

Compliance Committee to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters (Aarhus Convention)

**First progress review of the implementation of decision VI/8g
on compliance by Kazakhstan with its
obligations under the Convention**

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I. Introduction

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision VI/8g on compliance by Kazakhstan with its obligations under the Convention (see ECE/MP.PP/2017/2/Add.1).

II. Summary of follow-up

2. At its sixtieth meeting (Geneva, 12-15 March 2018), the Committee reviewed the implementation of decision VI/8g in open session with the participation by audio conference of representatives of Kazakhstan. Though invited, no communicants or registered observers took part in the open session. The Chair requested Kazakhstan to provide a written version of the information it provided during the session.

3. On 1 October 2018, Kazakhstan submitted its first progress report on decision VI/8g on time.

4. On 5 October 2018, the secretariat forwarded the first progress report to the communicant of communication ACCC/C/2013/88, inviting its comments by 1 November 2018.

5. On 2 November 2018, the communicant of communication ACCC/C/2013/88 submitted its comments on the first progress report.

6. After taking into account the information received, the Committee prepared its first progress review and adopted it through its electronic decision-making procedure on 24 February 2019. The Committee thereafter requested the secretariat to forward the first progress review to Kazakhstan and the communicant of communication ACCC/C/2013/88.

III. Considerations and evaluation by the Committee

7. In order to fulfil the requirements of paragraph 2 of decision VI/8g, Kazakhstan would need to provide the Committee with evidence that it had taken the necessary legislative, regulatory and administrative measures:

(a) To ensure that the mandatory requirements of the content of the public notice, as prescribed by article 6(2) of the Convention, are detailed in law;

(b) To establish a clear and consistent requirement for all information relevant to the decision-making to be made accessible to the public, in accordance with article 6(6) of the Convention;

(c) To ensure that, in accordance with article 6(7) of the Convention, the submission of comments by the public is not limited to only “reasonable” comments;

(d) To establish appropriate procedures, which are not limited to publishing decisions only on websites, to promptly notify the public of the environmental expertiza conclusions, and to facilitate public access to these decisions, in accordance with article 6(9) of the Convention;

(e) To maintain and make accessible to the public, through publicly available lists or registers, copies of the decisions taken and other information relevant to the decision-making, including evidence of having fulfilled the obligation to inform the public and provide it with opportunities to submit comments.

8. In order to fulfil the requirements of paragraph 5 of decision VI/8g, Kazakhstan would need to provide the Committee with evidence that it had taken the necessary legislative, regulatory and administrative measures and practical arrangements to ensure that:

- (a) The content of the public notice prescribed by the Rules of Public Hearings meets all the requirements set out in article 6(2) of the Convention;
- (b) Time frames set for decision-making procedures subject to articles 6 or 7 of the Convention are sufficient to enable the public to prepare and to participate effectively and:
 - (i) To the extent possible, they do not overlap with holiday periods and other non-working days;
 - (ii) The volume and the complexity of the project or plan, programme or policy is considered when setting the relevant time frames;
- (c) Appropriate practical and/or other provisions are made for the public to participate during the preparation of plans within the scope of article 7 of the Convention, including clear requirements to ensure that:
 - (i) The necessary information is provided to the public;
 - (ii) The public that may participate is identified by the relevant public authority;
 - (iii) The requirements of article 6(3), (4) and 8 of the Convention are applied.

Paragraph 2(a) of decision VI/8g

9. With respect to paragraph 2(a) of decision VI/8g, in its first progress report Kazakhstan refers to Article 57-2 of the Environmental Code. Article 57-2 does not, however, address the recommendation contained in paragraph 2(a). In contrast, in its reporting on paragraph 2(b), Kazakhstan lists the notice requirements in its Rules for Public Hearings.¹ Having examined this list, the Committee considers that a number of the notice requirements set out in article 6(2) of the Convention are still missing from the Rules for Public Hearings. These include all those the notice requirements that the Committee already highlighted were missing in its report on decision V/9i to the sixth session of the Meeting of the Parties, namely:

- “(a) The proposed activity and the application on which a decision will be taken (article 6, paragraph 2 (a), of the Convention);
- (b) The nature of possible decisions or the draft decision (article 6, paragraph 2 (b), of the Convention);
- (c) The commencement of the envisaged procedure (article 6, paragraph 2 (d) (i));
- (d) A time schedule for transmittal of comments or questions to the relevant public authority (article 6, paragraph 2 (d) (v));
- (e) An indication as to what environmental information relevant to the proposed activity is available (article 6, paragraph 2 (d) (vi));
- (f) Whether the activity is subject to a transboundary EIA procedure (article 6, paragraph 2 (e)).”²

10. In the light of the above, the Committee finds that Kazakhstan has not yet met the requirements of paragraph 2(a) of decision VI/8g.

