participation in decision-making process. This is demonstrated by the fact that among hundreds of the amendments introduced into the Environmental Code, there is not a single one which would widen up or specify rights of physical and juridical persons in the area of environmental protection.

In the section 16 (p.20), the report authors admit that even updated edition of the Rules of conducting of public hearings (2007) “does not exclude a possibility of conducting formal public hearings without due comprehensive consideration of all possible consequences of a planned economic activity, i.e. basic principles of EIA...”

“Current Rules of conducting of the state environmental assessment (SEA) does not contain procedural norms about public participation in a process

<sup>28</sup> See: <http://www.greensalvation.org/index.php?page=iski2013>; case No.2 and No.4.

<sup>29</sup> Letter of the Tourism Department of Almaty City №02-01/3T-K-41 dated on December 12, 2013.

<sup>30</sup> In the paragraph 7 of the decision II/5a to the Republic of Kazakhstan, it was recommended:

“a) Adopt and implement regulations setting out more precise public participation procedures covering the full range of activities subject to article 6 of the Convention, without in any way reducing existing rights of public participation;

b) Ensure that public authorities at all levels, including the municipal level, are fully aware of their obligations to facilitate public participation; and

c) Consider introducing stronger measures to prevent any construction work going ahead prior to the completion of the corresponding permitting process with the required level of public participation.”

of conducting the SEA. The aspect of public involvement at the very initial stage of the process making environmentally significant decisions – selection and reservation of a land lot for a planned economic activity – is not written down. The Land Code does not stipulate public involvement at this initial stage (paragraph 1, page 43). Discrepancies between the basic national legal norms of land legislation and norms of environmental protection legislation – Article 6 of the Environmental Code and Rules of conducting of the State Environmental Assessment may complicate implementation of the paragraph 4 of the Article 6 of the Aarhus Convention.”

But the authors of the report do not indicate that the initial edition of the Rules, adopted in 2007, contradicted provisions of the Convention and that the Rules acquired their modern look only after many years of protests of the public and two years of court proceedings of the Ecological Society Green Salvation and local residents with the MEWR. Saving the face of the authorities, the court did not satisfy the claimants’ demands. But corrections introduced into the Rules on March 26 2013, in many aspects satisfy the lawsuit demands. It should be noted that the new edition of the Rules still contradicts to the paragraph 1 of the Article 36 of the Environmental Code and Article 6 of the Convention. Probably, that is why, already after publication of the National Report, the MEWR addressed, in particular, to the public with an offer to introduce new amendments to the Rules.<sup>31</sup>

Although, in the new edition of the Rules, it is stated that public hearings are one of the forms of realization of public rights on participation in decision-making process, in practice, the state organs thrive to limit participation of physical and juridical persons solely to public hearings.

The report authors do not indicate that public hearings are organized with strong violations, do not bring specific examples. The report does not mention any cases when public opinion was ignored. In practice, such ceases happen all the time.<sup>32</sup> Usually, a developer of a planned activity conducts the hearings already after a decision was made by the state organs without a timely notification of the public, without duly prepared project documentation.

In section 15 (page 17), the report authors indicate: “In Kazakhstan, requirements of the Article 6 of the AC are applied not only to large scale projects and types of activities included in Appendix I of the Convention, but to all projects of economic or other activity which require EIA (environmental impact assessment) procedure. According to the paragraph 2, Article 40 of the Environmental Code, different requirements to conducting of the EIA of objects of different categories are stipulated by the Instruction on

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<sup>31</sup> Letter of the Ministry of Environment and Water Resources No.02-01-29/793i dated on May 20, 2014.

<sup>32</sup> <http://www.greensalvation.org/en/index.php?page=human-rights>.



conducting the EIA. In Appendices 1 and 2 of this Instruction, there is a more comprehensive, compare to the Appendix I of the AC, list of objects (types of activities) which are recommended for EIA.”

But the report does not mention that state organs often deny necessity of public participation in the EIA procedure at all, use unclear wording of the legislation, and sometimes, in violation of the Article 36 of the Environmental Code, simply ignore them.

