



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Riga, February 14, 2003

Judgment

in the name of the Republic of Latvia

in case No. 2002-14-04

The Republic of Latvia Constitutional Court in the body of the Chairman of the Court session Aivars Endziņš, justices Ilma Čepāne, Romāns Apsītis, Juris Jelāgins, Andrejs Lepse, Ilze Skultāne and Anita Ušacka, with the Court session secretary Egija Freimane,

in the presence of Egils Baldzēns – the representative of the applicant, i.e. 20 deputies of the 7th. Saeima, namely: Egils Baldzēns, Pēteris Salkazanovs, Jānis Leja, Rišards Labanovskis, Boriss Rastopirkins, Miroslavs Mitrofanovs, Juris Sokolovskis, Aleksandrs Golubovs, Leons Bojārs, Jānis Jurkāns, Modris Lujāns, Jakovs Pliners, Jānis Urbanovičs, Boriss Čilevičs, Oļegs Deņisovs, Pāvels Maksimovs, Osvalds Zvejsalnieks, Andrejs Klementjevs, Oļegs Tolmačovs and Igors Solovjovs

and the sworn advocate Ivars Grunte - the authorized representative of the institution, which has passed the challenged act – the Cabinet of Ministers

under Article 85 of the Republic of Latvia Satversme (Constitution), Articles 16 (Item 4) and 17 (the second part of Item 3) of the Constitutional Court Law

on December 17 and 18 , 2002 and January 14, 2003 in a public hearing reviewed the case

”On the Compliance of the Cabinet of Ministers August 8, 2001 Decree No. 401 ” On the Location of the Hazardous Waste Incineration Facility in Olaine” with Articles 111 and 115 of the Satversme, Articles 5 and 6 (Items 1-3) of the Waste Management Law, Articles 3 and 11 of the Law ”On the

Environmental Impact Assessment”, Articles 14 and 17 (the First Part) of the Law on Pollution as well as Article 11 of the Law ”On Environmental Protection””.

The establishing part

In 1999- 2000, when realizing the State Investment Program, the Ministry of Environmental Protection and Regional Development (henceforth –MEPRD) offered several local authorities to locate the hazardous waste incineration facility (henceforth – incineration facility) in their administrative territories. To realize the project and by taking into consideration the attitude of the local authorities it was decided to assess potential impact upon the environment (henceforth –EIA) in case if the incineration facility were located in such cities as Liepāja and Olaine as well as Rudbārži, Cenas and Krustpils pagasts (small rural districts). MEPRD as the initiator of the project asked the stock company ”BAO” (henceforth – SC ”BAO”) to carry out the functions connected with the process of EIA.

In May 2001 the final report on the impact upon the environment was elaborated (henceforth – the final report). On June 18, 2001 the State Assessment Bureau of Impact upon the Environment delivered the final report ”Conclusion on impact upon the environment of the potential places for location of the hazardous waste incineration facility” (henceforth – the conclusion on the final report). It inter alia stressed that ”fumes created by the facility comply with the requirements of the normative acts in effect” and that the investigation as to the location of the facility in Olaine ”does not name any exclusive aspects as concerns the normative acts and their observance” (*Supplement 4 to the written reply of the Cabinet of Ministers*). The State Bureau in its conclusion on the final report pointed out that it recommended locating the incineration facility in the Krustpils pagasts, Olaine or Liepāja.

On July 18, 2001 the Olaine City Dome (Council) decided to agree to the location of the incineration equipment in the territory of the city boiler house after MEPRD would take into consideration and realize several preconditions in arranging the city environment and infrastructure.

On July 21, 2001 the Cabinet of Ministers July 17, 2001 Regulations No.323 ”Requirements for Incineration of Waste and Operation of Incineration Facilities ” (henceforth – Regulations No. 323) took effect. The Regulations determined the limits of heavy metal, dioxin and furan emission in the air and in the waste water after its treatment and purification from the exhaust fumes.

On August 8, 2001 the Cabinet of Ministers passed the Decree No. 401 (henceforth – the challenged decree) , stating that the territory of the boiler

house in Olaine at No. 1 Celtnieku street had been confirmed as the place of location for the incineration facility.

The submitter of the application holds that the challenged decree does not comply with the following norms:

- Article 111 of the Satversme, determining that the State shall protect human health and guarantee a basic level of medical assistance for everyone;
- Article 115 of the Satversme, establishing that the State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment;
- Article 5 of the Waste Management Law, which- in order to protect persons, their life, health and property as well as to protect the surrounding environment – determines principles, connected with management of waste;
- Article 6 (Items 1-3) of the Waste Management Law , which establishes that "when organizing, planning and implementing management of waste, one shall observe the following requirements (in the sequence of their priority):
 1. shall prevent creation of waste and developing clean technologies;
 2. decrease the amount and dangerousness of waste;
 3. shall recycle waste, obtaining reusable materials and creating energy...".

