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- AVOCATS A LA COUR -

OBSERVATIONS OF THE AUTHORS OF COMMUNICATION ACCC/C/2007/22 ON THE DRAFT FINDINGS

THE THREE FRENCH ASSOCIATIONS ASSOCIATION DE DEFENSE ET DE PROTECTION DU LITTORAL DU GOLFE DE FOS-SUR-MER, COLLECTIF CITOYEN SANTE ENVIRONNEMENT DE PORT-SAINT-LOUIS-DU-RHONE FEDERATION D'ACTION REGIONALE POUR L'ENVIRONNEMENT (FARE SUD)

The communicants would first like to thank the Committee for sending them its draft findings with regard to France's compliance with its obligations under the Aarhus Convention in relation to decision-making processes and access to justice (Communication ACCC/C/2007/22).

They carefully read it and would like to share with the Committee their belief that a material fact may not have been sufficiently taken into account.

They came to this belief after reading the draft findings that do not appear to take into account the legal and material consideration which is, in their view, central in the case that they have brought before the Committee.

This is all the more the case that in its previous reports pertaining to Communications ACCC/C/2005/17 and ACCC/C/2006/16 (with their respective addenda), the Committee seemed to have taken a position that should have resulted in a solution that is the exact opposite of what is currently being proposed.

In this particular case (Communication ACCC/C/2007/22), the Committee has endeavored to analyze the impact and the circumstances under which both decisions were taken, *i.e.* the resolutions of 20 December 2003 and the authorization by the Prefect on 12 January 2006.

But, for the communicants, it is not really the fact that these decisions were made which constitutes France's violation of the Convention.

As a matter of fact, it was the resolution of 13 May 2005 which prevented Marseille Provence Métropole from modifying the project's technical options and geographic location once the resolution was passed (Exhibit No. 20).

Actually, the resolution of 13 May 2005 creates for the company designated thereby a right to compensation if the contract is terminated by MPM.

But the modification of the project's technical options could not have been done through a mere amendment because it would have resulted in a material change in the contract, bearing in mind that such a material change must give rise to a tender process pursuant to the competitive rules set forth in the EU Public Procurement

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Directive and French legislation on public service concessions (See, for example: ECJ, 19 June 2008, *Republik Österreich (Bund)*, Petition No. C-454-06).

So, after the resolution and the signing of the contract, a major change in the project to take into account the public's demands would have necessarily involved the termination of the contract.

In this regard, the communicants recall that during the public participation process, the public unanimously demanded that the incinerators be replaced with sorting-methanization centres.

And had MPM wanted to meet this demand, it would have been required to terminate the contract signed in July 2005 (Exhibit No. 21). It would not, in fact, have been entitled to modify the technical options while maintaining the contract signed in July 2005 because these options were the ones announced in the tender pursuant to the public procurement directives and French legislation on public service concessions. In fact, these options lead to different investment costs, different waste disposal outputs, different valuations and different operating constraints.

The contract would have been terminated even though the company was in no way at fault.

Based on the Council of State's case law, a company that was not at fault would be entitled to substantial compensation. In addition to the cost of studies (fairly marginal for a project such as this), MPM would have been required to compensate the company for the loss of the revenues that it could have made under the contract and to pay damages that the loss of the contract may have caused it (Exhibit No. 70: Excerpts from Books by Professors Richer and Boiteau).

In this particular case, the contract grants the company a 20-year concession to operate the waste management plant. The compensation would therefore have been a considerable amount.

A due diligence recently carried out on behalf of MPM estimated the compensation to be paid to the company for operating losses and various other losses between 40 and 100 million euros if the contract were terminated (Exhibit No. 71: MPM's scenarios regarding termination of the contract).

This sum of course does not include the cost of building the facilities.

This situation seems to reflect the one the Committee described when it held that:

"A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the events on the ground have effectively eliminated alternative options. If a legal framework of a Party to the Convention is such that the only opportunity for the public to provide input to decision-making on technological choices which is subject to the public participation requirements of article 6 of the Convention is at a stage when there is no realistic possibility for certain

technological choices to be accepted, then such a legal framework would not be compatible with the Convention.” (§54 of the Report on Communication ACCC/C/2005/17 of 2 May 2008).

The communicants are indeed aware that the resolution of 13 May 2005 is not a decision that relates to environmental requirements, in the strict sense, of operating the facilities.

But it seems impossible to consider that MPM would have been in a position to take in account the public's demand to modify the technical options with respect to waste disposal – *i.e.* changing the technical options – since such a modification would have necessarily resulted in the termination of the contract signed in July 2005 and the right for the company to receive substantial damages.

Consequently, one cannot reasonably consider that MPM could actually have taken into account all the demands expressed by the public to modify the project's technical options during the public participation process.

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Exhibits produced in relation to administrative contract law

Exhibit No. 70: Excerpts from Books by Professors Richer and Boiteau

Exhibit No. 71: MPM's scenarios regarding termination of the contract