Sometimes, state organs take decisions based on falsified by developer information, not checking it out first. Entrepreneurs even dare to falsify public hearings.<sup>33</sup> Because of the fact that state authorities apply the legislation not uniformly, in separate cases same issue gets opposite decisions.

The report authors do not talk about serious problems which appear as a result of unjustified separation of functions between environmental protection departments and organs of executive power. No mention about random transfer of authority from one department to another which violates the law. In result, public hearings can be conducted by organs which do not have an authority to do that.

Authors of the report do not indicate cases when local power authorities intentionally create obstacles for people’s participation in public hearings. As a result, far from everybody are able to take part in it and express their opinion. For example, on April 2, 2014, residents of the city of Almaty filed a lawsuit about acknowledging the public hearings and protocol of the hearings about allocation of a part of the lands of the specially protected natural territory (Ile-Alatau National Natural Park) for construction of a mountain ski resort “Kok-Zhailau” to be invalid. The reason for the lawsuit became the fact that they were not given a chance to speak out during the hearings.<sup>34</sup>

In section 17 of the report (page 22), it is said that according to the Rules of conducting of public hearings, local executive organs must publish announcements and protocols of public hearings in the Internet... “Analysis of websites of the oblast departments of environmental protection, as of 23.09.13., local executive authorities showed that majority of the websites lack of a section where announcements about public hearings and protocols of their results would be published”. It should be noted that a section of the website of the Aarhus Center of the Republic of Kazakhstan about conducting of public hearings is not informative enough either.<sup>35</sup>

In section 16 (page 21), the authors indicate that “public organizations of the RK raise a question about objectivity of provided to the public information, including the information discussed during EIA, because the system of

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<sup>33</sup> How we defend our rights. April 22, 2014; <http://www.greensalvation.org/index.php?page=manasa>.

<sup>34</sup> See: <http://www.greensalvation.org/index.php?page=iski2014>; case No.6.

<sup>35</sup> Aarhus Center: <http://aarhus.kz/1-11/1-7/>; May 10, 2014.

monitoring does not meet modern requirements and the provided information is often derived from calculations.”

Poor quality of the provided information and its incompleteness are serious obstacles for effective public participation in decision-making process. Even materials of EIA for expensive investment projects are made in rush with a large amount of inaccuracies and contradictions. For example, in the EIA materials provided during the above mentioned public hearings about allocation of a part of the lands of Ile-Alatau National Park for construction of a mountain ski resort “Kok-Zhailau”, it says: “Works on this project showed that there are not enough of truthful data for an argumentative statement and adoption of correct decisions... A lot of data is old, some incorrect decisions are needed to be reviewed using modern methods and technologies. Without solving this issue, it is impossible to make a prognosis about potential negative processes and incidents.”<sup>36</sup>

EIA developers which are persons, who have licenses on such activity, often obediently follow desires of a customer. And organs of control submissively follow the orders of local power authorities which once again confirm the high level of corruption of the state organs. Numerous methods of removal of the public from the decision-making process are widespread. But in these conditions, the state organs are caring about creating an image of lawfulness and implementation of the public rights.

### **Implementation of the Article 7**

In section 19, (page 23), the report authors indicate: “In Kazakhstan, draft program documents related to environmental protection are widely discussed with the public, public suggestions are collected and considered. Discussion of the program documents involves public represented by non-profit organizations, authorized state organs, specialized expert organizations, expert-ecologists, scientists, and professors of specialized higher educational institutions.”

In section 20 (page 23), the authors make a conclusion: “The current legislation in the RK in relation to preparation and development of important for environmental strategic decisions documents, such as plans, programs, and policies, put a base for involvement of the public into this process...”

But in section 21 (page 24), the tone somewhat changes: “The Rules of conducting of public hearings do not contain all the diversity of forms and criteria of effectiveness (timeliness, fullness, and adequacy) of public

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<sup>36</sup> “Feasibility study of transferring the lands of specially protected natural territories of Ile-Alatau State National Natural Park into lands of reserve for construction of a mountain ski resort “Kokzhailau”, p.91.

participation in environmentally significant decision making process during development of state, industrial, and regional programs of development of clusters of economy, schemes of placement of production forces... Experience of conducting of strategic environmental evaluation of plans, policies, and programs is still not available.”