The submitter of the application points out that when taking the decision on installing incineration equipment the fact that incineration of waste is nowadays an out of date way of recycling waste has not been taken into consideration. Besides he stresses that no reusable material and useful energy shall be obtained in the process.

To the mind of the submitter of the application the challenged decree is unconformable also with the following norms:

- Articles 3 and 11 of the Law "On the Environment Impact Assessment". In the process of public debate in Olaine out of about 13 000 inhabitants only a little bit more than 20 persons took part. The public debate carried out in the process of EIA testifies that 76% of the interrogated persons had not been informed about the planned installation of the incineration equipment. The Saeima received a letter of protest against the project, signed by 3732 persons. It certifies that the public has not been informed about the project of locating the incineration facility in Olaine;
- Article 14 of the Law on Pollution, which determines the limitations of commencement of polluting activities;

- Article 17 (the first part) of the Law "On Pollution", which establishes preconditions for elaboration of the program to decrease pollution or the program to implement normatives on the quality of the environment;
- Article 11 of the Law " On Environmental Protection", which determines that the Republic of Latvia population has the right of living in qualitative environment.

The applicant holds that several investigations prove the territory of Olaine to be a polluted area, therefore one more potential polluter must not be installed.

The Cabinet of Ministers – the institution, which has passed the challenged act does not agree with the viewpoint of the submitter of the claim. It expresses the point of view that the challenged decree has been passed after evaluating its conformity with the Satversme and the laws. The Cabinet of Ministers points out that "Subjects , regulating Article 111 of the Satversme and the challenged decree, are incompatible (the first guarantees the minimum of medical assistance and the other – confirms the locality of an incineration facility) and evaluation of their compliance as well as their contradistinction is impossible". Besides, when adopting the challenged decree the Cabinet of Ministers has realized all the necessary activities to commence the management of the waste, i.e. – it has undertaken measures to protect the health of people and the environment. The challenged decree facilitates the right of every person of Latvia, also the right of the Olaine population to live in a benevolent environment. Thus the Cabinet of Ministers has favored implementation of the objectives, determined in Article 115 of the Satversme. Before the adoption of the decree several activities were undertaken to give a full, versatile, objective and well-grounded information both on the incineration facility and the state of the environment in Olaine.

The Cabinet of Ministers expresses the viewpoint that Articles 5 and 6 (Items 1-3) of the Waste Management Law establishes criteria, which are to be observed when managing the waste. By passing the challenged decree the Cabinet of Ministers confirmed the location for setting up the facility only after the Olaine City Dome (Council) had taken the decision on setting up the incineration facility. When passing the challenged decree its conformity with laws and other normative acts was evaluated, at the same time the validity, usefulness and compliance with the normative acts of the decision adopted by the local authority was also assessed.

The Cabinet of Ministers stresses that in conformity with the Law "On the Environmental Impact Assessment" there was no necessity of evaluating the impact of the future incineration facility on the environment, however, to observe the principle of precaution, it has been done. The challenged decree has been passed by observing all the principles, named in Article 3 of the Law "On the Environmental Impact Assessment". Both – the initial public discussion on the impact of the incineration facility on the environment

(henceforth – the initial public participation) and the discussion of the EIA report on the impact of the facility on the environment has been carried out in Olaine. The population of Olaine were duly informed and - in compliance with of Article 3 (Item 2) of the Law "On the Environmental Impact Assessment" their requirements had been taken into consideration. Besides, as when carrying out AIE no legal restrictions for installing an incineration facility in the city of Olaine were established, the requirements of Article 3 (Item 3) of the Law have also been observed. The same can be said about the principles, named in Article 3 (Item 6) of the Law.

The Cabinet of Ministers holds that - if EIA is carried out then the initial assessment is not necessary, therefore Article 11 of the Law "On the Environmental Impact Assessment" shall not be applied in this case. In its turn the Law "On Pollution" does not regulate the choice of location of the facility, which may pollute the environment. It only determines the preconditions and procedure of receiving the permit for carrying out the above activities. Besides, to their mind the applicant – when pointing to the connection between the challenged decree and the norms of the Law "On Pollution"- has not clearly motivated his claim.

To the viewpoint of the Cabinet of Ministers the challenged decree complies with Article 11 of the Law "On the Environmental Protection", as the final report concludes that location of the incineration facility in Olaine will neither negatively influence the environment , nor be bad for the health of the population, endanger their lives, interests and property . In the same way the Cabinet of Ministers, when confirming the challenged decree, has taken into consideration the conclusion on the final report. Therefore the challenged decree is in conformity also with Article 115 of the Satversme.

An expertise on the potential pollution of the environment of the incineration facility in Olaine and the potential harm to the health and life of the population of Olaine and the surrounding areas was appointed. Dr.phys. Rūta Bendere, Dr.chem., Professor Imants Kaimiņš and Dr.med., Associate Professor Brigita Aulika were invited as the experts.

