

Findings and recommendations with regard to communication ACCC/C/2013/88 concerning compliance by Kazakhstan

Adopted by the Compliance Committee on 19 June 2017¹

I. Introduction

1. On 31 May 2013, a group of twelve members of the public, five of them members of the Ecological Society “Green Salvation” acting in their individual capacity and all represented by Mr. Sergey Solyanik (together the communicants), submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging the failure of Kazakhstan to comply with its obligations under article 6, paragraphs 2, 3 and 7, article 7 generally, and article 7 in conjunction with article 6, paragraphs 3, 4 and 8 of the Convention.²
2. Specifically, the communicants allege that the Party concerned has failed to comply with articles 6 and 7 of the Convention by failing to ensure public participation in the decision-making in relation to the construction of a ski resort in the Kok Zhailau area of the Ile-Alatau state national park. They also allege the overall failure of Kazakhstan to ensure public participation concerning plans, programmes and policies relating to the environment in accordance with article 7 of the Convention.³
3. At its forty-first meeting (25-28 June 2013), the Committee determined on a preliminary basis that the communication was admissible.
4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 26 July 2013.
5. The Party concerned provided its response to the communication on 3 April 2014.
6. On 7 January, 27 August and 9 December 2014 the communicants provided additional information.
7. The Committee held the hearing to discuss the substance of the communication at its forty-seventh meeting (16-19 December 2014), with the participation of a representative of the communicants. During the hearing, the Committee confirmed that the communication was admissible. Despite repeated invitations and reminders by the secretariat, the Party concerned did not take part in the discussion. The Committee requested the UNECE Executive Secretary to write to the Party concerned’s Ministry of Foreign Affairs indicating the Committee’s strong concern at the lack of engagement demonstrated by the Party concerned despite numerous reminders and despite arrangements having been made for the Party to participate in the discussion via audio-conference. The Committee agreed that it would also report the Party’s non-attendance to the sixth session of the Meeting of the Parties.
8. Following the hearing, on 6 March 2015, the Committee put a number of questions to both the communicants and the Party concerned and invited them to respond in writing by 1 April 2015.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

² See communication, page 1, for a list of the communicants.

³ Communication, page 3.

9. The communicants and the Party concerned submitted their responses on 2 April 2015 and 4 June 2015, respectively.
10. The Committee agreed its draft findings through its electronic decision-making procedure on 15 June 2016. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicants on 27 June 2016. Both were invited to provide comments by 25 July 2016.
11. The communicants and the Party concerned provided comments on 14 July 2016 and 3 September 2016 respectively.
12. By email of 14 September 2016, the Committee asked the Party concerned to provide the texts of the legislation referred to in its comments on the draft findings, which the Party concerned duly did on 16 September 2016.
13. The Committee proceeded to finalize its findings in closed session. After taking into account the comments received, the Committee made some minor amendments and agreed that no other changes to its findings were necessary. The Committee then adopted its findings at its virtual meeting on 19 June 2017 and agreed that they should be published as a formal pre-session document to its fifty-eighth meeting (Budva, Montenegro, 10-13 September 2017). It requested the secretariat to send the findings to the Party concerned and the communicants.

II. Summary of facts, evidence and issues⁴

A. Legal framework

Decision-making on specific activities

14. The development control system of the Party concerned follows the model applied in many countries of Eastern Europe, the Caucasus and Central Asia whereby the decision-making process includes (i) an OVOS (*Оценка воздействия на окружающую среду*) procedure carried out by the developer and (ii) a state environmental *expertiza* conducted by the competent authority. Under article 51, paragraphs 1 and 2 of the Environmental Code, the competent authority considers the project design and the final OVOS report (*отчет по оценке воздействия на окружающую среду*), including the report on public participation submitted by the developer, and issues its *expertiza* conclusion which, together with the construction permit, constitute the decision of a permitting nature.
15. Article 47 of the Environmental Code specifies the various types of activities to be subject to state environmental *expertiza*.
16. Clause 12 of Annex 2 to the “Guidelines on Assessing the Impact of Planned Business Activities on the Environment in the Course of Preparing Preliminary, Planning, Pre-Design and Design Documents” approved by Order 204-p of the Ministry of Environmental Protection of the Republic of Kazakhstan on 28 June 2007, states that “pistes, lifts, ropeways and associated structures” are subject to assessment.⁵
17. In accordance with article 57, paragraph 2 of the Environmental Code, all interested citizens and public associations shall be granted an opportunity to express their opinion during the conduct of a state environmental *expertiza*.⁶
18. At the time of the events at issue in this case, the procedure for the conducting of public hearings was prescribed by Order No. 135–IIa of the Minister of Environmental

⁴This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

⁵Communication, page 1.

⁶Communication, page 8.

Protection of 7 May 2007 “On Approval of Rules for Public Hearings”, as amended.⁷ With respect to public notice, Rules 8 and 9 stipulated:

8. Customer agrees beforehand with local authorities (in whose territory the planned work) time and place of the public hearing and publish an advertisement in the media about the conduct of public hearings. Publication of announcement made in the state and Russian languages, no later than twenty days prior to the public hearings. This ad is also posted on the website of the local executive bodies. Customer uses additionally other ways of informing the public (newsletters, displays, individual notice).

9. The declaration states:

- 1) the date, time and place of the public hearing;
- 2) the project or project plan to be submitted to a public hearing;
- 3) the address of the place where the public can familiarize themselves with projects in paper form;
- 4) the address of an Internet resource, which contains materials in electronic form;
- 5) in the absence of an Internet resource specified e-mail address where you can request materials in electronic form;
- 6) e-mail address where comments and suggestions received.

Plans, programmes and policies

19. The right of the public to participate in the environmental decision-making process with regard to plans and programmes is set out in articles 13 and 14 of the Environmental Code. Article 13, paragraph 1(9) states that physical persons shall have a right “to participate in the process of preparation of plans and programs related to the environment”. Article 14, paragraph 1(10) states that “public associations in the performance of their activity in the area of environmental protection” shall have a right to “participate in the process of preparation of plans and programs related to the environment.”⁸

20. The Decree of the President of the Republic of Kazakhstan dated 18 June 2009, no 827 “On the system of state planning in the republic of Kazakhstan” approved the state planning system. Pursuant to section 4 of the Decree, the state planning system includes:⁹

- (i) The Development Strategy of Kazakhstan until 2050;
- (ii) The Strategic Development Plan of the Republic of Kazakhstan for 10 years, forecast scheme of territorial and spatial development of the country;
- (iii) The National Security Strategy of the Republic of Kazakhstan;
- (iv) The 5 year forecast of socio-economic development;
- (v) State programmes for 5-10 years;
- (vi) Sectoral programmes;
- (vii) The strategic plans of state bodies for 5 years;
- (viii) Territorial development programmes for 5 years;
- (ix) The 10 year development strategy of national Governing holdings, national holdings and national companies with state participation in the authorized capital.