And in section 22 (page 24), the authors express even rougher: “Public participation in development of strategies, policies, programs often have a formal nature. There are no mechanisms of back-coupling between persons who take decisions and public on issues discussed. It is planned to improve the legislation with the draft law on questions related to the Aarhus Convention.” The two later statements reflect the real situation quite accurately.

Bright example, which demonstrates removal of the public from discussion of plans and programs, is adoption and implementation of the “Plan of development of mountain ski resorts of world class in Almaty oblast and near the city of Almaty” which was signed by that decree of the government of Kazakhstan No.1761 dated on December 29, 2012. Public was not involved into discussion of the Plan. The Ministry of Industry and New Technologies believes that the “Plan of development of mountain ski resorts of world class in Almaty oblast and near the city of Almaty” is not an object of the state environmental assessment, and therefore, does not require discussion with the public.<sup>37</sup>

On May 31, 2013, a group of residents of the city of Almaty, who believes that their removal from decision making process on the project of construction of the mountain ski resort “Kok-Zhailau”, is a violation of their rights, submitted a statement to the Aarhus Convention Compliance Committee. The Committee accepted it for consideration.<sup>38</sup>

The statement tells not only about the violation of the citizens’ rights, but also about general failure of the state organs to provide public participation in solution of questions related to plans, programs, and policies, in accordance with the Article 7 of the Convention. Although the public statement was accepted by the Committee for a review in summer 2013, the report authors do not mention about it in the report.

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<sup>37</sup> Letter of the Ministry of Industry and New Technologies No.16-06/2-6963//11-23/H-284 dated on 07 March 2013. Law No.124-V dated on July 3, 2013, eliminated the sub-paragraph 2, paragraph 1, article 47 of the Environmental Code, which stated that among others objects of environmental assessment include “projects of state, branch, and regional programs with accompanying materials of environmental impact assessment.”

<sup>38</sup> Statement to the Aarhus Convention Compliance Committee No. ACCC/C/2013/88:

<http://www.unecce.org/env/pp/compliance/compliancecommittee/88tablekaz.html>.

The preliminary determination of the Committee is that the communication is admissible (June 28, 2013).

## Implementation of the Article 8

In section 24 (page 25), the authors mention: “In recent years in Kazakhstan, majority of draft laws on environmental protection are discussed with public.” This statement is supported neither by statistics, nor by analytical information.

In section 25 (page 25), the authors correctly indicate: “The legislation does not state a mechanism of implementation of public participation in law making process. Suggestions from public representatives are not obligatory for inclusion into a comparison chart of corrections to a draft law. Practically, there are no mechanisms of back-coupling for suggestions of the public... As a result, often, the public does not have a real opportunity to participate in law making process, except for some single cases.”

Finally, in section 26 (page 26), there is a very peculiar conclusion: “Discovered during preparation of this National Report gaps and contradictions in the legislation of the RK may serve a good ground for public participation in law making process according to the Article 8 of the AC”. The report authors, probably, did not pay attention to the fact that this phrase word-to-word repeats a phrase from the I section of the Second National Report on Compliance with the Aarhus Convention of 2011, page 3.<sup>39</sup>

In other words, the authors admit that during these three years, nothing was created on this “good ground?!” Of course, reasons of such inaction are not explained.



<sup>39</sup> <http://www.eco.gov.kz/sotrudnichestvo/index.php>.

## Implementation of the Article 9

In section 30 (page 31), the report authors state that during hearings of lawsuits related to implementation of the Aarhus Convention provisions, “local courts, in general, apply legislative norms correctly.” But the authors do not support this conclusion with any prove.