Expert R.Bendere, when answering the questions asked at the Constitutional Court, explains that every year about 25 000 tons of hazardous wastes, which can be disposed off by incineration, accumulate in Latvia. She states that the consequences of hazardous polluting emissions in the atmosphere and in waste water (caused by the activities of the incineration facility) shall be purified and meet the requirements of both - the European Union (henceforth – the EU) Directive 94/67/EC and the Republic of Latvia normative acts. Waste water of the incineration furnace will not come into contact with the local inhabitants and –after processing it at the sewage treatment - cannot be hazardous to the environment. Smells might arise in the locality but it will be technologically kept low as the activities with the waste are carried out in an isolated space.

Expert I.Kalniņš points out that the planned incineration of pesticides will create pollution with dioxins and furans, which are hazardous and toxic substances. The expert stresses that the limit of the permissible concentration of cadmium, mercury, cobalt, vanadium and nickel in the atmosphere will be exceeded. Besides the amount of dioxins and furans left in the waste water after the process of incineration shall also surpass the permissible limit. In addition the compounds of dioxins and furans are not decomposed during the biological sewage treatment and may continue polluting the waters and the soil.

Expert B.Aulika, on the basis of the conclusion voiced by I.Kaimiņš and speaking on the general health level of the Olaine inhabitants points out that in 2000 and 2001 the number of oncologic patients ambulatory visits has increased. Decrease of the medium lifespan has also been noticed in Olaine. Morbidity rate of kids up to one year old has been twice as big as in Sigulda in 2000 and in 2001 1,8 times bigger than in Sigulda – chosen as a control city because there is no pollution by chemically-pharmaceutical plants. When compared to other cities, the ground water pollution with heavy metals is high in Olaine.

At the Court session the representative of the applicant repeatedly stressed the idea, expressed in the application, namely- he is against the fact that the incineration facility is being installed in Olaine. To his mind the pollution level in Olaine is not known, therefore in EIA– without additional observation- it has been mentioned as non-existing. However, basic research confirms that pollution in Olaine exists already from the Soviet times. Besides – as it is not precisely known what substances are going to be burned – one cannot prognosticate the amount and composition of the fumes. The Doctor of biology Anatoly Beļajevs has concluded that the planned fumes of several substances, emitted by the incineration facility shall exceed the permitted limit. In addition – to his mind incineration cannot be regarded as an up-to-date method of recycling hazardous waste.

The representative of the Cabinet of Ministers pointed out that the government passed the challenged Decree - which was within its competence - by observing the procedural process in effect. Furthermore, before passing the challenged Decree the Cabinet of Ministers verified the legitimacy of the decision adopted by the Olaine city Dome (Council). When making the decision on passing the challenged Decree the Cabinet of Ministers trusted the information and documents, submitted by MEPRD.

The representative of the Cabinet of Ministers affirmed that the conclusions on the draft decree by ministries and other state institutions have been positive. The Cabinet of Ministers states that the attitude of the inhabitants against the building of the incineration facility in Olaine has not been expressly negative. Moreover, incineration facilities are functioning in Denmark, Finland, Sweden, the USA and other states. Not infrequently incineration facilities are installed in

cities. The incineration equipment to be installed in Olaine has been certified to meet the EU requirements of the sector of the environment protection.

The Cabinet of Ministers holds that when carrying out EIA the publicity principle has been observed and the people received versatile, complete and motivated information both on the incineration facility and the environment in Olaine. The people did not make use of the rights envisaged by the law. If the challenged decree is repealed, the State will suffer losses in the amount of 3 209 393 lats, besides the State will have to repay 672 000 lats to the Danish Agency of Environment Protection.

Expert B.Aulika confirmed the statement voiced in her conclusion, namely, that the operation of the incineration facility would cause emission of many substances, among them heavy metals, dioxins, furans and formaldehydes, which are harmful to health. She stressed that influence of toxic chemical substances upon the organism of a human being depends on the physical properties, chemical structure, amount, and effect of the substances, as well as of air pressure, age of the inhabitants and other factors. As concerns Olaine, then taking into consideration the spectrum of the polluting substances and the pollution level of the ground waters as well as high rate of children morbidity and adult mortality, activities of the incineration facility will cause the above illnesses.

Witness Elita Kalniņa – the employee of the public organization "The Environment Protection Club" explained that she had participated in the initial public discussion in Olaine on March 30, 2000. She had not seen any announcement on the dispute and received the information about it from the head of the State Bureau. The witness explained that to her mind the inhabitants, who participated at the dispute, received enough information on the project and the present public representatives – employees of the Stock company "Olainfarm" and the employees of the Olaine library – were given the chance to express their opinion.

Expert R.Bendere explained that existence of the incineration facility in Olaine would improve the local ecological situation as it would be possible to liquidate the waste, which originated because of the operation of the functioning plants. To her mind it would be possible to purify the already polluted soil as well. The expert based her conclusion on the technical information furnished by the producer of the incineration equipment and expressed her opinion that the fumes, emitted by the facility, would not exceed the permitted limit.