⁷As amended by Order of the Minister of Environmental Protection of 26.03.2013 № 50-Oe.

⁸ English translation available at <http://invest.gov.kz/upload/docs/en/323a08584fc35cf34230a6139a54d974.pdf>.

⁹ Party’s replies to Committee’s questions, 4 June 2015, pp.3-4.

B. Facts

21. Kok Zhailau is a gorge that at the time the communication was submitted was part of the Ile-Alatau State National Nature Park (Ile-Alatau Park).¹⁰ The Ile-Alatau Park is included in the tentative list of sites of the UNESCO World Heritage List.
22. According to the communicants, the possibility of constructing a ski resort in the Kok Zhailau area was first raised by the Almaty city authorities in 2007.¹¹
23. In 2008, the ability to withdraw lands of specially protected natural territories for the purpose of the construction of tourism facilities was created.¹²
24. In 2011, Mr. Yessimov, Akim (Mayor) of Almaty, stated publicly that it was planned to build an international ski resort in the Kok Zhailau area.¹³
25. On 27 January 2012, the President of Kazakhstan stated that the diversification of foreign direct investment flows in Kazakhstan's economy was an important development issue, and should be directed to promising sectors such as "the development of tourism and world-class ski resorts near Almaty".¹⁴
26. On 30 January 2012, the communicants sent an open letter to the President, the Parliament, the Ministry of Industry and New Technologies, the Ministry of Agriculture, the Ministry of Environmental Protection, the Ministry of Finance, the Almaty Akimat and political parties in Kazakhstan, objecting to the proposal to construct a ski resort in Kok Zhailau.¹⁵
27. In July 2012, article 47, paragraph 1(2) of the Environmental Code was amended to remove projects of state, sectoral and regional programmes from the categories of activities subject to mandatory state environmental expertiza.¹⁶
28. In October-December 2012, a feasibility study for the Kok Zhailau ski resort, including a preliminary OVOS report, was prepared at the request of the Almaty Tourism Department.¹⁷
29. On 27 December 2012, notice that the public hearing on the preliminary impact assessment report on the Kok Zhailau feasibility study would be held on 11 January 2013 was published in the *Vecherniy Almaty* and *Almaty akshamy* newspapers and on the website of the Almaty Department of Tourism.¹⁸
30. On 29 December 2012, a "Plan to Develop World-Class Ski Resorts in Almaty Region and around Almaty City" was approved by Governmental Resolution 1761. The Plan contained a timetable of measures and activities, allocating certain tasks to different state agencies and interested organizations with indication of deadlines, expected results and source of funding.¹⁹ Item 29 of the plan refers to the conducting of public hearings on the construction of the ski resort in 2013.²⁰
31. On 11 January 2013, the public hearing on the preliminary OVOS report on the Kok Zhailau feasibility study was held at Kazgidromet in Almaty.²¹ Approximately one

¹⁰Communication, page 1.

¹¹Communication, page 1.

¹²Case 2-15084/13, decision of 25 November 2013 and additional information from communicants dated 27 August 2014, page 3.

¹³Case 2-15084/13, decision of 25 November 2013, page 3. According to the decision, this was stated by the defendant.

¹⁴Case 2-15084/13, decision of 25 November 2013, page 3.

¹⁵Annex 1 to the communication.

¹⁶Law of the Republic of Kazakhstan dated on 3 July 2012 No.124-V.

¹⁷Case 2-15084/13, decision of 25 November 2013, page 4.

¹⁸Annex 2 to the Party concerned's response to Committee's questions following hearing, 4 June 2015.

¹⁹Annex 5 to the communication, translation provided by the communicants.

²⁰Ibid.

²¹Communication, page 2.

hundred people took part in the hearing, including representatives from governmental agencies and public associations.²²

32. On 4 February 2013, a letter was sent to the Prime Minister of Kazakhstan by the communicants and other persons (358 signatures) highlighting the high environmental and economic risks of the project, as well as the need to involve the public in the discussion of the “Plan to Develop World-Class Ski Resorts in Almaty Region and around Almaty City”.²³

33. On 18 February 2013, the Maslikhat (local council) of the City of Almaty adopted Decision N93 “On Approval of the Development Plan of the City of Almaty for 2011-2015”.²⁴

34. On 1 March 2013, a television talk show ‘Nasha Pravda’ devoted to the topic of the Kok-Zhailau mountain ski resort was aired on a commercial channel, KTK.²⁵

35. On 4 March 2013, the Almaty Department for Natural Resources and the Regulation of Nature Use Management issued a positive conclusion of state ecological expertise on the preliminary OVOS report.

36. On 7 March 2013, the Ministry of Industry and New Technologies (MINT), on behalf of the Prime Minister, replied to the communicants’ letter of 4 February 2013. It stated that the MINT had assessed the tourist potential and prepared a plan for the development of the Almaty ski area. The studied area included the Ile-Alatau national park, the Almaty reserve and the existing ski resorts. The study had determined Southern Kaskelen as a priority area for developing an international ski resort near Almaty, along with three other areas – Kok Zhailau, Northern Kaskelen and Northern Turgen. The letter stated that the plan to develop the Almaty ski area was not subject to state environmental expertiza under article 47 of the Environmental Code.²⁶

37. The preliminary OVOS report of the Kok Zhailau feasibility study was approved by the State Environmental Examination Committee of the Almaty Natural Resources Department on 14 April 2013.²⁷

38. On 28 August 2013, the Forest and Hunting Committee adopted decision N244 “On Establishment of a Commission to Consider the Issue on Absence of Alternatives for Possible Location of Kok Zhailau Resort”. The Commission was composed of representatives of interested state authorities – Almaty Territorial Forest and Hunting Inspection, Ile-Alatau National Park, the Tourism Industry Committee of the Ministry of Industry and New Technologies, the Department of Ecology of Almaty, the Tourism Department of Almaty and the Department of Land Management of Almaty.²⁸

39. In December 2013, the Commission that had been established by the Forest and Hunting Committee issued a conclusion on the absence of alternative locations for the ski resort project.²⁹

40. On 25 February 2014, the public hearing on the “Feasibility study on the transfer of land plot of the Ile Alatau national park for the construction of the ski resort on Kok Zhailau” took place at the “Shymbulak” ski resort, approximately 20-25 kilometres from the centre of Almaty.³⁰

²²Judgment in case 2-15084/13, page 9.

²³ Communication, pp. 2-3.

²⁴Party concerned’s response to communication, 3 April 2014, Annex I, page 1.

²⁵Party concerned’s response to communication, 3 April 2014, page 2.

²⁶ Communication, page 3.

²⁷Communication, page 3.

²⁸Party concerned’s response to Committee’s questions following hearing, 4 June 2015, Annex I, page 4.

²⁹Ibid.

³⁰Communicants’ opening statement for hearing at Committee’s forty-seventh meeting, page 3.

