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Item 7 (b) of the provisional agenda

Procedures and mechanisms facilitating the implementation of the Convention: compliance mechanism

Report of the Compliance Committee*

Compliance by Kazakhstan with its obligations under the Convention

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 19 of decision V/9 of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8).

* The present document is being issued without formal editing.



I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), 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 V/9i on compliance by Kazakhstan with its obligations under the Convention (see ECE/MP.PP/2014/2/Add.1).

II. Summary of follow-up

2. The Party concerned provided its first progress report on the implementation of decision V/9i on 30 December 2014.

3. At the Committee's request, on 7 January 2015 the secretariat forwarded the first progress report by the Party concerned to the communicants of communications ACCC/C/2004/1, ACCC/C/2004/2, ACCC/C/2004/6 and ACCC/C/2011/59, inviting them to provide their comments on that report by 28 January 2015. Due to a technical error, the secretariat's email of 7 January 2015 did not reach the communicant of communication ACCC/C/2004/6 and it was re-forwarded to that communicant on 28 January 2015 with an extended deadline for comments.

4. On 28 January 2015, the communicant of communications ACCC/C/2004/1 and ACCC/C/2004/2 provided comments on the first progress report by the Party concerned. On 2 February 2015, comments were received from the communicants of communication ACCC/C/2004/6.

5. By letter of 20 October 2015, the secretariat sent the Committee's first progress review on the implementation of decision V/9i to the Party concerned.

6. On 4 November 2015, the Party concerned provided its second progress report on the implementation of decision V/9i.

7. At the Committee's request, on 7 November 2015 the secretariat forwarded the second progress report by the Party concerned to the communicants of communications ACCC/C/2004/1, ACCC/C/2004/2, ACCC/C/2004/6 and ACCC/C/2011/59, and the observers, inviting them to provide their comments on that report by 27 November 2015.

8. On 24 November 2015, the communicant of communication ACCC/C/2004/6 provided comments on the second progress report by the Party concerned. On 1 December 2015, the communicant of communications ACCC/C/2004/1 and ACCC/C/2004/2 provided comments on the second progress report.

9. At its fifty-second meeting (Geneva, 7-11 March 2016), the Committee held an open session on the implementation of decision V/9i, in which the Party concerned participated via audioconference. Though invited, the communicants of communications ACCC/C/2004/1, ACCC/C/2004/2, ACCC/C/2004/6 and ACCC/C/2011/59 did not take part in the session.

10. On 31 October 2016, the Party concerned provided its third progress report on the implementation of decision V/9i.

11. At the Committee's request, on 7 November 2016 the secretariat forwarded the third progress report of the Party concerned to the communicants of communications ACCC/C/2004/1, ACCC/C/2004/2, ACCC/C/2004/6 and ACCC/C/2011/59, inviting them to provide their comments on that report by 21 November 2016. On 18 November 2016, the communicant of communications ACCC/C/2004/1 and ACCC/C/2004/2 provided comments.

12. At its fifty-fifth meeting (Geneva, 6-9 December 2016), the Committee held an open session on the implementation of decision V/9i, in which representatives of the Party concerned took part both in person and by audio conference. Though invited, the communicants of communications ACCC/C/2004/1, ACCC/C/2004/2, ACCC/C/2004/6 and ACCC/C/2011/59 did not take part in the session.

13. On 8 December 2016, the Party concerned provided additional information.

14. On 3 January 2017, the secretariat sent the Committee's second progress review on the implementation of decision V/9i to the Party concerned. In its letter, the secretariat informed the Party concerned that, in order to be considered by the Committee in the preparation of its report to the sixth session of the Meeting of the Parties, all measures necessary to implement decision V/9i should be completed by, and reported upon, by no later than 31 January 2017.

15. At the fifty-sixth meeting of the Committee (Geneva, 28 February – 3 March 2017), representatives of the Party concerned participated by audio conference and in person in an open session to review the implementation of decision V/9i. Though invited, the communicants of communications ACCC/C/2004/1, ACCC/C/2004/2, ACCC/C/2004/6 and ACCC/C/2011/59 did not take part in the session.

16. On 30 March 2017, the Party concerned provided further information on the steps it had taken to implement decision V/9i.

17. The Committee adopted its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9i through its electronic decision-making procedure on 17 July 2017, and thereafter requested the secretariat to send it to the Party concerned and the communicants.

