

**Submission on the issue of holding public hearings through video conferencing in times  
of the Covid-19 crisis**

Geneva, 03 June 2020

To whom it may concern:

With regard to your call for input from the public on Kazakhstan's request for advice on whether holding public hearings through video conferencing during the pandemic would meet the requirements of the Convention (ACCC/A/2020/2), the Center for International Environmental Law (CIEL) is honored to submit the attached statement.

We hope our submission is of benefit to the Compliance Committee and remain at your disposal should further support or clarification be needed.

Yours sincerely,

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**Submission to the Aarhus Compliance Committee  
by the Center for International Environmental Law**

*Public Participation in the COVID-19 Era*

Request on behalf of Kazakhstan ACCC/A/2020/2

The Covid-19 pandemic is posing significant challenges across all policy areas. This includes fulfilment of the rights provided under the Aarhus Convention, and particularly public participation in decision-making on environmental matters. **Moving consultation meetings online to meet physical distancing requirements has significant implications for opportunities for the public to engage in environmental decision-making.**

**Environmental democracy must be upheld in times of crisis**

In this context, we would like to emphasize the *Maastricht Declaration on Transparency as a driving force for environmental democracy*, adopted at the fifth Meeting of the Parties of the Aarhus Convention, which clearly states that the economic crisis that happened at the time “should not be seized as an excuse to cut down on environmental protection and procedural rights” and that “in times of economic crisis, access to information, participation and access to justice are even more important, as the focus on solving the crisis has in many cases led to increased pressure to weaken measures aimed at protecting the environment.” Clearly, this statement is applicable to the current intertwined public health and economic crisis as well. Similarly, human rights institutions have emphasized the importance of upholding public participation in times of the Covid-19 crisis.<sup>1</sup>

We would also like to reinstate the *Riga Declaration*, adopted at the third Meeting of the Parties, which emphasizes “the need to provide for appropriate levels of discussion and feedback in the course of public participation, **including where consultation is organized through electronic means**”.

**Key concerns regarding online participation**

The Task Force on Public Participation in Decision-making has recognized that “the exclusive use of electronic tools for public participation can result in a lack of transparency, feedback and debate, as well as a lack of clarity on how public comments will be taken into account”<sup>2</sup> and that drawbacks from the use of electronic tools for participation include “cost (e.g., for video-streaming), difficulties in arguing with someone behind a screen, and in gathering and producing collective intelligence”.<sup>3</sup>

<sup>1</sup> eg UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule “States responses to Covid 19 threat should not halt freedoms of assembly and association” April 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E>, Office of the High Commissioner of Human Rights “Emergency Measures and Covid-19: Guidance” April 2020 [https://www.ohchr.org/Documents/Events/EmergencyMeasures\\_COVID19.pdf](https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf)

<sup>2</sup> Report of the Task Force on Public Participation in Decision-making on its first meeting, 2010, ECE/MP.PP/WG.1/2011/5

<sup>3</sup> Report of the Task Force on Public Participation in Decision-making on its fifth meeting, 2015, ECE/MP.PP/WG.1/2015/4

In our view, key concerns also include the exclusion of parts of the affected public, particularly those constituencies that are most directly affected and might not have the means for participation without encouragement and support. The participation of these constituencies is often at higher risk of being impaired by factors specific to web-based processes such as: poor internet connection, lack of technological literacy, less provision of translation, and inadequate notice periods, as well as the quality of the engagement that is possible online. These circumstances might be further exacerbated in the time of a health crisis by additional factors including increased caring responsibilities due to closed care institutions. It is likely that parts of the population that are historically discriminated against will be disproportionately affected by these issues, institutionalising a digital divide among respective members of the public concerned.

### **Postponing Decisions and Participation Procedures should be the Default Option**

Given these significant shortcomings of online consultation, we reiterate what other third-sector advocates have proposed: The general standard should be **postponing any key decisions as necessary until full, in-person public participation can be attained** so as to fulfil the legal obligations provided under the Aarhus Convention.<sup>4</sup>

In the majority of the Aarhus Convention Parties, measures taken to halt the spread of the pandemic are already showing effect, and it is foreseeable that in-person public participation will be safely possible again in the near future. In addition, states can take measures to minimize risks of infection, such as providing masks to each participant and setting up the room in a way that allows for physical distance between individuals.

### **Minimum Standards for Online Participation**

Nonetheless, where it is absolutely necessary to make decisions in a shorter time frame, and impossible to safely allow for in-person participation, there are some minimum standards for online participation.

These minimum standards include: extending the public notice period for involvement, having planning authorities alerting the public of the decision making process through direct post (as public notices may go unseen as people spend less time outdoors), removing pre-registration requirements for online sessions, having reliable live-streamings available, and giving the public specific advice on how to participate online. Ultimately, changes to the public participation process during the COVID-19 pandemic should safeguard and, where possible, enhance transparency, democracy, and participation in decisions of environmental matters.<sup>5</sup> This can be done effectively when decision-makers take full advantage of online participation and communication options to the public, such as surveys, questionnaires on draft proposals,

<sup>4</sup> Article 19 “Ensuring the public’s right to Know in the Covid-19 pandemic” May 2020 [https://www.article19.org/wp-content/uploads/2020/05/Ensuring-the-Publics-Right-to-Know-in-the-Covid-19-Pandemic\\_Final-13.05.20.pdf](https://www.article19.org/wp-content/uploads/2020/05/Ensuring-the-Publics-Right-to-Know-in-the-Covid-19-Pandemic_Final-13.05.20.pdf)

<sup>5</sup> Friends of the Earth “The impact of coronavirus on the planning system” April 2020 <https://policy.friendsoftheearth.uk/insight/impact-coronavirus-planning-system>

webcasting, and videoconference before and during the decision-making process.<sup>6</sup> Furthermore, to safeguard democratic accountability, major decisions of a controversial nature should always be made by elected officials, and not officers.