41. On 5 May 2014, the public hearing on the OVOS of the construction of the Kok Zhailau ski resort was held.
42. On 19 May 2014, Governmental Decree N508 “On Approval of the Concept of Development of Tourism Branch in the Republic of Kazakhstan till 2020” was adopted.³¹
43. On 2 June 2014, the Committee of Environmental Regulation and Control of the Ministry of Environment and Water Resources issued a positive conclusion on the state ecological expertise.
44. On 31 July 2014, the Almaty Akimat’s (Mayor’s) Department for Natural Resources and the Regulation of Nature Use issued a positive conclusion on the state ecological expertise.³²
45. Pursuant to the Decree of the President “About reformation of the system of the state governing of the Republic of Kazakhstan” dated 6 August 2014, the Ministry of Environment and Water Resources was dissolved, and the Ministry of Energy became the national authority responsible for environmental issues.
46. In August 2014, construction started on the Kok Zhailau ski resort.³³ The project is expected to include the construction of 65 kilometres of pistes, chair lifts, hotels, restaurants, trade and entertainment centres, golf courses and related infrastructure (roads, parking areas, power and water supplies).³⁴
47. On 2 December 2014, the Government approved the decision to transfer 1002 hectares of the Ile Alatau Park for the purposes of the Kok Zhailau project.³⁵

C. Domestic remedies

Plan to Develop World-Class Ski Resorts in Almaty Region and around Almaty City

48. The communicants assert that no domestic remedies were available to challenge Governmental Resolution N1671 approving “A Plan to Develop World-Class Ski Resorts in Almaty Region and around Almaty City” because, according to MINT, the Plan is addressed to the government of Kazakhstan only. It thus does not directly affect the interests and rights of the citizens and is not subject to administrative or judicial review by members of the public.³⁶

Decision-making on Kok Zhailau ski resort

49. On 3 June 2013, the communicants filed court proceedings with the Specialized Inter-regional Economic Court (SIEC) of the City of Astana alleging that the Ministry for Environment and Water Resources had failed to fulfil its responsibilities to use state property for the wellbeing of society and to maintain the integrity of Ile-Alatau National Park. The case was rejected on the ground that the court did not have jurisdiction. The Yessil District Court of the city of Astana did not accept the case either, on the grounds that the papers were not correctly presented and that it lacked jurisdiction.³⁷
50. On 7 October 2013, subsequent to the submission of the communication, Green Salvation filed a claim with the SIEC for the City of Almaty against the Almaty Department for Natural Resources and Nature Use Management and the Tourism Department requesting to invalidate State Environmental Expertiza Conclusion 07-08-133 dated 13

³¹Party concerned’s response to Committee’s questions following hearing, 4 June 2015, Annex I, page 1.

³²Communicants’ opening statement for hearing at Committee’s forty-seventh meeting, page 4.

³³Additional information from the communicants, 27 August 2014, p.1.

³⁴Communication, p.1.

³⁵Communicants’ opening statement for hearing at Committee’s forty-seventh meeting, page 4.

³⁶MINT Letter 16-06/2-6963//11-23/N-284 dated 7 March 2013.

³⁷Additional information from the communicants, 27 August 2014, page 2.

April 2013 with respect to the preliminary OVOS documents included in the Feasibility Study for the Kok Zhailau Ski Resort Project.³⁸

51. On 25 November 2013, the SIEC rejected Green Salvation's lawsuit.³⁹

52. On 17 March 2014, Green Salvation's petition of appeal against the SIEC's judgment of 25 November 2013 was considered and rejected by the City Court of Astana.⁴⁰

53. On 2 April 2014, the communicants filed a lawsuit challenging the validity of the public hearings regarding the feasibility study for the withdrawal of lands from the Ile-Alatau National Park for the construction of the Kok Zhailau ski resort. The application was not accepted for consideration by the Court because, in the Court's opinion, "the public hearings and protocol disputed by the claimants do not cause any juridical consequences".

54. Also, in 2014, members of the public, with support from the communicants, filed two further lawsuits. The first lawsuit was not accepted for consideration, on the ground that the papers were prepared incorrectly. The second lawsuit, filed before the District Court on 11 June 2014, related to a failure to provide environmental information, namely the feasibility study for the Kok Zhailau project prepared by the Department of Tourism of the city of Almaty as well as the alleged violation of rights and lawful interests guaranteed by the Aarhus Convention and national legislation. The Court rejected the lawsuit.⁴¹

55. On 1 July 2014, the communicants filed another case before the City Court of Astana, in which the Court determined that the case was within the jurisdiction of the SIEC.⁴²

56. On 30 September, 2014, the communicants submitted an appeal to the Civil Affairs Review Board of the Supreme Court against the SIEC's decision of 17 March 2014.

57. On 4 December 2014, the Civil Affairs Review Board of the Supreme Court rejected the communicants' application to initiate review proceedings.

D. Substantive issues

Article 6

58. The communicants assert that the Kok Zhailau project is an activity subject to article 6, paragraph 1(b) of the Convention, since in accordance with clause 20 of Annex I to the Convention, the activity is subject to environmental impact assessment in accordance with national law (see para. 16 above).⁴³

59. The communicants submit that the environmental impact assessment (OVOS) of the Kok Zhailau project was carried out in violation of articles 6, paragraphs 2, 3 and 7 of the Convention.

60. The communicants submit that the violations of article 6 in relation to the Kok Zhailau project are the same as those established by the Compliance Committee in its findings on communication ACCC/C/2010/59. The communicants suggest, therefore, that the Committee may wish to consider them in the context of its review of the Party concerned's implementation of the Committee's recommendations in that case.⁴⁴

³⁸Decision in Case 2-15084/13, pages 1 and 10.

³⁹Party concerned's response to communication, 3 April 2014, page 2.

⁴⁰Ibid.

⁴¹Additional information from the communicants, 27 August 2014, page 3.

⁴²Ibid., page 2.

⁴³Communication, page 1.

⁴⁴Communicants' opening statement for hearing at Committee's forty-seventh meeting, page 4.

