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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

REPORT ON THE SEVENTH MEETING

Addendum

FINDINGS AND RECOMMENDATIONS

with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case construction of high-voltage power line
(Communication ACCC/C/2004/02 by Green Salvation (Kazakhstan))

Adopted by the Aarhus Convention's Compliance Committee on 18 February 2005

Introduction

1. On 17 March 2004, the Kazakh non-governmental organization Green Salvation submitted a communication to the Committee alleging violation by Kazakhstan of its obligations under article 6, paragraphs 2 to 4 and 6 to 8, and article 9, paragraphs 3 and 4, of the Aarhus Convention.
2. The communication alleged that the Party concerned had failed to provide for an adequate public participation procedure in accordance with article 6 of the Convention in a permitting

procedure for the construction of high-voltage overhead electric power lines in the Gornyi Gigant district in Almaty. Various court proceedings had thus far failed to resolve the matter. 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 17 May 2004, following a preliminary determination as to its admissibility. A reply from the Party concerned received on 27 October 2004 disputed the claim of non-compliance on the grounds that the construction of such power lines was not an activity of a type covered by article 6, paragraph 1 (b), of the Convention in accordance with the legislation of Kazakhstan. The reply also questioned the admissibility of the communication, notably on the grounds that the decision-making process for the power line had commenced before the Convention entered into force.

4. The Committee at its fourth meeting (MP.PP/C.1/2004/4, para. 18) had determined on a preliminary basis that the communication was admissible, subject to review following any comments received from the Party concerned (for full statement of preliminary determination on admissibility, see <http://www.unece.org/env/pp/compliance/C2004-02/admissibility.doc>). At its sixth meeting, it took note of the aforementioned reservations of the Party concerned but considered that significant events had taken place since the entry into force and was not persuaded to reverse its opinion. The determination was therefore confirmed. The Party concerned has indicated its willingness to discuss the issues of compliance raised and its openness to receiving recommendations on the issue.

5. The Committee discussed the communication at its sixth meeting (15-17 December 2004), with the participation of representatives of both the Party concerned and the communicant, both of whom provided additional information.

6. In accordance with paragraph 34 of the annex to decision I/7, the draft findings and recommendations were forwarded for comment to the Party concerned and to the communicant on 1 February 2005. Both were invited to provide comments, if any, by 14 February 2005. Comments were received from both the Party concerned and the communicant. The Committee, having reviewed the comments, took them into account in finalizing its findings and recommendations by amending the draft where the comments, in its opinion, affected the presentation of facts or its consideration, evaluation or conclusions.

I. SUMMARY OF THE FACTS¹

7. On 18 March 1997, Kazakhstan adopted the Law on Ecological Expertise, which establishes an environmental impact assessment (EIA) procedure and requires, in article 15, paragraph 2, that the results of taking public opinion into account should be presented as part of the final ecological expertise report.

8. On 19 January 2001, the Mayor of Almaty adopted a decision to proceed, subject to obtaining the necessary permits, with the planning and construction of a 110-kV overhead transmission line to replace a faulty cable.

9. The first conclusion of an environmental expertise (EE) report on the construction of high-voltage power lines in the Gornyi Gigant district was issued on 3 April 2001. However, the Ministry of Natural Resources and Environmental Protection (renamed the Ministry of Environmental Protection in August 2002) reviewed this in December 2001 and ordered a new EE, on the grounds that the previous one had been undertaken without including the results of taking public opinion into account as required under article 15 of the Law on Ecological Expertise.
10. A second EE was undertaken in January 2002 by the Almaty Territorial Environmental Protection Board. However, in May 2002, the Ministry again deemed the EE to be in violation of article 15 of the Law on Ecological Expertise due to its failure to take account of public opinion, and revoked the EE pending clarification of all the circumstances related to the complaints of the local population. Meanwhile, the construction had already started in May 2002 and continued despite the Ministry's revocation of the EE.
11. In June 2002, in the light of concerns about the impact of the project on public health and the significant adverse public response from those living in the area, the Ministry instructed the Board to hold public hearings on the project. The hearings took place on 4 July 2002. However, the residents living in the immediate vicinity of the construction were not invited to them. In their absence, the hearings adopted a decision in support of the construction of the power line. The report of the hearings states that the decision took account of the interests of different groups. However, it also shows that the different groups taken into consideration included only organizations that, according to the communicant, were interested in the construction of the power line and not residents of the street where the power line would be located.
12. In August 2002, the Ministry, having received and been satisfied with the results of the public hearings, cancelled its earlier decision to suspend the EE conclusion of January 2002, considering the process now to be lawful.
13. Several court cases were started on behalf of the local residents challenging the decision to proceed with the construction. Approaches were also made to the prosecution service, members of parliament and administrative bodies. These did not succeed in overturning the decision or preventing the construction of the power line.
14. The overhead power line was built by the end of October 2002.
15. On 28 February 2004, the Minister of Environmental Protection issued Order N 68-II approving the "Instruction on the procedure for environmental impact assessment (EIA) of economic and other activities". In accordance with this Instruction, construction of certain high-voltage electric power lines falls under types of activities that may have a significant impact on the environment and therefore require EE. The Instruction applies to any power line of 220 kV or more and a length of 15 km (i.e. the threshold corresponds to that in para. 17 of annex I to the Convention). It would therefore not apply to the power line constructed at Gornyi Gigant. The new Instruction sets out requirements for public participation, whereas the previous Temporary Instruction on EIA did not provide specific procedures for public participation in EIA.

