



**Economic and Social
Council**

Distr.
GENERAL

ECE/MP.PP/2008/5/Add.5
2 April 2008

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

MEETING OF THE PARTIES TO THE CONVENTION ON
ACCESS TO INFORMATION, PUBLIC PARTICIPATION
IN DECISION-MAKING AND ACCESS TO JUSTICE
IN ENVIRONMENTAL MATTERS

Third meeting

Riga, 11–13 June 2008

Item 6 (b) of the provisional agenda

Procedures and mechanisms facilitating the implementation of the Convention:

Compliance mechanism

REPORT BY THE COMPLIANCE COMMITTEE

Addendum

**COMPLIANCE BY KAZAKHSTAN WITH ITS OBLIGATIONS UNDER THE
CONVENTION AND ITS IMPLEMENTATION OF DECISION II/5a
OF THE MEETING OF THE PARTIES**

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 1 of decision II/5 of the Meeting of the Parties (ECE/MP.PP/2005/2/Add.6) 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.

I. IMPLEMENTATION OF DECISION II/5a OF THE MEETING OF THE PARTIES

1. At their second meeting, the Parties adopted decision II/5a on compliance by Kazakhstan with its obligations under the Convention (ECE/MP.PP/2005/2/Add.7). Through paragraph 1 of the decision, the Meeting of the Parties endorsed the findings of the Compliance Committee that Kazakhstan had failed to comply with the provisions of article 4, paragraphs 1 and 2, article 9, paragraph 1, and article 3, paragraph 1, of the Convention. Through paragraph 3 of the decision, the Meeting of the Parties endorsed the findings of the Committee that Kazakhstan had failed to comply with article 6, paragraph 1 (a), and annex I, paragraph 20, of the Convention, and in connection with this, article 6, paragraph 2, 3, 4, 7 and 8.
2. The Meeting of the Parties requested the Government of Kazakhstan, in order to address the findings in paragraph 1 of decision II/5a, to submit to the Compliance Committee, not later than the end of 2005, a strategy for transposing the Convention's provisions into national law and for developing practical mechanisms and implementing legislation that would set out clear procedures for their implementation (ECE/MP.PP/2005/2/Add.7, para. 5).
3. The Meeting of the Parties also recommended to the Government of Kazakhstan to provide officials of all the relevant public authorities at various administrative levels with training on the implementation of the Guidelines on Handling Public Requests for Environmental Information, and to report to the Meeting of the Parties, through the Compliance Committee, no less than four months before the third meeting of the Parties, on the measures taken to this end (ECE/MP.PP/2005/2/Add.7, para. 6).
4. The Meeting of the Parties made a number of recommendations with regard to legislative and awareness-raising measures aimed at addressing the findings in paragraph 3 of decision II/5a and facilitating compliance with article 3, paragraph 1, of the Convention (ECE/MP.PP/2005/2/Add.7, para. 7).
5. The Government of Kazakhstan submitted to the Committee the draft strategy referred to in paragraph 5 of decision II/5a in early 2006. The draft strategy included legislative measures focused primarily on the proposal for provisions in the draft Environmental Code and included several capacity-building measures. The Committee considered the draft strategy at its eleventh meeting (ECE/MP.PP/C.1/2006/2, para. 29) and made a number of comments.
6. A report on the measures taken to implement the recommendations of decision II/5a was submitted by the Government of Kazakhstan in February 2008 pursuant to paragraph 8 of that decision. The report outlines a number of legislative and capacity-building measures undertaken by the Party, inter alia, to implement the recommendations of the Meeting of the Parties. A supplement to this report has also been provided by Kazakhstan in lieu of commenting on the draft of this document prepared by the Committee.
7. The draft of this document of the Committee was also forwarded for comment to all the communicants whose communications had triggered the review of compliance by Kazakhstan (communications ACCC/C/2004/01, ACCC/C/2004/02, ACCC/C/2004/06 and ACCC/C/2007/20). A number of comments were received from one of the communicants, the

Kazakh non-governmental organization (NGO) Green Salvation. Some of these are also addressed in the following sections.