Article 6, paragraph 2

61. With respect to notice under article 6, paragraph 2 of the Convention, the communicants claim that the announcement of the public hearing was incomplete.⁴⁵ More specifically, the announcement of the public hearing published in the *Vecherniy Almaty* newspaper on 27 December 2012 did not state the public authority responsible for making decisions on the project (article 6, paragraph 2 (c)) or the address and timeframes for transmittal of comments or questions (article 6, paragraph 2(d)(v)). In addition, the announcement did not state whether, in the light of the proximity of the proposed resort to the border between Kazakhstan and Kyrgyzstan, the project was subject to a trans-boundary environmental impact assessment procedure (article 6, paragraph 2 (e)).⁴⁶

62. The Party concerned submits that on 27 December 2012 the notice was placed in the *Almaty Akshamy* and *Evening Almaty* newspapers and on the website of the Almaty Department of Tourism.⁴⁷

Article 6, paragraph 3

63. With regard to article 6, paragraph 3, the communicants allege that the timeframe provided for the public to have access to examine the OVOS documentation was very limited, making it impossible to comprehensively study the document.⁴⁸ The communicants allege that the period between the notice of the public hearing on 27 December 2012 and the public hearing on 11 January 2013 was 15 calendar days, of which 7 were either holidays or weekends.⁴⁹

64. In addition, the communicants allege that because the website of the Department of Tourism was not working, members of the public could obtain access to the preliminary OVOS report only three days before the hearing when it was posted on the website of Green Salvation.⁵⁰ Moreover, it was impossible to get into the Department of Tourism to inspect the documentation in person, since it is located in the Almaty Akimat which has strict entrance restrictions.⁵¹ For this reason the public did not have enough time to examine the preliminary OVOS documents and prepare comments.⁵²

65. The Party concerned states that Almaty Department of Tourism gave Green Salvation the relevant project documentation on compact discs. The documents for the preliminary OVOS of the construction of the Kok Zhailau ski resort were also made available on the webpage of Almaty Department of Tourism together with the relevant announcement.⁵³

Article 6, paragraph 7

66. Regarding article 6, paragraph 7, the communicants make various allegations with respect to the hearing on the preliminary OVOS report on 11 January 2013 and the public hearing on the “Feasibility study of the transfer of land plot of the Ile Alatau national park for the construction of the ski resort on Kok Zhailau” on 25 February 2014 as set out below.

⁴⁵Communication, page 3.

⁴⁶Communication, page 2.

⁴⁷Party concerned’s comments on draft chronology, 4 June 2015, page 2.

⁴⁸Communication, pages 3-4.

⁴⁹Communicants’ opening statement at hearing at Committee’s forty-seventh meeting, page 3.

⁵⁰Ibid., page 3.

⁵¹Communicant’s reply to Committee’s questions, 25 November 2015, Annex 1, page 1.

⁵²Communication at 5-6. See also Communication at page 2 for a similar point, and the relevant web address:http://www.greensalvation.org/index.php?page=KokZhaylyau_campaign

⁵³Response by the Party concerned to the Committee’s questions, Annex 2, p.2.

67. The communicants also make a more general allegation that public comments were gathered only at public hearings.⁵⁴ The communicants submit that this fact is clear from the website of the Almaty Department of Tourism.⁵⁵

Hearing on preliminary OVOS report, 11 January 2013

68. The communicants allege that not all those who wanted to take part in the public hearing on the preliminary OVOS report held on 11 January 2013 could do so, because access to the Kazgidromet building was restricted by a private security service forty minutes before the hearing.⁵⁶ Only after a confrontation and involvement of mass media were those persons who arrived after that time permitted to enter the venue. The communicants contend that the public was notified only about the requirement to register between 8.30-9.00am but no prior notice was given of a requirement to arrive at least 40 minutes before the hearing.⁵⁷ The communicants allege that as a result of this requirement, not all participants were allowed to be registered and the opinion of non-registered participants was ignored.⁵⁸

69. Moreover, the communicants allege that the hearing for such a large-scale project which will affect 1.5 million people living in Almaty took only three hours. During the hearing many of those who wanted to speak or ask questions to the developers and municipal authorities were prevented from doing so. Not all questions were answered and some of the statements and documents submitted by the public were not included in the minutes of the hearing.⁵⁹

70. The Party concerned submits that everyone who came to the public hearings was registered. After the public hearing was held, answers to all questions raised at the hearings were prepared as an Annex to the Minutes and posted on the Almaty Department of Tourism's website. It states that no questions about the Minutes of the Public Hearings have been received by the Almaty Department for Tourism.

71. The Party concerned states that in addition, on 1 March 2013, a talk show 'Nasha Pravda' ('Our Truth') on the topic of the Kok-Zhailau mountain ski resort was aired on the commercial television channel, KTK.

72. Moreover, on 9 September 2013, the Almaty Department for Tourism took part in Citizen Hearings organised by Green Salvation and others, where issues relating to the mountain ski resort were clarified.

Hearing on "Feasibility study of the transfer of land plot of the Ile Alatau national park for the construction of the ski resort on Kok Zhailau" on 25 February 2014

73. The communicants submit that the only way to travel to the Shymbulak ski resort where the hearing was held (20-25 kilometres from Almaty) was by bus, which goes once an hour to the stop, Medeo. From Medeo, participants had to take either a taxi or a cable car, which while free of charge, ran late. The communicants state that not everyone who wanted to discuss the project was able to travel so far from the city on a working day during working hours and that, prior to the hearing, city residents had sent dozens of letters to the Almaty Department of Tourism requesting to move the public hearing to a later date in order for the public to have more time to acquaint themselves with the documentation and also to hold the hearing during a weekend and in the centre of the city. However, these requests were ignored.

⁵⁴Communicant's opening statement for hearing at forty-seventh meeting, page 3.

⁵⁵ <http://almatytourism.kz/index.php/ru/proekt-gorno-lyzhnogo-kurorta-kok-zhajlyau>.

⁵⁶Communication, page 4.

⁵⁷Communicant's reply to Committee's questions, 25 November 2015, page 1.

⁵⁸Communicant's reply to Committee's questions following hearing, 2 June 2015, page 3.

⁵⁹Communication, pages 2 and 6.

74. The Party concerned submits that the Shymbuluk ski resort was chosen to provide opportunities for the public to visit the resort and that the public was provided with a free shuttle bus to the Medeo gondola station and then a free gondola to the resort itself.⁶⁰

Article 7

75. The communicants raise two interconnected allegations regarding article 7. First, they allege the overall lack of appropriate legal mechanisms under national law to ensure public participation in the process of preparing plans, programmes and policies relating to the environment generally.⁶¹ Second, they allege that the Party concerned failed to ensure proper public participation during the preparation of the “Plan to develop world-class ski resorts” adopted by Governmental resolution N1761 of 29 December 2012.

Legal framework in general

76. With respect to the legal framework in general, the communicants submit that the Party concerned does not have a procedure for ensuring public participation in the preparation of plans and programmes relating to the environment.⁶²

77. The communicants submit that in addition, the deletion of state projects and sectoral and regional programmes from the list of documents subject to obligatory state environmental expertiza under article 47 of the Environmental Code (see para. 27 above) is in contradiction to the requirements of article 7 of the Convention.

78. With regard to the alleged failure to provide procedures and practical measures for public participation in the preparation of plans and programmes relating to the environment, the Party concerned submits that in accordance with the Private Entrepreneurship Act, the Minister for the Environment and Water Resources created an Expert Council on Entrepreneurial Issues attached to the Ministry. Its membership includes accredited associations of private businesses and interested commercial organizations. Under the mandatory procedure, draft normative legal acts are sent to the Expert Council for expert comments and conclusions.