Expert I.Kaimiņš explained that he based his opinion on the information, incorporated into the final report of EIA. He holds that incineration of hazardous waste will only worsen the ecological situation in Olaine. Moreover,

operation of the incineration facility will also negatively influence apiculture and biological farming in Olaine and its neighbourhood.

The invited person – the Chairman of the Olaine City Dome (Council) explained that when informing the community about the initial public participation and discussing the report, all the requirements of the law had been observed. The Olaine Dome, when adopting the decision on locating the incineration facility in the administrative territory of Olaine, had taken into consideration the conclusion of the final report, according to which the above facility would not harm the health of the inhabitants of Olaine. Elements of the infrastructure and environment would also be put in order to ensure location and operation of the facility and in addition 27 new posts would be created.

The invited person – the former Chairman of the S/C "BAO" Board Indulis Emsis explained that hazardous substances, also the pesticides stored in Gardene and Kņava were in provisional storage places and had to be recycled. He holds that the society is not well informed about the EIA process, because no funds for it had been granted. The normative acts do not obligatorily demand consent of the society in cases when the State institutions make decisions on the location of the incineration facilities. Because of the negative public attitude the government risks and adopts a needed but unpopular decision. The producer guarantees the safety of the incineration facility operation and in case the facility endangers health of people or environment, its operation will be stopped.

The invited person – the Olaine inhabitant Andris Tolmačovs explained to the Court that he had collected about 4000 signatures of the Olaine inhabitants against the location of the incineration facility in Olaine. People were informed about collection of the signatures by announcements, put into their letter boxes and school-children as well as active people had helped Tolmačovs to do it. "Olaine Newspaper" with a circulation of only 1000 copies, which is read by approximately two to three thousand people, is regarded as the local newspaper. Therefore the inhabitants did not have enough information about the planned incineration facility.

The invited person – Doctor of Biology A. Beļajevs expressed the viewpoint that EIA was elaborated on the basis of unqualified information and therefore the Law "On the Environmental Impact Assessment" has been violated. In the process of incineration of hazardous waste new hazardous waste is produced, therefore the best method is to bury and not to incinerate it. To his mind several parameters on the potential fumes mentioned in the EIA do not meet the requirements of the normative acts. At the moment of passing the challenged decree, the prognosticated emission of lead in the atmosphere and the pollution of the waste water (concentration of metals, dioxins, furans) caused by the process of purification exceeded the limits, mentioned in Regulations No. 323. In the same way, when taking into consideration the information, which the SC

”BAO” submitted to receive the permission for performing activities of category B polluting processes, one could conclude that the emission of heavy metals into the atmosphere, caused by the incineration facility as well as the concentration of dioxins and furans, emitted in the process of purification of the fumes into the waste water will exceed the requirements included into Regulations No. 323 (with the amendments).

The invited person - the representative of the Olaine inhabitants Osvalds Pastors stressed that – when exploring the social conditions in Olaine, connected with the location of the planned incineration facility – he could not receive information on the state of health of Olaine inhabitants from the State institutions and offices. The Olaine inhabitants have not been well enough informed about the process of public participation, because the people do not usually read the newspaper ”Latvijas Vēstnesis” and the Russian speaking population could not read the information.

The invited person – the assistant of the head of the State Bureau Arnolds Lukševics admitted that - even though the requirements of law with regard to information of the inhabitants about the procedure of the public participation were observed, the information has not been competent. The State Bureau in its conclusion has also included the requirements as regards the incineration equipment to ensure observation of the provisions of the law. Besides the State Bureau has taken into consideration the negative attitude of the Olaine inhabitants to locating the incineration facility in Olaine and recommends creating a public supervisory body, consisting of the Olaine inhabitants, which could have some control over the incineration process and observation of law.

The invited person - the former Minister of Environmental Protection and Regional Development Vladimirs Makarovs explained that - by taking into consideration the negative public attitude against the location of the incineration facility in Olaine, MEPRD has reached an agreement with the Olaine city Dome (Council) on investment of additional funds into arrangement of the city environment and infrastructure. Olaine has been chosen as the place of location for the incineration facility because there is a qualified in the sector of waste management labour force, developed infrastructure and other necessary preconditions. V.Makarovs stressed that the agreement on purchase of the incineration equipment, concluded by MEPRD and the Danish Agency of Environmental Protection, determines that the equipment has the two year warranty (security). The Danish specialists will supervise exploitation of the equipment in accordance with the requirements of the normative acts of the EU and Latvia. If the exploitation of the incineration facility emits fumes, hazardous to the environment and the people, which are forbidden by the Latvian normative acts, the exploitation of the facility will be stopped.

The invited person – the Minister of Environmental Protection and Regional Development Raimonds Vējonis explained that operation of the incineration

facility would not start before the permit to carry out polluting operations was granted. It will include provisions, the objective of which is to ensure observation of normative acts in the sector of environmental protection. Besides the incineration facility has to be installed also to carry out the liabilities, which Latvia has undertaken as the EU candidate state.