Moreover, in section 28 (page 29), they write: “In order to provide unique interpretation and correct application of the environmental legislation by courts during hearings of civil cases in the area of environment, in 2013, it is planned to prepare a new edition of a normative statement of the Supreme Court “About practice of application of the legislation by courts in arguments related to the environment.”

From this, it can be concluded that the Supreme Court has to adopt a new normative statement, because the courts still lack of a unique interpretation and correct application of the environmental legislation. By stating that “the local courts, in general, apply legislative norms correctly,” the report authors embellish the real picture.

In section 29 (page 30), the authors correctly state: “Lack of a clear and specific processual procedure of determination of jurisdiction of civil cases initiated by ecological non-profit organizations sometimes leads to ungrounded denials by courts in accepting lawsuit statements.” Our experience shows that in the majority of the times, courts deny accepting lawsuit statements and only rarely accept the statements from the first time. One of the main reasons of these denials is the fact that judges manipulate the norms of the law, when determine jurisdiction of a case.

Based on the organization experience, it can be stated that courts often intentionally do not accept lawsuits from the public, which are pursuing state organs. In these cases, the courts dare to obvious violations of law. They return case materials, explaining it as if the jurisdiction was determined incorrectly. But the Civil Procedural Code (CPC) stipulates that if jurisdiction was determined incorrectly, the court must file the case to the proper court.<sup>40</sup>

During our many years of experience, there was not a single case when this article of the CPC was applied by the courts. As a result of determination of jurisdiction by the courts and accepting of a case for consideration, time frames stated by the laws are violated, long delays up to 9 months and more are taking place.

Lately, the courts more and more often do not accept statements from the public, as if the documents were made incorrectly. Procedure of filing a statement often takes many months. Meanwhile, illegal activity continues.

One more reason for denial of statements is a frivolous interpretation by judges of the provisions of the Convention and the national legislation. For

<sup>40</sup> CPC of the RK, article 36, paragraph 2, sub-paragraph 3.

example, on April 2, 2014, the public of the city of Almaty addressed the Medeu District Court of the city of Almaty with a lawsuit about acknowledging of the public hearings about allocation of a part of the lands of Ile-Alatau National Natural Park for construction of a mountain ski resort “Kok-Zhailau” to be invalid. On April 7, the judge denied to accept the statement by indicating: “that it cannot be reviewed and solved... because the public hearings and protocol appealed by the claimants do not cause any juridical consequences.” The judge ignored the provision of the first article of the Convention, which states that each party guarantees rights to access to information, public participation in decision-making process, and access to justice.

On sections 29 and 30, the authors devote unjustly too much space to description of seminars, round tables, conferences, probably, because they are not informed very well or are not willing to bring real examples of public access to justice.

In the report, they do not name a whole row of other obstacles which are facing the public during filing lawsuits to courts:

- the courts take out the state organs and Prosecutor’s Office from the list of defendants;
- representatives of the state organs-defendants do not show up to court hearings without any respected reasons, but judges do not take any measures to establish respect to a court. As a result, a case hearings is artificially delayed;
- the principle of equality of parties in a court process is violated;
- judges step out of lawsuit demands which violates interests of claimants;
- the principle of independence of judges is violated. During consideration of cases, they take advice from a curator of the higher instances;
- high level of corruption in state organs and courts causes real doubts in independence of judges and objectivity of adopted decisions. Even the judges caught in bribery stay at their positions or work as lawyers;
- judges have poor knowledge of the environmental legislation and international conventions. Incompetence of judges leads to delay of legal proceedings.

Finally, the report does not mention a word about implementation of court decisions made in favor of the public. This is one more serious problem of access to justice. For years, court decisions are not being executed.<sup>41</sup> Main reasons used are, usually, lack of money, change of leadership of the state organs, unclear distribution of authorities between state organs, and similar circumstances.

Statistics presented in section 30 (page 31) about lawsuit statements filed by public and non-profit organizations look very doubtful.

<sup>41</sup> Section 2. Implementation of court decisions:  
<http://www.greensalvation.org/index.php?page=iski2014>.