79. The Party concerned states that in addition to a Public Environmental Council, public councils on water resources, forestry, hunting and fishing (“sectoral public councils”) have also been created under the auspices of the Ministry. Membership of these Councils includes representatives of the Ministry, public authorities, public organizations and the business sector, as well as leading academics and public figures. The Party concerned states that two thirds of the members of these Councils are representatives of public organizations and the business sector. The tasks of the Public Environmental Council include involving civil society in the formulation and implementation of the government’s environmental policy. The tasks of the sectoral public councils include making recommendations for improving legislation in the areas of protection and use of water resources, forests and fauna, water conservation, drawing on international experience and with a view to attracting investment.

80. The communicants counter that there is no “Public Environmental Council”, but rather a “Public Council under the Ministry of Energy”, also referred to in government documents as the “Public Council on Fuel and Energy Complex and Ecology”. They state that the scope of its activities is much wider than government environmental policy, and covers inter alia policy on development of the oil, gas and coal industries and nuclear energy. They submit that it is not clear what the Party concerned means by “public organizations” and that the most active and independent environmental non-governmental organizations (NGOs) are not included in the membership or activities of the public councils.

81. With respect to the communicants’ allegation that the deletion of state projects and sectoral and regional programmes from the list of documents subject to obligatory state

⁶⁰Party concerned’s response to Committee’s questions after hearing, 4 June 2015, page 8.

⁶¹Communication, page 4.

environmental expertiza under article 47 of the Environmental Code (see para. 27 above) contradicts the requirements of article 7 of the Convention, the Party concerned submits that in accordance with article 47 of the Environmental Code documentation on planned activities that have an impact the environment shall be subject to mandatory state environmental expertiza.⁶³

82. The Party concerned also states that action plans on environmental protection designed to obtain permits for emissions into the environment for activities considered to be category I or II activities under article 40 of the Environmental Code are required to be submitted to public hearings.⁶⁴

Plan to Develop World-Class Ski Resorts in Almaty Region and near Almaty

83. With respect to the “Plan to Develop World-Class Ski Resorts in Almaty Region and near Almaty” the communicants submit that the MINT took the view that the Plan was not subject to state environmental expertiza and, consequently, did not need to be discussed with the public.⁶⁵ The communicants submit that, in accordance with article 47 of the Environmental Code, development projects covering special economic zones (such as the Ile-Alatau National Park) are subject to state environmental expertiza, and thus, the MINT’s view was incorrect and a public participation procedure should have been carried out.⁶⁶

84. The Party concerned does not dispute that the “Plan to Develop World-Class Ski Resorts” is a plan relating to the environment within the meaning of article 7 of the Convention.

Article 7 in conjunction with article 6 paragraphs 3, 4 and 8

85. With regard to article 6, paragraph 3, the communicants say the Party concerned does not have an established practice of ensuring public participation in the discussion of plans and programmes relating to the environment nor does it have national legislation governing this. There is no established procedure for making strategic environmental assessments of policies, programmes and plans (there is no such notion in the Party concerned’s laws at all) and, consequently, to ensure public participation in the discussion of their possible impact on the environment.⁶⁷

86. Regarding article 6, paragraph 4, the communicants say that since the Party concerned lacks procedures for ensuring public participation in the preparation of plans, programmes and policies relating to the environment, public discussion of many projects is not conducted at the earliest stage possible. Concerning the Kok Zhailau project, public discussion began after the Almaty authorities had already chosen the location for construction without discussing with the public alternate options that had been determined by the MINT.⁶⁸

87. Concerning article 6, paragraph 8, the communicants say that since programmes and plans relating to the environment are not discussed with the public as required by article 7 of the Convention, decisions adopted with respect to these documents do not take full account of the outcomes of the public participation. An example of this was the Plan to Develop World-Class Ski Resorts. The failure to ensure that public opinion was taken into account in the Plan has resulted in the Almaty authorities having selected the location for the construction of the Kok Zhailau resort on their own and thereby causing an acute social and environmental conflict with the residents of Almaty.⁶⁹

88. With respect to the Plan to Develop World-Class Ski Resorts, the Party concerned comments are set out in paragraphs 70-72 above.

⁶³Party concerned’s response to Committee’s questions after hearing, 4 June 2015, page 3.

⁶⁴Ibid.

⁶⁵MINT Letter 16-06/2-6963//11-23/N-284 dated 7 March 2013.

⁶⁶Communication, page 3.

⁶⁷Communication, pages 3 and 4.

⁶⁸Communication, page 4.

⁶⁹Communication, pages 4-5.

III. Consideration and evaluation by the Committee

89. Kazakhstan deposited its instrument of ratification of the Convention on 11 January 2001. The Convention entered into force for Kazakhstan on 30 October 2001, the date of the Convention's general entry into force.

The scope of the considerations of the Committee

Legal issues already examined in communication ACCC/C/2010/59

90. The communicants' main allegations relate to public participation with regard to the Plan to Develop World-Class Ski Resorts (article 7 generally and article 7 in conjunction with article 6, paragraphs 3, 4 and 8 of the Convention) and through this example they seek to demonstrate the lack of both relevant national legal regulation and administrative practice to comply with the Convention. To this end, the Committee considers it necessary to examine both the general legal framework and the practice with respect to the specific document at stake.

91. The communicants' other allegations relate to public participation (article 6, paragraphs 2, 3 and 7) with regard to the specific project connected to the Plan to Develop World-Class Ski Resorts.

92. The Committee notes that it assessed the Party concerned's national regulatory scheme regarding article 6 of the Convention in its findings on communication ACCC/C/2010/59. In those findings, the Committee found that the Party concerned was in non-compliance with article 6, paragraphs 2, 6, 7 and 9, of the Convention.⁷⁰

93. Bearing in mind that the Committee is reviewing the Party concerned's progress in implementing the findings and recommendations on communication ACCC/C/2010/59 in the context of decision V/9i of the Meeting of the Parties, the Committee will not examine issues already considered in the earlier case. However, the Committee will examine those aspects of the Party concerned's legal framework and practice raised in the present case that were not dealt with in the earlier communication.

Information provided after the Committee's draft findings

94. In its comments on the Committee's draft findings,⁷¹ the Party concerned provided a list of legislation through which it says that public participation in decision-making on plans, programmes and policies on environmental issues is regulated. While welcoming this information, including the new legislation adopted in April and June 2016, since the legislation was put before the Committee only after the draft findings were sent to the parties, it is not in a position to examine the extent to which the legislation meets the requirements of article 7 in the context of the present communication. Rather, the Committee may examine this legislation in its review of the implementation of the present findings and any related decision of the Meeting of the Parties on compliance.

Admissibility and exhaustion of domestic remedies

95. The Committee points out to the communicants that all domestic remedies related to the decision-making at issue should in general be exhausted before a communication is submitted to the Committee. In this case, relevant domestic proceedings were still ongoing, and in fact, some had not even been filed, at the time that the communication was submitted. The Committee discourages such a practice, as it is

⁷⁰ ECE/MP.PP/C.1/2013/9, paras. 66-69.