The concluding part

1.

In Latvia, as in many other states the right to live in a benevolent environment has been declared as the fundamental right of the person. In accordance with Article 115 of the Satversme the State shall protect this right by providing information about environmental conditions and by promoting the preservation and improvement of the environment. The above norm of the Satversme first of all obliges the State with the duty of creating and ensuring an efficient system of environmental protection. Secondly, it endows the individual with the right of obtaining information on the environment and co-operating in the process of adoption of decisions on environmental issues. The Law "On the Environmental Protection" specifies the right of a person to a qualitative environment and the duty of the state institutions to ensure it.

Management of the hazardous waste is one of the most important undertakings, which shall be carried out under the system of Latvian Environmental Protection (*see Latvia: 2000- 2002 Plan for the National Development// Latvijas Vēstnesis, 03.12.1999, No. 400/403*). Only during the last few years measures, regulating the management of the hazardous waste so as not to violate the interests, mentioned in Article 5 (the first part) of the Law on Management of Waste, namely, life and health of a persons as well as the property of the person have been undertaken to observe the international liabilities and take into consideration the EU experience.

2.

In conformity with Article 4, Item 1 of the Waste Administration Law, hazardous waste is "waste with one or more qualities, which make it harmful to health and life of people as well as to the property of persons and which comply with the categories of hazardous wastes, determined in the classificatory of wastes". Normative acts, regulating management of the hazardous waste, envisage several complicated procedures also during the process of installation and activities of the incineration facility. **Therefore the Constitutional Court evaluates not only the challenged decree but also the other activities, connected with installation of the incineration facility – the significance of the final report and conclusion on it at the time of adoption**

of the challenged decree as well as preconditions for starting the operation of the incineration facility.

In accordance with Articles 1, Item 3 and 11 EIA is a must for installation and operating of such incineration equipment, which – taking into consideration the amount of its activity, its type and the chosen place – may essentially influence the environment. Besides, in conformity with Article 3, Item 1 of the same Law, the above assessment shall be accomplished at the early stage of planning, projecting decision-making. It follows from Articles 3 (Item 3) and 22 that the final report and conclusion on the final report, prepared by the initiator, have to be regarded only as recommendations; however, when making the decision on the acceptance of the plan, these documents shall be considered from every point of view.

When choosing the site for installation of the equipment (facility) one has to take into consideration the provisions of Articles 9 (Item 4) and 7 (Item 2). Namely, the decision on placing the new treatment facility of hazardous waste in the territory shall be adopted by the local authority of pagasts and city, but the Cabinet of Ministers shall confirm it.

Taking into consideration the fact that the total daily production capacity of the incineration facility is seven tons, the envisaged activity – in accordance with Item 5.1 of the First Supplement to the Cabinet of Ministers July 9, 2002 Regulations No. 294 "The Procedure of Registering Facilities, Carrying out Polluting Activities of Categories A,B and C and Granting Permits to Perform Polluting Activities of Categories A and B" – shall be regarded as the polluting activity of category B. It follows from Article 19 (the third part) of the Law on Pollution, that the operator before setting the equipment in motion shall receive permission of category B from the Regional Environment Board. Thus, when operating the equipment, polluting activities may be permitted only on the condition that the equipment will function in compliance with the requirements, determined in the particular decision (permit) and the normative acts.

In this case the decision on the necessity of EIA was taken and after that the procedure of evaluation, envisaged by the law, was completed. Thus, when taking the decision on acceptance of the anticipated operation of the facility, the Cabinet of Ministers (choosing of the locality) and the Regional Environment Board (granting the permit of operating the equipment) had the obligation to assess the final evaluation documents from every point of view.

3.

To give to the public the possibility of expressing the viewpoint on starting the activities, which may essentially affect the environment, the Law "On the Environmental Impact Assessment" (Articles 15, 17 and 18) and the Cabinet

of Ministers June 15, 1999 Regulations "The Procedure of Evaluating Impact upon the Environment" (henceforth – Regulations No. 213) determine the process of preparation of the initial public participation, the report on the issue as well as the procedure of it and assessment of the results. In its turn, in conformity with Regulations No. 294 to start the operation of the incineration facility, participation of the society is envisaged for the third time.

In addition to the requirements on the organization of public participation, anticipated in Regulations No. 213, Regulations No. 294 envisage not only public notice but also individually mailing the information about the public participation to the owners (managers), whose real estates border on the area of the potential pollution or which are in the direct zone of the pollution.