III. Considerations and evaluation by the Committee

18. In order to fulfil the requirements of decision V/9i, the Party concerned would need to provide the Committee with evidence that:

(a) Mandatory requirements for the public notice are detailed by law, such as the obligation to inform the public in a timely manner and the means of public notice, including the obligation that any information relevant for the decision-making is also available on the website of the public authority competent for decision-making;¹

(b) There is a clear possibility for any member of the public concerned to submit any comments on the project-related documentation at different stages of the public participation process, without the requirement that these comments be reasoned;²

(c) There is a clear responsibility of the relevant public authorities to:

(i) Inform the public promptly of the decisions they have taken and of how the text of the decisions can be accessed;³

(ii) Maintain and make accessible to the public, through publicly available lists or registers, copies of the decisions taken and other information relevant to

¹ Decision V/9i, para. 7 (a).

² Ibid., para. 7 (b).

³ Ibid., para. 7 (c) (i).

the decision-making, including evidence of having fulfilled the obligation to inform the public and provide it with opportunities to submit comments.⁴

19. The Committee welcomes the three progress reports received from the Party concerned, which were all received on time, as well as the further information provided on 18 April and 8 December 2016 and 30 March and 12 July 2017.

20. The Committee also welcomes the comments and information provided by the communicants on 29 January, 2 February, 24 November and 1 December 2015 and 18 November 2016.

21. As an initial point, the Committee notes that both the Party concerned and the communicants have reported on a number of legislative, political and factual developments which are not directly related to issues within the scope of decision V/9i. While the Committee has noted the information provided, it will not examine these matters further in the context of its review of the implementation of decision V/9i.

Paragraph 7 (a) of decision V/9i: Public notice and publication of relevant information

Public notice (article 6, paragraph 2, of the Convention)

22. With respect to the recommendation in paragraph 7 (a) of decision V/9i concerning the obligation to inform the public in a timely manner and the means of public notice, the Committee notes that paragraph 10 of the Order No. 135-p of the Minister of Environmental Protection “On approval of the Rules of conducting public hearings” dated 7 May 2007, and as amended on 21 June 2016 (“Rules on Public Hearings”),⁵ requires that the announcement of a public hearing be published in the media, in state and Russian languages, no later than 20 days before the public hearing. The Committee further notes that, in accordance with article 57-2, paragraph 3, of the Environmental Code⁶ and paragraph 11 and 12 of the Rules on Public Hearings, the announcement is also to be posted on the website of the local executive bodies and that, in accordance with article 57-2, paragraph 3, of the Environmental Code,⁷ the public authority should also use other ways of informing the public.

23. In its second progress review,⁸ the Committee noted that paragraph 11 of the Rules on Public Hearings (as amended on 21 June 2016) does not set out the required content of the public notice. On 30 March 2017, the Party concerned provided the Committee with a draft order which would amend the Rules on Public Hearings. Pursuant to this amendment, paragraph 10 of the Rules on Public Hearings would be amended so as to specify the content of the public notice. The Committee welcomes the proposed amendment, while noting that the amendment omits several of the requirements of the public notice as set out in article 6, paragraph 2, of the Convention. In particular, the proposed amendment would not require notice to include the following:

(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);

⁴ Ibid., para. 7 (c) (i).

⁵ Provided by the Party concerned on 8 December 2016.

⁶ As adopted on 8 April 2016. Annex to email from the Party concerned, 18 April 2016, p. 2.

⁷ Ibid.

⁸ Committee’s second progress review, 3 January 2017, para. 50.

(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)).

24. The Committee finds that the Party concerned has met the requirements of paragraph 7 (a) of decision V/9i with respect to the obligation to introduce a mandatory obligation to inform the public in a timely manner and to detail the means of public notice. Regarding the content of the public notice, while welcoming the steps taken by the Party concerned, including the proposed amendment to the Rules on Public Hearings, the Committee finds that the Party concerned has not yet fully met the requirements of paragraph 7 (a) of decision V/9i, with respect to detailing the mandatory content of the public notice in its law.

Publication of relevant information (article 6, paragraph 6, of the Convention)

25. With respect to paragraph 7 (a) of decision V/9i and the publication of all information relevant to the decision-making, the Committee notes that Article 57-2, paragraph 3 of the Environmental Code requires local executive bodies to provide open access to ecological information twenty days prior to the hearing.⁹ Article 57-2, paragraph 3, also requires that certain information, namely the “environmental impact assessment, the planned economic and other activity and decision-making process on this activity”, must be made available through an internet resource and other sources of information.¹⁰ However, article 6, paragraph 6, of the Convention requires that “all information relevant to the decision-making” (and not just ecological information) is to be made available, including at least the information listed in subparagraphs (a) - (f) of article 6, paragraph 6. In addition, as pointed out by the Committee in its second progress review,¹¹ paragraph 7 (a) of decision V/9i requires the Party concerned to introduce a mandatory requirement in its law to ensure that the relevant information is made available by the public authority competent for the decision-making, even if it is also made available in parallel elsewhere, e.g. on the developer’s website.