⁷¹ Party concerned's comments on the draft findings, 3 September 2016, pp.4-5.

important that the Party concerned's own administrative and judicial review procedures have the opportunity to rectify any defects in its domestic procedures before a case is brought before an international review mechanism such as the Committee. However, since in this case it appears that, following the rejection on 4 December 2014 of the communicant's application for permission to appeal to the Supreme Court, all domestic remedies with respect to the decision-making to permit the Kok Zhailau project were exhausted, the Committee finds the allegations under article 6 admissible.

96. With respect to the communicant's allegations of non-compliance with article 7, the communicants assert that there were no domestic remedies available and the Party concerned has not disputed this point. The Committee finds the allegations regarding article 7 to be admissible.

Application of article 6

97. According to the Guidelines approved by Order 204-p of the Ministry of Environmental Protection of the Republic of Kazakhstan, the Kok Zhailau ski resort project is subject to mandatory OVOS and state environmental expertiza, including public participation. It is thus an activity subject to an EIA procedure with public participation under national law as envisaged in paragraph 20 of annex I to the Convention, and is therefore subject to article 6, paragraph 1 (a) of the Convention. The public participation provisions of article 6 accordingly apply.

98. The project to construct the Kok Zhailau ski resort included a range of decision-making procedures involving public participation subject to article 6 of the Convention. In chronological order, these proceedings, together with the corresponding public hearings and decisions taken, were as follows:

- On 11 January 2013, the public hearing on the preliminary OVOS report and the summary of the project feasibility study was held. On 4 March 2013, the Municipality's Department for Natural Resources and the Regulation of Nature Use issued a positive conclusion of state ecological expertiza on the preliminary OVOS report.
- On 25 February 2014, the public hearing on the feasibility study of the transfer of land plot of the Ile Alatau National Park for the construction of the Kok Zhailau ski resort was conducted. On 2 June 2014, the Committee of Environmental Regulation and Control of the Ministry of Environment and Water Resources issued a positive conclusion of state ecological expertiza.
- On 5 May 2014, the public hearing on the OVOS report for the construction of the Kok Zhailau ski resort was held. On 31 July 2014, Almaty Akimat's Department for Natural Resources and the Regulation of Nature Use issued a positive conclusion of state ecological expertiza.

Effective and adequate notification of the public (article 6, paragraph 2)

99. In order to ensure appropriate conditions for meaningful public participation, article 6, paragraph 2(a)-(e) of the Convention provides a list of minimum information which is to be mentioned in the public notice.

100. The Committee considers that rules 8 and 9 of the Rules on Public Hearings, as amended in 2013, concerning the required content of the public notice (see para. 18 above), 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 a requirement to notify the public of the authority responsible for making the decision (article 6, paragraph 2 (c)), the commencement of the procedure (article 6, paragraph 2 (d)(i)), the indication of the time-schedule for transmittal of comments or questions (article 6, paragraph 2 (d)(v))

and whether the activity is subject to a trans-boundary environmental impact assessment or not (article 6, paragraph 2 (e)).

101. The Committee further considers that, while the announcement of the public hearing published on 27 December 2012 in the *Vecherniy Almaty* newsletter contained the information required under the national legislation, it did not meet the requirements of article 6, paragraph 2, of the Convention, thus providing incomplete notification regarding the decision-making procedure.

102. In the light of the above, the Committee finds that, by failing to ensure that its legal framework ensures that the public concerned is informed in an adequate, timely and affective manner of all matters included in sub-paragraphs (a)-(e) of article 6, paragraph 2, the Party concerned has failed to comply with article 6, paragraph 2 of the Convention both with respect to its current legislation and regarding the public participation procedure on the Kok Zhailau project in particular.

Reasonable time-frames for public participation (article 6, paragraph 3)

103. The Committee notes that the announcement of the public hearing conducted on 11 January 2013 was published on 27 December 2012, i.e., only 15 calendar days in advance of the public hearing which is even less than the 20 calendar days envisaged by national law (see para. 18 above). Moreover, this period of time included days of New Year holidays when most state agencies did not work and, consequently, it was not possible to transmit questions or request information on those days. The communicants allege that as a result of the above, there were in fact only 7 working days within which the public could do so. Moreover, the communicants allege that the Almaty Department of Tourism website was not working in this period. Nor was it possible to inspect the documents in person at the Almaty Department of Tourism since it is located in the Almaty Akimat and has strict entrance restrictions. This meant that members of the public could obtain access to the preliminary OVOS report only three days before the hearing (when it was posted on the website of Green Salvation). The Committee considers that such a time-frame can under no circumstances be considered a reasonable time-frame to get acquainted with the documentation and participating effectively.

104. The Committee considers that providing notice a minimum of 20 calendar days before the public hearing for the public to become acquainted with the documentation and to prepare to participate may generally be sufficient, bearing in mind that longer periods may be required in complex cases or when there is voluminous documentation. In this regard, the Committee recalls its previous findings on communication ACCC/2006/16 concerning compliance by Lithuania where it held: “The requirement to provide “reasonable time-frames” implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a complex project”.⁷²

105. However, it is apparent that when this period partially or fully overlaps with the days of the major religious festivals, national days or to a certain extent, the main summer or winter holidays, the actual time-frames envisaged for the public to prepare to participate are automatically shortened.

106. Given that in the present case, notice was given only 15 calendar days in advance of the hearing (i.e. in contravention of the Party concerned’s own Rules on Public Hearings) and the period for the public to examine the relevant documentation was further reduced due to the limited access to the documentation in the light of the days of national holidays and the difficulties with the Almaty Department of Tourism’s website, the Committee finds that, by failing to ensure a sufficient time-frame for the public to prepare

⁷² ECE/MP.PP/2008/5/Add. 6, para. 69.

and participate effectively during the environmental decision-making on the Kok Zhailau project, the Party concerned failed to comply with article 6, paragraph 3, of the Convention.

Submission of comments (article 6, paragraph 7)

107. The communicants allege that the public was obstructed from participating in the hearings on the preliminary OVOS report on 11 January 2013 and the feasibility study in February 2014. These allegations are examined below.

Hearing on the preliminary OVOS report, 11 January 2013

108. Depending on the stage of decision-making procedure, the immediate responsibility to ensure that the arrangements for the hearing enable the public to participate effectively may fall on the developer or the relevant authority. The Committee stresses, however, that regardless of the stage of the decision-making, the ultimate responsibility to ensure that the requirements of the Convention are met always rests with the Party concerned.

109. The Committee takes note of the information provided by the communicants, and not refuted by the Party concerned, that access and registration of participants for the public hearing on 11 January 2013 was restricted. In particular, not all those who wanted to take part in the public hearing could enter the Kazgidromet building because the entrance was blocked by a private security service forty minutes before the start of the hearing. As a result, not all participants were registered. The views of non-registered participants who did later manage to get into the building, were ignored.