Paragraph 2(b) of decision VI/8g

11. With respect to paragraph 2(b) of decision VI/8g, in its first progress report Kazakhstan refers to various provisions of its legislation. None of the legislative provisions referred to, however, are relevant to the recommendation contained in paragraph 2(b) of the decision. In contrast, in its reporting on paragraph 2(a) of decision VI/8g, Kazakhstan refers to Article 57-2 of the Environmental Code which is indeed of relevance. Article 57-2 provides that, twenty days prior to the public hearing, the local executive body will provide

¹ Party’s first progress report, 1 October 2018, pp. 3-4.

² ECE/MP.PP/2017/41, para. 23.

the public “access to environmental information relating to the impact assessment on the environment of the planned economic and other activities and to decision-making process for this activity through the online resource, as well as using other means of informing”.³ It also reports that the Rules for Public Hearings contain a similarly worded provision.

12. The Committee emphasizes that providing the public with access only to the “environmental information” related to the environmental impact assessment procedure of the planned economic and other activity and the decision-making process on this activity does not meet the requirements of article 6(6) of the Convention. Article 6(6) of the Convention requires that all information relevant to the decision making that is available at the time of the public participation shall be made available to the public. This means that the public must be given access to “all information” relevant to the decision-making”, not just the relevant environmental information. The Committee accordingly finds that Kazakhstan has not yet met the requirement of paragraph 2(b) of decision VI/8g.

Paragraph 2(c) of decision VI/8g

13. While in its first progress report Kazakhstan reports on paragraph 2(c) of decision VI/8g, none of the information it has provided⁴ in that regard is actually relevant to the implementation of paragraph 2(c). In particular, it has provided no evidence that it has taken the necessary legislative, regulatory and administrative measures to ensure that, in accordance with article 6(7) of the Convention, the submission of comments by the public is not limited to only “reasonable” comments.

14. The Committee accordingly finds that Kazakhstan has not yet met the requirements of paragraph 2(c) of decision VI/8g.

Paragraph 2(d) of decision VI/8g

15. With regard to paragraph 2(d) of decision VI/8g, in its first progress report Kazakhstan reports that, according to Article 57 of the Environmental Code, the conclusion of the state environmental expertiza is published on the internet site of the local executive authorities within five days after its receipt by the developer.⁵

16. With respect to publication within five days after its receipt by the developer, the Committee points out that in its report to the sixth session of the Meeting of the Parties it already made clear to Kazakhstan that:

“The requirement in article 57, paragraph 3, that the results of state environmental expertise be published within five working days after its receipt by the project proponent does not necessarily ensure that the public will be promptly informed after the decision is taken. The Committee considers that the starting point for calculating the time period for informing the public of the results of state environmental expertise should be the date that the expertise conclusion is issued by the competent authority and not the date of its receipt by the project proponent.”⁶

17. Likewise, with respect to the means through which the public are to be notified of the environmental expertiza conclusions, the Committee already made clear to Kazakhstan in its report on decision V/9i to the sixth session of the Meeting of the Parties that publication only through websites is not sufficient.⁷

18. In light of the above, the Committee finds that Kazakhstan has not yet met the requirements of paragraph 2(d) of decision VI/8g.

³ Party’s first progress report, 1 October 2018, p. 3.

⁴ Ibid., pp. 6-7.

⁵ Ibid., pp. 1 and 7.

⁶ ECE/MP.PP/2017/41, para. 33.

⁷ Ibid., paras. 34-36.

Paragraph 2(e) of decision VI/8g

19. With respect to paragraph 2(e), in its first progress report Kazakhstan reports upon rule 27 of the Rules for Public Hearings which requires that a protocol of the hearing be prepared reflecting the comments and proposals from the public concerned, the developer's position regarding each comment or proposal and information about the possibility to appeal the decision. While not mentioned in its report on paragraph 2(e), in its report on paragraph 2(d), Kazakhstan states that the Rules for Public Hearings require the protocol of the hearing to be placed on the internet site of the local executive body not later than seven days after the hearing.⁸

20. The Committee points out that the recommendation in paragraph 2(e) of decision VI/8g is identical to the recommendation in paragraph 7(c)(ii) of decision V/9i. In its second progress review dated 3 January 2017 on paragraph 7(c)(ii) of decision V/9i, the Committee stated:

“In the draft order to amend the Rules on Public Hearings provided by the Party concerned on 30 March 2017, paragraph 27 of the Rules would be amended and paragraph 28 added so as to ensure the publication on the internet of a protocol of the comments received at the public hearing and the position of the developer on those comments. The Committee considers that, if adopted in its proposed form, this amendment may address the requirement in paragraph 7 (c) (ii) of decision V/9i to provide “evidence of having fulfilled the obligation to provide [the public] with opportunities to submit comments”. However, it would not address the requirements of paragraph 7(c) (ii) to maintain a publicly accessible list or register of the decisions taken to permit activities subject to article 6 of the Convention, together with other information relevant to the decision-making, including evidence of having fulfilled the obligation to inform the public.”⁹

21. Accordingly, in order to fulfil paragraph 2(e) of decision VI/8g, Kazakhstan will need to provide the Committee with evidence that it has taken the necessary legislative, regulatory and administrative measures to maintain a publicly accessible list or register of the decisions taken to permit activities subject to article 6 of the Convention, together with other information relevant to the decision-making.

22. In the light of the above, the Committee finds that Kazakhstan has not yet met the requirements of paragraph 2(e) of decision VI/8g.

Paragraph 5(a) of decision VI/8g

23. In its first progress report, Kazakhstan does not report on its progress to implement paragraph 5(a) of decision VI/8g.

24. The Committee reminds Kazakhstan that the recommendation in paragraph 5(a) of the decision addresses the Committee's finding on communication ACCC/C/2013/88 that:

“...rules 8 and 9 of the Rules on Public Hearings, as amended in 2013, concerning the required content of the public notice...do not correspond to the list of minimum information required under article 6, paragraph 2 (a–e), of the Convention. In particular, the Rules on Public Hearings omit the requirements to notify the public of the authority responsible for making the decision (article 6, paragraph 2 (c)), the date of commencement of the procedure (article 6, paragraph 2 (d) (i)), the indication of the time schedule for the transmittal of comments or questions (article 6, paragraph 2 (d) (v)) and whether the activity is subject to a transboundary environmental impact assessment or not (article 6, paragraph 2 (e)).”¹⁰

25. Kazakhstan has not provided the Committee with any evidence that it has taken legislative, regulatory and administrative measures and practical arrangements to ensure that the content of the public notice prescribed by the Rules of Public Hearings meets all the

⁸ Party's first progress report, 1 October 2018, p. 7.

⁹ ECE/MP.PP/2017/41, para. 38.

¹⁰ ECE/MP.PP/C.1/2017/12, para. 100.

requirements set out in article 6(2) of the Convention. Consequently, the Committee finds that Kazakhstan has not yet met the requirement of paragraph 5(a) of decision VI/8g.

Paragraph 5(b)(i) and (ii) of decision VI/8g

26. Kazakhstan does not report on its implementation of paragraph 5(b)(i) and (ii) of decision VI/8g in its first progress report.

27. The Committee notes however that some of the information Kazakhstan provided with respect to paragraph 2(b) would seem relevant in this context and that information is examined below.

Timeframes for decision-making subject to article 6

28. In its reporting on paragraph 2(b) of the decision, Kazakhstan reports that, according to Article 57-2 of Environmental Code, “local executive bodies twenty days prior to the public hearings provide the public access to environmental information relating to the impact assessment on the environment of the planned economic and other activities and to decision-making process for this activity through the online resource, as well as using other means of informing”.

29. In its findings on communication ACCC/C/2013/88, the Committee found that a period of twenty days may be generally sufficient for the public to prepare and effectively participate in decision-making procedures subject to article 6 of the Convention.¹¹ However, the Committee also held that longer periods may be required in complex cases or when there is voluminous documentation or when the timeframe overlaps with holidays and other non-working days.¹² In this regard, Kazakhstan has provided no evidence that longer timeframes than twenty days can be provided in such situations to ensure that the public can prepare and participate effectively. The Committee thus finds that Kazakhstan has not yet met the requirements of paragraph 5(b)(i) and (ii) of decision VI/8g with respect to decision-making subject to article 6 of the Convention.