In order to ensure meaningful and equitable public participation online, it is also necessary that states take steps to bridge the “digital divide” that may be present among members of the public concerned, some of whom do not have appropriate access to online forms of participation. This is supported by the *Recommendations on the more effective use of electronic information tools to provide public access to environmental information*, adopted at the second Meeting of the Parties, which recommend to “support the reduction and as far as possible the removal of social, financial and technological barriers restricting public access to telecommunications networks, such as high connection costs and poor connectivity, as well as lack of basic computer literacy”, to “ensure that submissions received electronically are given equal weight to comments received non-electronically” and to “establish and, in the case of donor countries, provide financial and technological support for schemes for the transfer of technology and expertise so as to overcome or reduce the ‘digital divide’, e.g. through bilateral projects or partnerships”.

This is a particular concern when the affected public is based in remote areas that often experience poor connectivity.<sup>7</sup> It must also be noted that marginalized groups, such as women, indigenous peoples, low-wage workers and minorities, should be given specific attention to ensure their participation in online processes.<sup>8</sup> This should be done through using accessible and consultative mechanisms which specifically consider these historically marginalised demographics, supporting them with financial and human resources, media education, and digital literacy programmes necessary for full and inclusive online participation during the time of the pandemic. At the same time, the focus on combating the spread of Covid-19 has created additional risks and challenges for those standing up for their rights or speaking out against development activities that are harming them and their communities. When postponing decisions is not an option, governments should ensure the use of appropriate means of communication -- including through the use of radio, digital, and other communication technologies during lockdowns -- to secure participation from project-affected communities and civil society organisations, and free, prior and informed consent of Indigenous Peoples and other communities who have similar rights, as well as consider innovative ways and mediums of communication, including for different technological, socio-economic and cultural contexts, and ensure that such outreach specifically seeks to include people who experience discrimination and exclusion.

<sup>6</sup> European Centre for Not-for-Profit Law “Keeping Civic Space Healthy: Rights Card on Public Participation in decision making during Covid-19” <https://ecnl.org/keeping-civic-space-healthy-rights-card-on-public-participation-in-decision-making-during-covid-19/>

<sup>7</sup> Cf the statement submitted by EcoForum Kazakhstan to the Compliance Committee in response to the call for input

<sup>8</sup> See also the Guidance Note regarding the Convention on the Elimination of all Forms of Discrimination Against Women and COVID-19 (Committee on the Elimination of Discrimination against Women, 22 April 2020), [https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Guidance\\_Note.docx](https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Guidance_Note.docx).

Against this background, where online participation does not meet certain minimum standards in terms of diversity of demographics represented, it should be considered as insufficient and complementary forms of engagement should be made possible.

Given the challenges related to ensuring the transparency of the participatory processes conducted through electronic tools, additional steps should be implemented to ensure the accountability of decision-makers and to minimize undue influence from corporate actors while seeking to engage the public concerns in line with the provisions of the Aarhus Convention. This includes the need to comply with existing transparency standards.<sup>9</sup> This is particularly important given the scale of the policies and programs with potential environmental impacts that are being validated in the context of recovery package and the accompanying efforts by some private actors to secure the deregulation of environmental and participatory standards in this context.

An additional concern is that once limited in-person meetings become possible again, civil society might be excluded or relegated to online participation in order to limit the number of participants. In general, any changes made to public participation procedures due to the Covid-19 crisis should be as limited as possible and should include clear sunset clauses.

Finally, it should be emphasized that any restrictions on internet access imposed by the government, such as internet shutdowns, blocking access to specific sites or by specific people or online censorship, as well as infringements on the right to privacy, are fundamentally opposed to meaningful participation at all times but especially when such consultations are held online. In this context, the statement by the UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule on states responses to Covid-19 is of relevance: “The rights to freedom of peaceful assembly and of association apply online just as they do offline. In this time when physical assemblies are restricted, it is all the more necessary that access to and use of the internet be ensured. In addition to refraining from restrictions such as internet shutdowns or online censorship, States should take measures to ensure access to the internet extends to the entirety of the global population, and that it is affordable. In the context of civil society organizations specifically, States should ensure that they may complete their registrations online, and should provide opportunities for them to participate, via online fora, in policy development. In all cases, ensuring the rights to peaceful assembly and association online requires that individuals’ rights to privacy are fully respected and protected.”<sup>10</sup>

<sup>9</sup> See for instance the letter of the European Ombudsman to the President of the European Commission and to the President of the European Council regarding the Transparency of the EU Covid-19 crisis response, 20/04/2020, at <https://www.ombudsman.europa.eu/en/case/en/56900>.

<sup>10</sup> UN expert on the rights to freedoms of peaceful assembly and of association, Mr. Clément Voule “States responses to Covid 19 threat should not halt freedoms of assembly and association” April 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25788&LangID=E>