8. With regard to the recommendation concerning the development of the implementation strategy, the report provided by the Government of Kazakhstan indicates that adoption of the Environmental Code in 2007 has achieved most of the goals set out in the draft strategy. The report therefore indicates that further development and formal adoption of the strategy were not necessary.

9. The Committee, however, takes note of the view of Green Salvation that the decision not to formally adopt the strategy had a negative impact on its practical implementation by public authorities, inter alia because this decision had not been communicated to them and they refrained from implementing elements of the strategy while awaiting its formal adoption.

10. The Committee takes note of the many relevant legislative provisions introduced by the new Environmental Code, including framework provisions on access to environmental information and public participation, as reported by the Government of Kazakhstan.

11. The Committee, at the same time, takes note of concerns expressed in the comments on the draft of this document (see para. 7) to the effect that the framework provisions of the Environmental Code differ little from those of the Environmental Protection Act which it replaced, and that to a certain extent its adoption led to or might lead to a reduction in the possibilities for the public to participate in the decision-making (e.g. through de-formalizing and weakening the role of environmental review that can be initiated and conducted independently by the members of the public, or, allegedly, restricting the public participation possibilities to hearings only). Green Salvation also alleges that the adoption of the Code did not result in practical improvements in enforcement, in particular in cases where construction of large development projects began despite the absence of a positive outcome of the environmental assessment process and without the necessary environmental permits having been obtained, a factor that in practice limited the possibilities for effective and timely public participation.

12. With regard to implementation of the recommendation set out in paragraph 7 (a) of decision II/5a, the Committee welcomes the progress in developing the regulatory framework as demonstrated by the adoption of a number of regulations and guidance documents setting out specific and detailed procedures for, inter alia, access to environmental information in the context of environmental assessment, public comments and complaints, environmental assessment, public hearings and monitoring of public authorities in the context of environmental assessment.

13. The Committee, however, notes with particular concern that some of the provisions of the new Environmental Code, even when taken in combination with the new regulations governing procedural aspects of public participation, can be interpreted by the members of the public as limiting the procedural options for the public to participate (e.g. limiting it to public hearings only). In this regard, the Committee notes that it does not, at this time, have a possibility to analyse in depth the new legal framework and detailed procedures adopted recently in Kazakhstan, and also notes that the practical experience with the application of these new procedures would have been necessarily limited. The Committee, however, expresses its hope

that further development and practical application of detailed procedures, in particular, in connection with providing the public with various effective means of participation and ensuring that due account is taken of the public comments, will be demonstrated in the near future.

14. The Committee also takes note of the information provided concerning the publication and dissemination of the Guidelines on Handling Public Requests for Environmental Information to ministries, agencies and regional departments of the Ministry of Environment, local authorities and courts at various levels. The reports, however, contained no information with regard to training on implementation of the Guidelines for public authorities at various administrative levels, as recommended in paragraph 6 of decision II/5b.

15. With regard to implementation of the recommendation set out in paragraph 7 (c) of decision II/5a, the Committee also notes examples of alleged failures to ensure that activities are not initiated until the proper authorization and permitting are carried out with proper public involvement, as reflected in the comments to the draft of this document provided by the members of the public (see para. 7). It recognizes that effective implementation of such measures requires time. It also notes that rules for monitoring activities of public officials in connection with environmental assessment were adopted by the Ministry of Environment of Kazakhstan in May 2007. However, the Committee considers that practical failure to ensure that projects and activities are not carried out without properly issued permits undermines public confidence in the decision-making process and in the effectiveness of their own involvement.

16. The Committee welcomes the intention, expressed by the Ministry of Environment of Kazakhstan in its report on implementation of decision II/5a, to participate actively in the work of the Regional Coordination Committee created within the project on public participation and support to civil society in implementation of the Convention supported by the European Commission.