Timeframes for decision-making subject to article 7

30. In its report on paragraph 2(b) of the decision, Kazakhstan reports that all plans, programmes and policies on environmental issues are documents of the state planning system and that all documents of the state planning system (with the exception of Kazakhstan Development Strategy up to 2050) are normative legal acts. It states that public participation in the development of instruments of the state planning system is regulated, inter alia, by Article 57-1 of the Environmental Code, paragraph 62 of Presidential Decree dated June 18, 2009 No. 827 “On the system of state planning”, article 18 of the Law “On legal acts” of April 6, 2016 (and before 6 April 2016, the Law “On normative legal acts”) and Order No. 22 of the Minister of Information and Communications approving the “Rules of placement and public discussion of the draft concepts of the bills and draft regulations on the website of public normative legal acts”.

31. According to the Rules approved by Order No. 22, the time-period for public discussion of normative legal acts shall not be less than 10 days from the date of their placement on the internet portal.¹³ State authorities and/or developers of draft normative legal acts shall within three business days after the completion of the period for public discussion consider the comments and suggestions and decide on their acceptance or rejection. The state bodies shall thereafter form and publish a preliminary version of the report on the completion of the public discussion on the draft.¹⁴

¹¹ Ibid., para. 104.

¹² Ibid., paras. 104-105.

¹³ Party’s first progress report, 1 October 2018, p. 4.

¹⁴ Ibid., p. 4.

32. Within one working day after the publication of the draft report on completion of the public discussion online a public vote will be held on the draft normative legal act presented by the public authority and comments and suggestions of the public.¹⁵

33. As a threshold matter, the Committee notes that Kazakhstan has not provided evidence to substantiate its assertion that all plans, programmes and policies on environmental issues are documents of the state planning system and that all documents of the state planning system (with one stated exception) are normative acts that are regulated under the above provisions. The Committee points out it is for Kazakhstan to show that all plans within the scope of article 7 of the Convention, including plans similar to the Plan to Develop World-Class Ski Resorts at issue in ACCC/C/2013/88, are indeed considered to be documents of the state planning system and are so regulated. The Committee therefore invites Kazakhstan to submit appropriate evidence to substantiate its assertion together with its second progress report.

34. Turning to the content of the above regulatory regime, the Committee considers that the time frames reported by Kazakhstan are insufficient. Specifically, a minimum of ten days to comment on normative legal acts starting from the date of their publication, would be sufficient in only rare instances, involving consultations on very simple instruments.

35. The time needed for proper consultations must be sufficient to enable the public to prepare and participate effectively. This requires not only avoiding time frames that overlap with holiday periods and non-working days, but also crucially a consideration of the volume and complexity of the project or plan, programme or policy. Kazakhstan has not provided evidence to demonstrate that ten days is indeed the minimum timeframe for the public to participate and that, in practice, longer time periods are provided, taking into account the nature of the plan, programme or policy in question.

36. Furthermore, the legislation provides for only three business days to consider any comments submitted. This clearly falls short of the time needed to adequately take comments received into consideration, and thereby fails to provide for an adequate timeframe under article 6(3) for the purposes of taking the outcome of public participation into account within the meaning of article 6(8).

37. In the light of the above, the Committee finds that Kazakhstan has not yet met the requirements of paragraph 5(b) (i) and (ii) of decision VI/8g with respect to decision-making subject to article 7 of the Convention.

Paragraph 5(c)(i) of decision VI/8g

38. Kazakhstan does not provide any information on its implementation of paragraph 5(c)(i) of decision VI/8g in its first progress report.

39. The Committee accordingly finds that Kazakhstan has not yet met the requirements of paragraph 5(c)(i) of decision VI/8g.

Paragraph 5(c)(ii) of decision VI/8g

40. Kazakhstan does not provide any information on its implementation of paragraph 5(c)(ii) of decision VI/8g in its first progress report.

41. The Committee accordingly finds that Kazakhstan has not yet met the requirements of paragraph 5(c)(ii) of decision VI/8g.

Paragraph 5(c)(iii) of decision VI/8g

42. Kazakhstan does not provide any information on its implementation of paragraph 5(c)(iii) of decision VI/8g in its first progress report.

¹⁵ Ibid., p. 3.

43. The Committee accordingly finds that Kazakhstan has not yet met the requirements of paragraph 5(c)(iii) of decision VI/8g.

Final remarks

44. In the light of the above, the Committee expresses serious concern regarding the information provided by Kazakhstan in its first progress report on decision VI/8g.