16. The Committee understands that the 1997 Law on Ecological Expertise remains in force. During the discussion, the representative of Kazakhstan informed the Committee that the EE process was limited to the consideration of pollution and waste issues. However, in the opinion of the Committee, neither the 1997 Law itself nor the Instruction issued in 2004 is limited in that way.

17. The communicant alleges that, aside from the Law on Ecological Expertise, other legislative and regulatory instruments relevant to the construction of the Gornyi Gigant power line, notably the Environmental Protection Act, the Law on Land, the Regulations for the Protection of Electrical Networks with a Voltage of more than 1000 V, and the Building Standards and Regulations, were breached in the decision-making process and/or by the decision itself. It also provides evidence that this view is supported by various expert bodies such as the Scientific Centre for Hygiene and Epidemiology and the National Centre for Labour Hygiene and Occupational Diseases.

II. CONSIDERATION AND EVALUATION

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

19. The Convention, as an international treaty ratified by Kazakhstan, has direct applicability in the Kazakh legal system. All the provisions of the Convention are directly applicable, including by the courts.

20. Whether or not public participation in accordance with the procedures set out in article 6, paragraphs 2 to 9, of the Convention was required in connection with the decision to construct the Gornyi Gigant power line depends upon whether that activity falls within the scope of activities determined by article 6, paragraph 1.

21. The Committee notes that the size of the power line (110 kV and 1 km in length) falls below the threshold set out in paragraph 17 of annex I (220 kV and 15 km in length). Therefore, paragraph 17 does not provide a basis for deeming the activity to be subject to article 6, paragraph 1 (a).

22. Annex I, paragraph 20, requires that, if public participation is provided under an EIA procedure in accordance with national legislation, the provisions of article 6 shall apply. Article 15, paragraph 2, of the Law on Ecological Expertise of Kazakhstan requires the results of taking public opinion into account, according to a procedure to be adopted by the central executive body in the sphere of environmental protection, to be presented as part of an ecological expertise, among other documents. The Ministry in its letter of 17 December 2004 argued that the specific procedure of the central executive body did not exist in 2002 (at the time that the EE in question was being undertaken). However, article 15 of the Law itself does, in the view of the Committee, provide for public participation in the sense of annex I, paragraph 20. The fact that the Ministry itself recognized, in December 2001 and then in May 2002, that both the first and the second ecological expertises violated article 15 of the Law on Ecological Expertise because “the project was accepted for assessment without the results of a survey of public opinion,” and that the Almaty Territorial Environmental Protection Board, under instruction from the Ministry, subsequently introduced some

elements of public participation into the process, bears this out. The Committee therefore considers that such an EIA procedure does exist in Kazakh legislation, as part of the 1997 Law on Ecological Expertise; that consequently the activity in question does fall within the scope of annex I, paragraph 20; and that a decision to permit such an activity does therefore fall within the scope of article 6, paragraph 1.

23. The Committee considers that the procedures followed by the Almaty Territorial Environmental Protection Board in January 2002 and July 2002 were not in line with the requirements of article 6, paragraph 2, of the Convention. The residents living along the proposed route of the power line were obviously among the “public concerned” and, as such, they should have received notice of the hearings, including all the details required under article 6, paragraph 2. Despite this, it appears that they were not invited to the July hearings.

24. The Committee notes that the failure to notify members of the public concerned in accordance with article 2, paragraph 5, may also have effectively denied them the possibility to avail of the rights provided for under other provisions of article 6. If a key group of members of the public most directly affected by the activity was not informed of the process and not invited to participate in it, it follows that they did not receive notice in “sufficient time” as required under article 6, paragraph 3, and that in practice they did not have the opportunities for early and effective participation that should have been available in accordance with paragraph 4 or to provide input in accordance with paragraph 7. Similarly, if no public notice of the planned hearings or other participation opportunities was given, and if affected local residents were not invited to the hearing, whatever views they might have had to offer could not have been taken into account as required by article 6, paragraph 8.

25. Aside from any consequential problems arising from a failure to implement paragraph 2, some other provisions of article 6 may have been breached even with respect to those members of the public that did receive notification of the hearings in accordance with the requirements of paragraph 2. For example, the fact that construction started before the July hearings were held is clearly not in conformity with the requirement under article 6, paragraphs 3 and 4, for “reasonable time frames” and “early public participation, when all options are open.” Furthermore, it appears that the responsible authorities treated the outcome of the hearings as if it were the outcome of public participation. This would have been more acceptable if the hearings had genuinely involved all key groupings within the public concerned. As it was, the views of those who were not invited to participate in the hearings, which apparently were expressed in other ways and were well known to the authorities, do not appear to have been taken into account.