17. The Committee notes the information provided on capacity-building and awareness-raising for officials of public authorities carried out by the Environmental Capacity-Building Centre of the Ministry of Environment, whose curriculum includes implementation of environmental legislation, including the Convention. The Committee notes, however, that effective implementation of the recommendations set out in paragraphs 6 and 7(b) of decision II/5a might require a more targeted approach to capacity-building and awareness-raising, focused specifically on the issues of implementing the Guidelines on Handling Public Requests for Environmental Information and relevant governmental regulations, as well as facilitating public participation.

II. IMPLEMENTATION OF RECOMMENDATIONS WITH REGARD TO COMMUNICATION ACCC/C/2004/06 AND ISSUES ARISING FROM COMMUNICATION ACCC/C/2007/20

18. Communication ACCC/C/2004/06 was made by Ms. Gatina, Mr. Gatin and Ms. Konyushkova of Almaty, Kazakhstan, on 3 September 2004. It concerned the compliance by Kazakhstan with its obligations under article 9, paragraphs 3 and 4, of the Convention in the case of access to justice in appealing the failure of the Almaty Sanitary-Epidemiological Department

and the Almaty City Territorial Department on Environmental Protection to enforce domestic environmental law with regard to the operation of an industrial facility for the storage of cement and coal and production of cement-based materials.

19. Having considered the communication, the Committee found at its twelfth meeting (June 2006) that the failure by Kazakhstan to provide effective remedies in a review procedure concerning the omission by the public authority to enforce environmental legislation, as well as the failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken, constituted a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention. The findings and recommendations of the Committee are contained in an addendum to the report of the twelfth meeting of the Committee (ECE/MP.PP/C.1/2006/4/Add.1).

20. The Committee recommended to the Party concerned, with its agreement, to:

(a) Include in the strategy, prepared in accordance with decision II/5a of the Meeting of the Parties, publication of the courts' decisions and statistics related to environmental cases and to allocate specific significance to capacity-building activities for the judiciary;

(b) Thoroughly examine, with appropriate involvement of the public, the relevant environmental and procedural legislation in order to identify whether it sufficiently provides judicial and other review authorities with the possibility to provide adequate and effective remedies in the course of judicial review;

(c) Take the findings and conclusions of the Committee into account in further consideration of the specific matter raised by the communicant;

(d) Include in its report to the Meeting of the Parties, to be prepared pursuant to paragraph 8 of decision II/5a of the Meeting of the Parties, information on the measures taken to implement these recommendations.

21. On 10 May 2007, the Kazakh NGO Green Salvation submitted communication ACCC/C/2007/20 with regard to compliance by Kazakhstan with article 3, paragraph 1, and article 9, paragraph 3, of the Convention. The communication concerned the alleged failure to develop, in accordance with the requirements of the national legislation, a regulation setting out public participation procedures, as well as the alleged refusal by the courts to admit appeals against the Government's failure to act.

22. The Committee invited the Government of Kazakhstan to address the substantive issues raised in communication ACCC/C/2007/20 in its report on the implementation of decision II/5a of the Meeting of the Parties, because the issues were closely related (ECE/MP.PP/C.1/2007/4, paras. 20–22 and ECE/MP.PP/C.1/2007/8, para. 22). No objections were received from the parties concerned with regard to this proposed way of proceeding with the communication.

23. In considering the implementation by Kazakhstan of the Committee's recommendations made in connection with communication ACCC/C/2004/06, the Committee takes note of the

strong link between the implementation of these recommendations and the implementation of the recommendations contained in decision II/5a of the Meeting of the Parties.

24. The Committee takes note of the relevant information provided by the Party concerned in its national implementation report for 2005–2007 (ECE/MP.PP/2008/IR/KAZ) as well as in its report on implementation of decision II/5a submitted to the Committee pursuant to paragraph 8 of that decision (ECE/MP.PP/C.1/2008/2).

25. It welcomes the progress made by the Party concerned, in particular through the many recent initiatives of the Supreme Court of Kazakhstan regarding raising awareness and building capacity with respect to the Convention among judges and other legal practitioners at all levels.