The materials, attached to the case testify that before the Olaine Dome (Council) July 18, 2001 Decision No. 16 and before the adoption of the challenged decree information on the organization of the initial public discussion was published in the newspaper "Latvijas Vēstnesis" on March 14, 2000 and in the newspaper "Rīgas Apmiņas Avīze" on March 31, 2000. In its turn on January 16, 2001 in both – "Latvijas Vēstnesis" and "Rīgas Apmiņas Avīze" was published the information that the public discussion of the report on the issue would be held on January 30, 2001. Besides, the Chairman of the Olaine Dome J.Pavlovičs stated that announcements of the same contents had been placed on five information boards in the city (*see vol. 2, p.61 of the case*). However, only about 20 persons, mostly the municipality employees, participated in the initial discussion (*p.96 of the same source*) and the discussion of the report of the working group (*p.100 of the same source*).

On the one hand, well-grounded is the viewpoint of the applicant that the public discussion has been just formal and that the public opinion has not been found out in the EIA process. On the other hand, participation in the process of taking decisions on activities in the sphere of the environment is not the public obligation but only it's right. Besides the public organization "The Environment Protection Club", representative of which participated in the initial public discussion did not make use of the rights, guaranteed in Article 13 of the Law "On Environmental Protection".

However, one may not agree with the viewpoint of the Cabinet of Ministers representative that " in conformity with the Latvian legislature and the international agreements binding on Latvia the society received a versatile, complete and motivated information both on the hazardous waste incineration facility and the conditions of environment ... in Olaine". Vice versa, the S/C "BAO", the State Bureau as well as the Olaine Local Authority, when receiving the results of the Olaine inhabitant opinion poll, could see that the inhabitants were insufficiently informed about the project. 76% of the respondents admitted that they were not informed about the construction of the incineration facility but in 86% cases the respondents stated that the opinion poll had been

their source of basic information. Besides, in compliance with the results of the opinion poll 84% of the respondents had a negative attitude to locating the incineration facility in Olaine (*see the Final Report, pp. 190 – 193*). When publishing the information on the public participation in the newspapers "Latvijas Vēstnesis" and "Rīgas Apmiņas Avīze", which are subscribed by only some inhabitants, the social status and national composition of the Olaine inhabitants was not taken into consideration. Well-grounded is the attached to the case conclusion of the Director of the State Geological Service Inga Gavēna that "no popular scientific summary with which all the inhabitants of the potentially affected zone might acquaint themselves was attached to the Final Report. The EIA Program elaborated by the State Bureau envisages that the Final Report shall include the above summary (*see Conclusions of the State Bureau Experts not on the Regular Staff about the Reports on Influence of the Waste Incineration Facilities upon the Environment p.5*). Thus the Final Report on the incineration equipment, with which the person might acquaint himself/herself at the Olaine City Dome, may be regarded as complicated and hard to grasp for a layman. Besides both discussions took place during the working hours.

Even though the procedure of passing democratic decisions is comparatively new and those, who adopt the decisions, do not have the required knowledge, skills and experience to involve the society, still it is possible that there is no wish and interest to include the society in adoption of decisions as well as to take into consideration the motions, expressed by it. The basic principles of the state administration, regulating the administrative, discretionary power establish that the public shall be given the real possibility of expressing its viewpoint and of being heard before the final decisions, which might influence its rights or interests are taken (*see Lambrecht C., Public Participation in Environmental Decisions//European Environmental Law; ed.Gerd Winter, Dartmouth, 1996, p.95*).

In compliance with Article 115 of the Satversme, Articles 1 (Item 7), 14, 17³ and 17⁵ of the Law "On Environmental Protection" as well as Articles 3 (Item 2), 16 (the second part), 18 and 22 (the second part) of the Law "On the Environment Impact Assessment" the concerned public experiences the right of receiving information on the environment and the right of public participation. In its turn the above norms assign the subjects of the public power with the assignment not only to further and **secure** public participation in taking decisions, which are connected with the protection of the environment but also – by **efficiently** informing the society about its rights and possibilities of receiving information on environment and participation in making the decisions – shall evaluate the viewpoints, expressed by it. The main objective of the mandatory, determined by the law public participation is to ensure that the best possible decision is taken in the interests of the public and objections of every person shall be evaluated and as much as possible taken into consideration. The public participation shall serve two main objectives: first of

all to obtain information, which advances taking a motivated and fair decision, secondly, to convince the public that the viewpoints, expressed by it are being taken into consideration (*see Basse E.M. Introduction to Danish Environmental Law.// North European Law, ed. E.J.Hollo- K.Martinen, Helsinki, 1995, p.93*).

One cannot agree with the viewpoint of the former Minister of the Environmental Protections and Regional Development V. Makarovs, who stated that not only the national normative acts but also the Aarhus Convention "On the Access to Information, Public Participation in Decisions and Access to Justice on Issues Relating to the Environment" (henceforth – the Aarhus Convention) have been taken into consideration.

On April 18, 2002 the Saeima ratified the Aarhus Convention, which enables public participation in the process of creating environmental policy. In its turn it makes the state responsible for creation of the effective system for the protection of the environment, the objective of which is to ensure not only access to information and the right of public participation in decision-making process relating to the environment, but also to create a mechanism for the protection of this right.