110. The Committee considers that Parties should ensure that if private security services or police officers are to be used at public hearings to maintain the public order they must in no way restrict the opportunity of the public to participate in the decision-making procedure and submit comments.

111. The Committee notes that the Party concerned and the communicants have provided contradictory information about the opportunity to submit comments and have them registered. More specifically, while the communicants state that many public comments were ignored, the Party concerned contends that all opinions received were registered and, as evidence, refers to the minutes of the public hearing with relevant annexes.⁷³ While the minutes include both positive and negative feedback by the participants, on the evidence before it, it is not possible for the Committee to determine the extent to which any comments submitted by the public were not recorded and, therefore, the Committee is not in a position to make a finding on this point.

Hearing on the feasibility study on the transfer of land plot of the Ile Alatau national park for the construction of the ski resort on Kok Zhailau on 25 February 2014

112. With regard to the public hearing on the feasibility study on the transfer of land plot of the Ile Alatau National Park for the construction of the ski resort on Kok Zhailau held on 25 February 2014 in Shymbulak (20-25km away from Almaty), the Committee considers that the parties' account of events differ. In particular, the communicants contend that the hearing being held on a weekday in a location 20-25km from Almaty meant that the public was unable to participate effectively. In contrast, the Party concerned asserts that free buses and a gondola were provided in order to enable the public concerned to reach the hearing. The communicants counter that the free buses run late. The Committee notes, however, that the communicants have not provided the Committee with evidence that this meant that any members of the public that tried to attend the hearing were prevented from doing so.

⁷³Party concerned's response to communication, 3 April 2014, annex 1.

113. Based on the above, the Committee finds that the communicants' allegation that the Party concerned failed to comply with article 6, paragraph 7, of the Convention with respect to the hearing on the feasibility study on 25 February 2014 is unsubstantiated.

114. With regard to the television talk show "Nasha Pravda" broadcast on 1 March 2013 and the citizen-hearing initiated by "Green Salvation" and others on 9 September 2013, the Committee observes that such measures may be useful to facilitate dialogue and raise public awareness. The Committee stresses, however, that such means can only ever complement but never replace the Party's obligation to ensure that there is an official procedure in place through which the public may submit its comments in accordance with article 6, paragraph 7, of the Convention. The Party concerned can thus not rely on either the talk show or the citizen-hearing to help it to meet its obligations under article 6, paragraph 7 of the Convention.⁷⁴

Taking due account of the outcome of the public participation (article 6, paragraph 8)

115. Though the communicants did not specifically allege that the Party concerned's legal framework lacked a requirement to ensure due account was taken of the outcome of public participation, the Committee has not been able to identify any such requirement in the legislation or Rules on Public Hearings put before it. By letter of 12 November 2015, the Committee, inter alia, asked the Party concerned to provide it with the excerpts of national legislation where the requirements for due account to be taken of the outcomes of public participation on decision-making within the scope of articles 6 and 7 of the Convention was set out.⁷⁵ The Party concerned failed to respond to the Committee's request. On the basis of the information before it, the Committee thus finds that, by failing to set out clear requirements in its legal framework for due account to be taken of the outcomes of public participation in decision-making within the scope of articles 6 and 7 of the Convention, the Party concerned fails to comply with article 6, paragraph 8 of the Convention and article 7, in conjunction with article 6, paragraph 8 of the Convention.

Article 7

116. The communicants raise two interconnected allegations regarding article 7: first, the lack of appropriate legal mechanisms under national law to ensure public participation in the process of preparing plans, programmes and policies relating to the environment generally; and, second, the failure of the Party concerned to ensure proper public participation during the preparation of the "Plan to Develop World-class Ski Resorts in Almaty Region and around the City of Almaty". These allegations are examined below.

(a) General framework for public participation concerning plans, programmes and policies (article 7)

117. The Committee welcomes the clear statement of the rights of the public to participate in the preparation of plans and programmes set out in articles 13 and 14 of the Environmental Code. At the same time, it is apparent that there is no such statement of the right of the public to participate in the preparation of policies regarding the environment.

118. Moreover, the Committee emphasises that simply stating these rights alone, unaccompanied by clear procedural requirements either in regulation or established administrative practice on how to ensure these rights, cannot be considered sufficient to meet the specific and detailed requirements of article 7 of the Convention.

119. In this regard, the Committee notes that according to the amendments to the Environmental Code which entered into force on 3 July 2013, the requirement in article 47 of the Environmental Code that plans and programmes be subject to state environmental expertise was deleted, meaning that the requirement for these types of documents to be

⁷⁴ See also Committee's findings on communication ACCC/C/2009/37, para. 95,

⁷⁵ Questions 9 and 10 of the questions attached to the secretariat's letter of 12 November 2015.

subject to environmental assessment was removed. The Committee observes that strategic environmental assessment (SEA) is the main legal mechanism through which public participation is incorporated in decision-making on plans, programmes and policies. While the Convention does not itself require an SEA to be carried out, the Committee stresses the necessity of having proper procedures in place that will ensure effective public participation in decisions under article 7 of the Convention. The Committee considers that the Party concerned has not in due time put before the Committee any excerpts from its current legislation or administrative practice that demonstrate that the requirements of article 7 are being implemented in its national law and practice.⁷⁶

120. Regarding the Party concerned's reference to the Private Entrepreneurship Act, the Committee points out that it is not relevant for the implementation of article 7 because it does not provide for public participation in the preparation of plans, programmes or policies.

121. The Committee takes note of the creation of the Public Council under the Ministry of Energy and sectoral public councils on water resources, forestry, hunting and fishing (paras. 79-80 above). While recognizing that such Councils may make a useful contribution to the development of environment policy, the Committee emphasizes that the Councils can only be of a complementary nature. In this regard the Committee recalls its previous findings on communication ACCC/2010/51 concerning compliance by Romania where it held: "...the inclusion of representatives of NGOs and "stakeholders" in a closed advisory group cannot be considered as public participation under the Convention. Furthermore, whatever the definition of the "public concerned" in the law of a Party to the Convention, it must meet the following criteria under the Convention: it must include both NGOs and individual members of the public; and it must be based on objective criteria and not on discretionary power to pick individual representatives of certain groups".⁷⁷

122. Based on the information examined,⁷⁸ the Committee finds that, by failing to make appropriate practical and/or other provisions for the public to participate during the preparation of plans, programmes and policies relating to the environment, the Party concerned has failed to comply with article 7, of the Convention, in general.