26. Based on the above, while welcoming the adoption in April 2016 of Article 57-2 of the Environmental Code, the Committee considers that it does not fully meet the requirement in paragraph 7 (a) of decision V/9i for the Party concerned to introduce a mandatory requirement to ensure that the public authority competent for the decision-making gives the public concerned access to all information relevant to the decision-making. The Committee accordingly finds that the Party concerned has not yet fully met the requirements of paragraph 7 (a) of decision V/9i in this respect.

Paragraph 7 (b) of decision V/9i: Possibility to submit comments on project-related documentation and to submit any comments without a requirement for reasons

27. With respect to paragraph 7 (b) of decision V/9i, in its findings on communication ACCC/C/2010/59, endorsed through paragraph 4 (a) of decision V/9i, the Committee held:

⁹ Annex to email from the Party concerned, 18 April 2016, p. 2.

¹⁰ Ibid.

¹¹ Committee’s second progress review, 3 January 2017, para. 51.

By allowing the submission of public comments only on the OVOS report at the stage of state environmental *expertiza*, and by limiting the range of the public comments only to those containing reasoned argumentation, Kazakh legislation...fails to comply with article 6, paragraph 7 of the Convention.¹²

Right to submit any comments without a requirement that comments be reasoned

28. Concerning the requirement in Kazakh legislation for comments to be reasoned, the Committee welcomes the adoption in April 2016 of article 57-1 of the Environmental Code which establishes the right to submit comments and suggestions to the public authorities during the process of state environmental impact assessment without a requirement that those comments be reasoned.¹³

29. Regarding comments at the stage of state environmental *expertiza*, on 30 March 2017 the Party concerned provided the Committee with a draft order to amend the Rules on Public Hearings, which would, inter alia, remove the current requirement in rules 19 and 27 that the protocol of the public hearing shall reflect “reasonable comments and suggestions from public concerned”. On 12 July 2017, the Party concerned informed the Committee that it would still require approximately two to three months to finally adopt the order.¹⁴

30. In the light of the above, the Committee finds that the Party concerned has fulfilled the requirement in paragraph 7 (b) to remove the requirement that comments be reasoned at the stage of state environmental impact assessment. With respect to the stage of state environmental expertise, while welcoming the proposed amendment to remove the reference to “reasonable comments and suggestions” in the Rules on Public Hearings, because the amendment has not yet been adopted, the Committee finds that the Party concerned has not yet fully met the requirement of paragraph 7 (b) of decision V/9i in this respect.

Possibility to submit comments on project-related documentation at the environmental expertiza stage

31. In its findings on communication ACCC/C/2010/59, the Committee held that the right of the public to submit comments at the environmental *expertiza* stage only on the OVOS report, but not other project-related documentation, was not in line with the requirements of the article 6, paragraph 7, of the Convention.¹⁵

32. The Committee notes that, pursuant to paragraph 13 of the Rules on Public Hearings (as amended on 21 June 2016), the public concerned shall provide the developer with comments and suggestions (if any) on project documentation on time, no later than 3 working days before the date of the public hearings. The Committee notes that paragraph 13 of the Rules refers expressly to comments on the project documentation and is not limited to the OVOS report itself. In the absence of any information to the contrary, the Committee accordingly finds that the Party concerned has met the requirements of paragraph 7 (b) of decision V/9i with respect to the possibility to submit comments at the environmental *expertiza* stage not only on the OVOS report but also on other project-related documentation.

¹² ECE/MP.PP/C.1/2013/9, para. 68.

¹³ Annex to email from the Party concerned, 18 April 2016, p. 1.

¹⁴ Update by Party concerned, 12 July 2017.

¹⁵ ECE/MP.PP/C.1/2013/9, para. 57.

Paragraph 7 (c) (i) of decision V/9i: Inform the public promptly of the decision and how the text of the decision can be accessed

33. In relation to paragraph 7 (c) (i) of decision V/9i, the Committee welcomes the 2016 adoption of article 57, paragraph 3, of the Environmental Code which requires that the results of state environmental expertise be published on the website of the local executive authorities.¹⁶ However, the Committee notes 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.¹⁷

34. With respect to publication of the results of the state environmental expertise on the website of the local executive authorities, the Committee recalls its findings on communication ACCC/C/2013/99 concerning Spain:

In the view of the Committee, informing the public about the decision taken exclusively by means of the internet does not meet the requirement of article 6, paragraph 9 of the Convention. ...[R]elying only on publishing the decision electronically may exclude members of the public who do not use the internet regularly or do not have easy access to it from the possibility to be effectively informed about the decision that has been taken. Moreover, as the Committee held in its findings on communication ACCC/C/2012/71, “it is not reasonable to expect members of the public to proactively check the Ministry’s website on a regular basis just in case at some point there is a decision-making procedure of concern to them”.¹⁸

35. In its findings on communication ACCC/C/2013/99, the Committee also pointed out that “as a good practice, the methods used to notify the public concerned under article 6, paragraph 2, should be utilised as a minimum for informing the public under article 6, paragraph 9, of the decision once taken, recalling that the latter requires the public generally to be informed, and not just the public concerned”.¹⁹

36. Based on the above considerations and while welcoming the progress made, the Committee finds that Article 57, paragraph 3, of the Environmental Code does not fully meet the requirements of paragraph 7 (c) (i) of decision V/9i.