The main objective of the Aarhus Convention is to protect the right of every person and the future generations to live in a benevolent, qualitative environment. The Convention *inter alia* stresses that the public is to be informed about different procedures, allowing it to participate in decision-making in the sphere of the environment. Article 3 (Item 2) of the Convention establishes that the state has to ensure that "officials and institutions shall help and give advice to people (the public) about access to information, participation in decision-making and access to justice on issues relating to the environment".

Article 6 of the Aarhus Convention "Public Participation in Decisions on Specific Activities" stresses that of great importance is timely and efficient informing of the public. In the commentary of the UNO European Economic Commission on implementation of the Aarhus Convention it is pointed out that public notice (announcement) would be considered adequate only if it effectively targets at least the public concerned with the decision. Taking into consideration the fact that in today's information- saturated society it may be extremely difficult to command the attention of those the public authorities would like to reach, the commentary stresses that efforts must be made to ensure that public concerned is not only reached but that the meaning of the notification is understandable on the planned specific activities. In accordance with Item 5 of the First Supplement to the Aarhus Convention hazardous waste incineration facilities regardless of their capacity belong to the above group of specific activities. All reasonable efforts are to be made to facilitate public participation. A small announcement in a newspaper among hundreds of advertisements would not be considered effective (*see The Aarhus Convention:*

An Implementation Guide. United Nations Economic Commission for Europe, Geneva, 2000 pp. 89 – 112).

At the time of passing the challenged decree accession of Latvia to the Aarhus Convention was signed and even though it was not ratified, the government of Latvia had expressed its political will to observe the guiding lines on the environment protection, mentioned in the Convention.

Thus, even though the initial public participation and the discussion of the report of the working group had taken place and the requirements of Regulations No. 213 were formally observed, the public concerned – contrary to the requirements determined in Articles 1 (Item 7) and 17⁵ (the second and third parts) of the Law "On Environmental Protection" – was ineffectively involved in the process of EIA.

Therefore to avert formal public participation as well as to ensure adequate public participation, the Constitutional Court draws the attention of the Cabinet of Ministers to the fact that effectiveness of Regulations No. 213 (as concerns the right to public participation in decision-making, guaranteed in the Law "On Environmental Protection", Article 115 of the Satversme and Aarhus Convention) shall be assessed.

4.

To ascertain whether the challenged decree is legitimate, it is necessary to evaluate the action of the Cabinet of Ministers when taking the decision on the location of a new hazardous waste incineration facility.

Article 7 (Item 2) of the Waste Management Law authorizes the Cabinet of Ministers to determine the concrete place of location of a hazardous waste incineration facility after one or several municipalities have reached the decision that it/they agree to locate the object in its/their administrative territory. Furthermore, the confirmation of the location by the Cabinet of Ministers is needed in both cases- when EIA on the incineration facility and its potential location has been realized and when in accordance with the law EIA is not needed. Thus – as regards location of new incineration facilities (regardless of their capacity) - the Waste Management Law determines two fundamental requirements: agreement of the municipality and the Cabinet of Ministers decision on the concrete location of the facility.

The Waste Management Law does not envisage specific criteria for the Cabinet of Ministers to take into consideration when confirming the location of a hazardous waste incineration facility. If more than one municipality agrees to locate the facility in its territory then the Cabinet of Ministers shall evaluate ecological, social and economic considerations, included in EIA or other documents, of every alternative. However, even in case if there are no

alternatives, the decision shall be made on the basis of the principle of assessment, determined in Article 3 (Item 4) of the Environmental Protection Law. Namely – any activity or undertaking, which may affect the quality of the environment, is permissible only in case if the positive result of the above activity, achieved by the actor and the public, exceeds the negative influence on the quality of the environment or the harm done to the environment and the public.

5.

The Cabinet of Ministers stresses that when passing the challenged decree it assessed its compliance with the Satversme, the laws and evaluated the State Bureau June 18, 2001 conclusion on the Final Report. The State Bureau concluded that EIA did not give proof of potential violations of normative acts in case the incineration facility started operating.

However, the Cabinet of Ministers paid no attention to the fact that on July 21, 2001 Regulations No.323, which determined permissible limits of heavy metal, dioxin and furan emissions, had taken effect. Thus at the moment of passing the challenged decree the prognosticated emission limit of lead in the air and the limit of the exhaust fumes of arsenic, lead, chrome, copper, nickel, zinc, dioxins and furans found in the waste water after its refining exceeded the limits established in Regulations No. 323. The documents, attached to the draft of the challenged decree, submitted to the Constitutional Court by the Cabinet of Ministers, do not allow objectively judging whether the government had taken into consideration the above when passing the decree.