45. Firstly, in its first progress report Kazakhstan has not reported on its implementation of paragraph 5(a)-(c) of decision VI/8g at all. The Committee recalls that in its findings on communication ACCC/C/2013/88, it had indicated that it could not examine the legislation that Kazakhstan provided after the Committee's draft findings had already been sent to the parties in the context of that communication.¹⁶ The Committee had explained that it may instead examine this legislation in its review of the implementation of the findings and any related decision of the Meeting of the Parties on compliance. The Committee will indeed examine Kazakhstan's legislation on article 7 in the context of reviewing Kazakhstan's progress to implement paragraph 5 (a)-(c) of decision VI/8g. However, in order for the Committee to do this, Kazakhstan must provide clear and detailed progress reports describing how it has implemented each of the matters set out in paragraph 5 (a) – (c). This includes explaining to the Committee which provisions of its legislation addresses each of the matters set out in paragraphs 5 (a) – (c). It also includes informing the Committee if any of the legislation previously provided to the Committee has been amended, and to provide the text as amended, or if the legislation is unchanged, to state that fact. The Committee thus requests Kazakhstan in its second progress report due on 1 October 2019 to provide a clear and detailed progress report on how it implements each of the matters set out in paragraphs 5(a) – (c) of decision VI/8g,

46. Secondly, while welcoming Kazakhstan's presentation of its first progress report in the useful format of a table, the Committee points out that the information provided in the table on the implementation of paragraph 2(a), (b), (c) and (e) of decision VI/8g does not address the content of those recommendations at all. The Committee thus urges Kazakhstan when preparing its second progress report to ensure that the information provided indeed clearly addresses the relevant paragraph of the decision.

47. Thirdly, the Committee notes that in its first progress report, Kazakhstan has in several instances (see paras. 916 and 17 above) reported on material that the Committee had already made clear in its report on decision V/9i to the sixth session of the Meeting of the Parties did not meet the requirements of the Convention.

48. Finally, as noted by the communicant of communication ACCC/C/2013/88 in its comments on Kazakhstan's first progress report, all references in Kazakhstan's first progress report are to actions taken prior to the sixth session of the Meeting of the Parties (Budva, Montenegro, 11-13 September 2017). The Committee expresses its serious concern at the lack of progress by Kazakhstan since the sixth session of the Meeting of the Parties.

49. The Committee makes clear its willingness to explain to Kazakhstan what is expected from it in order to fulfil paragraphs 2 and 5 of decision VI/8g. In this regard, as for the other decisions of the Meetings of the Parties on compliance, the Committee will hold an open session on decision VI/8g at its sixty-third meeting (Geneva, 11-15 March 2019). Kazakhstan, communicants and observers will be invited to take part in that session. The Committee strongly encourages Kazakhstan to actively take part in that session in order to gain a clear and accurate understanding of what will be required from it in order to meet the requirements of decision VI/8g and be found to be no longer in non-compliance.

¹⁶ ECE/MP.PP/C.1/2017/12, para. 94.

IV. Conclusions

50. The Committee finds that Kazakhstan has not yet met the requirements of decision VI/8g.

51. While welcoming the first progress report of Kazakhstan which was received on time, the Committee expresses serious concern that Kazakhstan has entirely failed to report on paragraph 5 of decision VI/8g and has failed to demonstrate any progress with respect to meeting the requirements of paragraph 2 of decision VI/8g.

52. The Committee invites Kazakhstan to structure its second progress report due on 1 October 2019 in a format (e.g. a table) that clearly explains what measures have been taken, or are being taken, to address each of the recommendations in paragraphs 2(a)-(e) and paragraphs 5(a), 5(b)(i) and (ii), and 5(c) (i)-(iii) of decision VI/8g.

53. The Committee invites Kazakhstan, together with its second progress report due on 1 October 2019 to:

(a) Provide evidence that it has taken the necessary legislative and regulatory measures to fully meet each of the requirements in paragraphs 2(a)-(e) of decision VI/8g;

(b) Provide evidence that it has taken the necessary legislative, regulatory and administrative measures and practical arrangements to fully meet the requirements in paragraphs 5(a), 5(b)(i) and (ii), and 5(c) (i)-(iii) of decision VI/8g.

(c) Submit the texts of any legislative, regulatory or administrative measures intended to implement the recommendations in paragraphs 2(a)-(e) or paragraphs 5(a), 5(b)(i) and (ii), and 5(c) (i)-(iii) of decision VI/8g that are available either in draft or final form at the time of submitting its second progress report, together with English translations thereof, as well as an approximate timeline for the adoption of any of the proposed measures still then in draft form.

(d) Provide evidence to substantiate its assertion that all plans, programmes and policies on environmental issues, including plans similar in nature to the Plan to Develop World-Class Ski Resorts, are documents of the state planning system and that all documents of the state planning system (with one stated exception) are normative acts.