(b) Public participation regarding the Governmental Resolution N1761 "Plan to Develop World-class Ski Resorts in Almaty Region and near Almaty"

123. As a preliminary point, the Committee notes that the Party concerned has not disputed before the Committee that the "Plan to Develop World-class Ski Resorts in Almaty Region and near Almaty" is a plan or programme relating to the environment within the meaning of article 7 of the Convention. However, in earlier correspondence with the communicants, MINT had asserted that the Plan to Develop World-class Ski Resorts was not subject to state environmental expertiza. In order to determine whether the Plan to Develop World-Class Ski Resorts is indeed a plan or programme relating to the environment under article 7 of the Convention, the Committee first examines whether the resolution is a plan or programme, and if so, whether it relates to the environment.

Plan or programme

124. When examining whether the Plan to Develop World-class Ski Resorts is a plan or programme, the Committee recalls its past findings in which it had observed that when examining whether a decision falls within the ambit of article 7 of the Convention, its label under the national law of the Party concerned is not decisive, and it is necessary to examine the content of the document and its legal effects.⁷⁹

⁷⁶ See para. 94 above.

⁷⁷ ECE/MP.PP/C.1/2014/12, para. 109.

⁷⁸ See para. 94 above.

⁷⁹ See Committee's findings on communications ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 29; ACCC/C/2005/12 (Albania) (ECE/MP.PP.C.1/2007/4/Add.1), para. 65; and ACCC/C/2008/27 (United Kingdom of Great Britain and Northern Ireland) (ACCC/MP.PP/C.1/2010/6/Add.2), para. 41.

125. In this respect, the Committee considers that, as also set out in the Aarhus Convention Implementation Guide, a typical article 7 decision (plan or programme) has the legal nature of (a) a general act (often adopted finally by a legislative branch), (b) initiated by a public authority, (c) which sets, often in a binding way, the framework for certain categories of specific activities (development projects), and (d) which usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.⁸⁰

126. Having examined the content of the Plan to Develop World-Class Ski Resorts in the light of the above elements, the Committee considers:

- (a) It is called a “plan” though, of course, this label is not decisive;
- (b) It is in the form of a general act, adopted by the Prime Minister;
- (c) It was initiated by MINT, which is also responsible for monitoring the implementation of the plan;
- (d) It sets the framework for a certain category of specific activities (i.e. the construction of world class ski resorts around Almaty), and to this end, provides for various measures to be undertaken, together with a timetable for doing so and allocating certain tasks to different state agencies and interested organizations with indication of deadlines, expected results and source of funding;
- (e) It is not in itself sufficient for permitting the construction of the Kok Zhailau project.

127. In the light of the above analysis, the Committee finds that the Plan to Develop World-class Ski Resorts is a plan within the meaning of article 7.

“Relating to the environment”

128. The Committee considers, as also stated in the Aarhus Convention Implementation Guide, that whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information” (article 2, para. 3).⁸¹ The following types of plans, programmes and policies may be considered as relating to the environment: (a) those which may have a significant effect on the environment and require SEA; (b) those which may have a significant effect on the environment but not require SEA; (c) those which may have an effect on the environment but the effect would not be significant; (d) those intended to help to protect the environment.⁸²

129. The Committee considers that the Plan to Develop World-class Ski Resorts provides for measures which are likely to affect the state of elements of the environment, including land, landscape and natural sites (article 2, para. 3(a) of the Convention). For example, it envisages the submission of proposals on changing the master plan of the Ile-Alatau State National Nature Park, on earmarking funds for development of master plans of construction of ski resorts, on earmarking funds for a feasibility study of external engineering and transport infrastructure for new ski resorts, and on conducting ecological expertise, amongst others. Bearing in mind that a plan, programme or policy is to be considered as relating to the environment whether or not its own effect on the environment will be “significant” and whether or not an SEA of the plan is required (see paragraph 128 above), the Committee considers that irrespective of the parties’ differing views on those two particular aspects, the Plan to Develop World-class Ski Resorts is unarguably “relating to the environment”. The Committee thus finds that the Plan to Develop World-class Ski Resorts is a plan within the meaning of article 7 of the Convention. Accordingly, the Committee next examines the extent to which the requirements of article 7 were in fact met in this case.

130. Of particular pertinence in this case is the incorporation of article 6, paragraph 4 into the text of article 7 meaning that Parties must provide for early public participation

⁸⁰ The Aarhus Convention: An Implementation Guide (second edition), page 125.

⁸¹ Ibid., page 77.

⁸² Ibid., page 176.

on plans and programmes relating to the environment when all options (including the so-called “zero option”) are open and when due account can be taken of the outcome of the public participation. In light of the above, in the present case, the Committee considers that it was too late to provide public participation only at the stage of permitting the specific activity of the Kok Zhailau project itself since by then all options, and in particular the “zero option” not to construct any new ski resorts at all, were no longer open.

131. The Committee notes that the Party concerned has not asserted that the Plan to Develop World-class Ski Resorts was subject to a public participation procedure. Rather it contends that no public participation procedure was required and thus none was carried out. However, as set out above, the Committee has found that the Plan to Develop World-class Ski Resorts was indeed required to be subject to public participation in accordance with article 7 of the Convention. The Committee therefore finds that by failing to provide for early and effective public participation on the Plan to Develop World-class Ski Resorts, the Party concerned has failed to comply with article 7, in conjunction with articles 6, paragraph 3, 4 and 8 of the Convention.

IV. Conclusions and recommendations

132. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

133. The Committee finds that:

- (a) by failing to ensure that its legal framework ensures that the public concerned is informed in an adequate, timely and effective manner of all matters included in subparagraphs (a)-(e) of article 6, paragraph 2, the Party concerned has failed to comply with article 6, paragraph 2 of the Convention both with respect to its current legislation, and regarding the public participation procedure on the Kok Zhailau project in particular.
- (b) by failing to ensure a sufficient time-frame for the public to prepare and participate effectively during the environmental decision-making on the Kok Zhailau project, the Party concerned failed to comply with article 6, paragraph 3, of the Convention.
- (c) by failing to set out clear requirements in its legal framework for due account to be taken of the outcomes of public participation in decision-making within the scope of articles 6 and 7 of the Convention, the Party concerned fails to comply with article 6, paragraph 8 of the Convention and article 7, in conjunction with article 6, paragraph 8 of the Convention
- (d) by failing to make appropriate practical and/or other provisions for the public to participate during the preparation of plans, programmes and policies relating to the environment the Party concerned has failed to comply with article 7, of the Convention in general.
- (e) by failing to provide for early and effective public participation on the Plan to Develop World-Class Ski Resorts in Almaty Region and near Almaty, the Party concerned has failed to comply with article 7, in conjunction with articles 6, paragraph 3, 4 and 8 of the Convention.

B. Recommendations

134. Noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, the Committee, pursuant to paragraph 36(b) of the annex to decision I/7, recommends that the Party concerned takes 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, paragraph 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 do not overlap with holiday periods and other non-working days and
 - (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 which may participate is identified by the relevant public authority;
 - (iii) The requirements of article 6, paragraphs 3, 4, and 8, of the Convention are applied.
-