The materials (*see the documents attached to September 12, 2002 letter No. 90/TA-1792 by the Prime Minister Andris Bērziņš, vol.2, pp.124-155 of the case*) show that on July 26, 2001 the challenged draft decree has been considered at the State Secretary meeting and after that positive conclusions were received from the Ministries of Justice, Finance, and Economy as well as from the Secretariat of the Minister of State Reforms and the Municipality Union. In compliance with Item 47.5 of the Cabinet of Ministers Regulations No. 160 "Rules of Procedure of the Cabinet of Ministers" then in effect, the draft of the challenged decree was not considered at the Cabinet of Ministers Committee meeting.

Besides, in his August 6, 2001 letter, addressed to the State Chancellery, the former Minister of Environmental Protection and Regional Development V.Makarovs asks the government to include the project in the extra schedule for August 7 meeting but does not point out either the unconformity of the prognosticated emission with the requirements of Regulations No. 323 or the fact that the attitude of the Olaine inhabitants to the project is expressly negative. To the contrary – V.Makarovs writes that the choice of Olaine for the location of the incineration facility " is based on the assessment of many

potential places and has been determined by taking into consideration such criteria as the geographical position, infrastructure, geological conditions, access roads, the attitude of the local public as well as positive EIA results, including the results of public participation” (see vol.2, p.140 of the case). The public opinion was not disclosed in the Final Report, attached to the challenged decree.

Thus MEPRD did not carry out its liabilities honestly. As the government received neither the complete information about the conformity of the parameters of the facility with the requirements of the normative acts nor the negative public attitude against the object, the Constitutional Court holds that, when taking the decision on the draft of the challenged decree, the Cabinet of Ministers could not evaluate the aspects from every point of view.

6.

To start the operation of the hazardous waste incineration facility in Olaine, the operator shall receive B category permit for performing polluting activities from All Riga Regional Environmental board. In its turn the Board, when making the decision on granting the permit, shall observe the provisions determined in Article 22 (part two) of the Law "On Environmental Impact Assessment", Article 28 (part four) of the Law "On Pollution" and in Regulations No.294 – it has to take into consideration both the EIA final documents and the requirements of the normative acts, which have taken effect after elaboration of the above documents. The task of the Board is to examine compliance of the parameters of the equipment with the requirements of Regulations No. 323. Moreover, the Board has to assess also the proposals on the terms of granting the permit of the particular branch of the Health Agency, other concerned state institutions, the Olaine local authority and the public.

When making the decision on permissibility of the operation of the facility, it is within the competence of the Board to determine whether the established deviations may be technologically averted by additional treatment equipment or other methods. If it is possible, then, in conformity with Article 31 of the Law "On Pollution", mandatory provisions, observation of which is necessary to ensure health of the people and quality of the environment , shall be incorporated into the permit.

Besides, in compliance with Articles 50 and 51 of the Law "On Pollution" the concerned persons have the right of contesting the decision of All Riga Regional Environmental Board on granting the permit at the State Bureau. In its turn the decision of the State Bureau may be appealed against in the procedure envisaged by law at the court of general jurisdiction.

Taking into consideration that it is within the authority of All Riga Regional Environmental Board to grant permits for operating facilities only if the prospective emissions comply with the requirements of the normative acts, the Constitutional Court holds, that when passing the challenged act the main objective of the government was to determine the optimal locality of the facility but not to take the decision on the compliance of the equipment parameters with the requirements of the normative acts. Thus the fact that at the moment of passing the challenged decree parameters of the equipment did not comply with some requirements of Regulations No. 323 and that during public participation in the EIA process shortcomings were observed, shall not be considered as a sufficient reason to declare the challenged decree unlawful and null and void.

7.

Provisions of Articles 5 and 6 (Items 1-3) of the Waste Management Law as well as Articles 14 and 17 (the first part) shall be applied to granting of the permit to carry out polluting (dangerous) activities and general improvement of the environment, but are not directly pertained to the challenged decree. Besides, the applicant, neither in his claim to the Constitutional Court nor at the Court session has submitted the legal motivation on unconformity of the challenged decree with Article 115 of the Satversme. Therefore the conformity of the challenged decree with the above legal norms is not being assessed in this Judgment.

The substantive part

On the basis of Articles 29 (Item 6 of the first part), 30, 31 and 32 the Constitutional Court

DECIDED:

- 1. To terminate proceedings on the compliance of the Cabinet of Ministers August 8, 2001 Decree No. 401 "On the Location of the Hazardous Waste Incineration Facility in Olaine" with Article 111 of the Republic of Latvia Satversme, Articles 5 and 6 (Items 1-3) of the Waste Management Law as well as Articles 14 and 17 (the first part) of the Law "On Pollution".**
- 2. To declare the Cabinet of Ministers August 8, 2001 Decree No. 401 "On the Location of the Hazardous Waste Incineration Facility in Olaine" as being in conformity with Article 115 of the Republic of Latvia Satversme, Article 11 of the Law "On Environmental**

Protection” and Articles 3 and 11 of the Law ”On Environmental Impact Assessment”.

The Judgment is final and allowing of no appeal.

The judgment was announced in Riga on February 14, 2003.

The Chairman of the Court session

Aivars Endziņš