Paragraph 7 (c) (ii) of decision V/9i: Publicly available lists or registers of decisions taken

37. With respect to paragraph 7 (c) (ii) of decision V/9i, the Committee welcomes the adoption of article 161 of the Environmental Code and the searchable internet resource “Adilet” established by government resolution of October 2013, which contains a large number of normative documents including legal acts, ministerial orders and decisions of local authorities.²⁰ The Committee also welcomes the regular monitoring of public hearings conducted by the Ministry of Energy aimed at improving the relevant practice of local

¹⁶ Annex to email from the Party concerned, 18 April 2016, p. 2.

¹⁷ See also Committee’s second progress review, 3 January 2017, para. 54.

¹⁸ ECE/MP.PP/C.1/2017/17, para. 104, citing ECE/MP.PP/C.1/2017/3, para. 76.

¹⁹ ECE/MP.PP/C.1/2017/17, para. 103.

²⁰ Second progress report by the Party concerned (annex I), 4 November 2015, p. 2.

governments.²¹ However, the Committee does not consider that the Party concerned has yet specifically addressed the requirement in paragraph 7 (c) (ii) of decision V/9i to maintain and make publicly accessible lists or registers of the decisions taken to permit decisions subject to article 6 of the Convention, together with evidence of having fulfilled the requirements of article 6 with respect to those decisions.²²

38. 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.

39. In the light of the above, while welcoming the steps taken in that direction, the Committee finds that the Party concerned has not yet met the requirements of paragraph 7 (c) (ii) of decision V/9i.

IV. Conclusions

40. Based on the above considerations, the Committee finds that:

(a) The Party concerned has met the requirements of paragraph 7 (a) of decision V/9i with respect to the introduction of a mandatory obligation to inform the public in a timely manner of decision-making on activities subject to article 6, paragraph 1, of the Convention and detailing the means of public notice, but not yet with respect to the mandatory content of the public notice or the requirement to ensure that the public authority competent for the decision-making on such activities gives the public concerned access to all information relevant to the decision-making;

(b) The Party concerned has fulfilled some of the requirements of paragraph 7 (b) of decision V/9i by removing the obligation for comments to be reasoned and allowing the public to submit comments on the OVOS report and other project-related documentation, but has not yet fulfilled all the requirements of that paragraph by failing to eliminate the stipulation that comments must be “reasonable”;

(c) The Party concerned has not yet met the requirement in paragraph 7 (c) (i) to take the necessary measures to ensure that the relevant public authorities inform the public promptly of the decisions taken and how the text of the decisions can be accessed, nor the requirement in paragraph 7 (c) (ii) to maintain publicly accessible lists or registers of the decisions taken.

41. The Committee recommends to the Meeting of the Parties that it re-affirms decision V/9i and, in that regard, requests the Party concerned to take the necessary legislative, regulatory and administrative measures:

²¹ Ibid., p. 3.

²² See Committee’s second progress review, 3 January 2017, para. 55.

(a) To ensure that the mandatory requirements of the content of the public notice, as prescribed by article 6, paragraph 2 of the Convention, are detailed in law;²³

(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, paragraph 6 of the Convention;²⁴

(c) To ensure that, in accordance with article 6, paragraph 7, of the Convention, the submission of comments by the public is not limited to only “reasonable” comments;²⁵

(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, paragraph 9, of the Convention;²⁶

(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;²⁷

42. The Committee also recommends that the Meeting of the Parties recommends that the Party concerned:

(a) To provide detailed progress reports to the Committee by 1 October 2018, 1 October 2019 and 1 October 2020 on the measures taken and the results achieved in the implementation of the above recommendations;

(b) To provide such additional information as the Committee may request in between the above reporting dates in order to assist the Committee to review the progress by the Party concerned in implementing the above recommendations;

(c) To participate (either in person or by audio conference) in the meetings of the Committee at which the progress of the Party concerned in implementing the above recommendations is to be considered.

²³ See decision V/9i, para. 7 (a).

²⁴ Ibid.

²⁵ Ibid, para. 7 (b).

²⁶ Ibid, para. 7 (c) (i).

²⁷ Ibid, para. 7 (c) (ii).