High cost of addressing to a court by citizens and public organizations is also a significant obstacle for realization of the rights. It is necessary to pay a state fee, pay for the services of a lawyer, which are extremely expensive in Kazakhstan. If a case is reviewed in a different city, it is necessary to pay for travel and accommodation expenses, as well. Besides, not always the legal costs are being reimbursed even after a court decision. Therefore, a person with an average income, practically, cannot afford filing a statement to a court because of the financial reasons.

### 3. Conclusion

After adoption of the Environmental Code in the beginning of 2007, the official organs stated many times that it meets all requirement of the Convention. In the report about adopted measures to implement decision II/5a prepared by the Ministry of Environmental Protection, it was mentioned: "In the Republic of Kazakhstan, there was created a political, legislative, and institutional base for active participation of the whole society in solving countrywide questions, including environmental ones. Thus, all conditions for the necessary provision of the access by all components of the Aarhus Convention are created in the republic."<sup>42</sup> The optimistic conclusions were also contained in the report prepared for the Third Meetings of the Parties of the Aarhus Convention: "In the present time, in the Republic of Kazakhstan, at the legislative level, in general, there were created conditions for the required provision of the access by all components of the Convention..."<sup>43</sup>

In the report prepared for the Forth Meeting of the Parties, the authors express less optimism. They admitted some deficiencies of the Environmental Code and a number of other laws, contradictory of their provisions and other serious deficiencies contained in normative legal acts.

In the report for the Fifth Meeting of the Parties, even more gaps in the legislations are admitted. But despite of the fact that compare to the previous one, the last report is made in a more critical manner, no real steps are made by the MEWR and the government. Hiding of information and removal of citizens from the decision-making process create new and more acute conflict situations.

The report, obviously, has a predominantly large amount of information about conducting of different trainings, round tables, conferences. Meanwhile, there is practically no information about real actions of the public, about

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<sup>42</sup> Report about measures undertaken to implement the decision II/5a "Compliance by Kazakhstan with its obligations under the Aarhus Convention", p.18: <http://rudocs.exdat.com/docs/in-dex-355499.html>.

<sup>43</sup> First National Aarhus Convention Implementation Report, p.26: <http://www.eco.gov.kz/sotrud-nichestvo/index.php>.

problems of access to information, about public hearings, sporadic data about access to legislation.

The authors of the report even do not try to analyze what the incompliance of the provisions of the Aarhus Convention has lead to and what consequences can be expected in the future.

In our opinion, content of the reports prepared for the Third, Forth, and Fifth Meetings of the Parties of the Aarhus Convention is an illustration of failure and incapability of the state to comply with the international obligations for many years.

1. In the present time, it can be said about a tough ecological heritage of the period of the independence. Thousands of people have to live in sanitary and protection zones, eat off-grade food. Fertile lands are being turned into dumpsters or being built on, forests are being clear cut, water bodies pollution is continuing, desertification process is accelerating.

2. Public right on access to information, decision-making process in the matters related to the environment, and access to justice are pronounced in Kazakhstan. But there are no mechanisms of their realization.

3. Understanding that execution of the above mentioned rights will mean development of democracy institutes in the country, the state authorities make everything to prevent it.

4. Another reason of incompliance with the Convention is an intentional weakening and destruction of the state apparatus by the dominating political groups. This is confirmed by the place of Kazakhstan in the Failed States Index.<sup>44</sup>

Thus, the present National Report does not give an objective picture of compliance with the Aarhus Convention in Kazakhstan. But its authors, obviously, are trying to improve the image of the country in the eyes of the international community.

Based on the above stated, we address to the Committee of the Fifth Meeting of the Parties of the Convention. We believe that they shall give an unbiased evaluation to compliance with the obligations taken by the parties. This is not a violation of sovereign rights of the Parties of the Convention. Otherwise, objectively, it is a silent support of a non-democratic regime. There should be developed measures of influence on the countries, which systematically do not comply with the international obligations, but not in the form of their exclusion from the list of the Parties of the Convention.

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<sup>44</sup> The Failed States Index 2013: <http://ffp.statesindex.org/rankings-2013-sortable>.