26. The communicant also claims that article 6, paragraph 6, was not complied with but did not substantiate this claim with specific arguments. The Committee therefore has no basis on which to conclude that there was any failure to comply with that provision.

27. The Committee also considers that there is inconclusive evidence that the public lacked access to justice and therefore finds no basis on which to conclude that article 9 of the Convention was not complied with. Although the communicant was not satisfied with the decisions of the courts, having an adverse court decision does not in itself necessarily translate into a denial of access to justice.

While appeal processes in the case in question were indeed overall lengthy, this seems to be primarily due to the different interpretations of the then existing legal provisions by various judicial instances, rather than the procedures being unfair, costly or inequitable. The matter is, in the Committee's opinion, therefore more linked with a lack of a clear legal framework in the context of article 3, paragraph 1, of the Convention, than a lack of access to justice under article 9.

28. While noting that the Convention has direct effect according to Kazakh law, the Committee also notes the obligation under article 3, paragraph 1, on each Party to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. Regulations implementing the Convention's provisions, including timely, adequate and effective notification of the public concerned, early and effective opportunities for participation, and the taking of due account of the outcome of the public participation, would help to avoid ambiguity in the future. Such regulations could be developed with input from the public. The content of such regulations should also be communicated effectively to public authorities.

29. The Committee considers it to be beyond the scope of its mandate to examine the claim by the communicant and other expert bodies that other regulations were breached through the construction of the power line (see para. 17). However, it notes that if the local residents had had the full opportunities to be involved in the decision-making process as they should have had if article 6 of the Convention had been properly applied, they might then have been better placed to exercise their right to 'challenge the substantive and procedural legality' of the decision in accordance with article 9, paragraph 2, of the Convention. In this sense, therefore, the possibility that the decision itself breached other regulations has some relevance, but the violation of those regulations, if established, would not necessarily constitute non-compliance with the Convention.

30. The Committee notes with some concern the fact that the EE process, being limited to the consideration of waste and pollution issues (see para. 16), does not necessarily address all significant environmental effects. While it is a moot point whether this constitutes non-compliance with article 6, it is certainly within the spirit of article 6 that the permitting process (or the combination of permitting processes) for activities covered by article 6 should address all significant types of effects of such activities on the environment (see, for example, art. 6, para. 6 (b)). Limiting the (combined) scope of the permitting processes to just some types of environmental effects could significantly undermine the efficacy of that article.

31. Finally, the Committee notes with appreciation the efforts of the Ministry in December 2001 and May-June 2002 to attempt to introduce some elements of public participation in a process that was defective in that respect. It further notes that Kazakhstan's failure to comply with the Convention in this particular case stems directly from the fact that public participation was, in the view of the Committee, required under the Law on Environmental Expertise, thereby bringing the activity in question within the scope of annex I, paragraph 20. Because the applicability of paragraph 20 is contingent on there being national requirements for public participation, it is one of those provisions of the Convention that does not necessarily contribute to a level playing field or a common set of standards. In other words, a country which had no public participation requirement with respect to EIA for such an activity would not be in non-compliance in such a case, and yet its

system would be less in harmony with the objective of the Convention than that of Kazakhstan. This is certainly an important mitigating factor in considering the gravity of any non-compliance arising with respect to that particular provision.

III. CONCLUSIONS

32. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs with a view to bringing them to the attention of the Meeting of the Parties.

A. Main findings with regard to non-compliance

33. The Committee finds that the Government of Kazakhstan did not comply fully with article 6, paragraph 1 (a), and annex I, paragraph 20, of the Convention, and, in connection with this, article 6, paragraphs 2, 3, 4, 7 and 8.

34. The Committee considered but did not reach a firm conclusion on the question as to whether the activity in question would be covered by article 6, paragraph 1 (b).

35. The Committee did not find any basis on which to conclude that article 6, paragraph 6, and article 9 were not complied with.

B. Recommendations

36. The Committee, pursuant to paragraph 35 of the annex to decision I/7 and taking into account the cause and degree of the non-compliance, recommends that the Meeting of the Parties should:

(a) Recommend to the Government of Kazakhstan, with a view to fully implementing article 3, paragraph 1, of the Convention, to:

- (i) 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;
- (ii) Ensure that public authorities at all levels, including the municipal level, are fully aware of their obligations to facilitate public participation;
- (iii) 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;

(b) Invite the Government of Kazakhstan to submit a report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties on the measures taken to implement the recommendations in subparagraph (a);

(c) Request the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures;

(d) Undertake to review the situation at its third meeting; and

(e) Mandate the Working Group of the Parties to develop guidance on the scope of the permitting processes in which the public participation procedures set out in article 6 should apply, having in mind the environmental focus of the Convention, and to present such guidance for endorsement by the Parties at their third meeting.

Note

¹ This section includes only the main facts considered to be relevant to the question of compliance, as presented to and considered by the Committee