26. It also notes the information with regard to the statistical data for environmental court decisions reflected in the Party's national implementation report (for 2005–2007).

27. The Committee also welcomes the legislative changes related to access to justice introduced by the relevant provisions in the new Environmental Code of Kazakhstan, in particular addressing rights of NGOs to initiate court cases for compensation of damages and injunctive relief, including suspension or termination of activities.

28. With regard to the recommendation referred to in paragraph 20 (b) above concerning provision of effective remedies in the course of judicial review, the Committee notes, however, that neither report contains information on any such examination, with appropriate involvement of the public, of the relevant legislation having been carried out.

29. The Committee also notes that a related issue was raised in communication ACCC/C/2007/20 with regard to the alleged deficiencies in implementation of article 9, paragraph 3, of the Convention, in particular with regard to the reluctance of courts to accept appeals concerning public authorities' failure to act. In this regard, the Committee notes that it had already established the failure by Kazakhstan to implement provisions of article 9, paragraph 3, of the Convention in connection with review of communication ACCC/C/2004/06. This situation of non-compliance, in the Committee's opinion, has not as yet been remedied and further measures would need to be taken by the Party concerned. This conclusion is only further confirmed by the allegations put forward in communication ACCC/C/2007/20.

30. Furthermore, the information provided by the Party concerned is rather limited with respect to the general application of the relevant legislation in practice and does not address the matter raised in the recommendation referred to in paragraph 20 (c) above.

III. CONCLUSIONS

31. Having considered the information referred to in paragraphs 5 to 17 related to the implementation of decision II/5a, the Committee concludes that the Government of Kazakhstan has overall undertaken a number of measures to implement most of the provisions of the decision. It notes, however, that more targeted capacity-building efforts referred to in paragraph

17 should be undertaken to improve the implementation of the relevant provisions of the Convention.

32. Having considered the information referred in paragraphs 18 to 30 related to the implementation of its recommendation made in connection with communication ACCC/C/2004/06, the Committee finds that the Party concerned has not as yet achieved compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention, in particular with respect to practical possibilities to appeal against a failure to act by public authorities.

33. The Committee also would like to note with appreciation the active role of the communicants and Kazakh NGOs in general in following up on the implementation of decision II/5a and the overall implementation of the Convention in Kazakhstan.

IV. RECOMMENDATIONS

34. The Committee recommends to the Meeting of the Parties, pursuant to paragraph 35 of the annex to decision I/7 and bearing in mind paragraph 8 of decision II/5a, as well as taking into account the cause and degree of non-compliance and measures taken by the Party concerned in the intersessional period, to:

(a) Take note of the progress made by the Party concerned in implementing decision II/5a of the Meeting of the Parties, in particular with regard to relevant legislative and regulatory developments, including detailed procedures for access to information and public participation in decision-making;

(b) Endorse the findings and recommendations of the Committee as adopted at its twelfth meeting;

(c) Take note of the progress made by the Party concerned in implementing the Committee's findings and recommendations with regard to communication ACCC/C/2004/06 since their adoption in June 2006, and in particular provisions of the new Environmental Code further facilitating access to justice;

(d) Further welcome the many relevant capacity-building initiatives for the judiciary and other legal professionals initiated by the Supreme Court of Kazakhstan;

(e) Note the active engagement and constructive approach demonstrated by the Government of Kazakhstan in the process of review of compliance and implementation of the recommendations made in this context;

(f) Recognize that further efforts, in particular in the area of access to justice, are needed, and that the Party remains in non-compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention;

(g) Invite the Government of Kazakhstan to thoroughly examine, with appropriate involvement of the public, the relevant legislation and court practice, with a view to enhancing the availability of adequate and effective remedies in the course of judicial review so as to bring about full compliance with article 9 of the Convention;

(h) Further invite the Government of Kazakhstan to report to the Meeting of the Parties, through the Compliance Committee, six months before the fourth meeting of the Parties, on the measures taken in connection with bringing about full compliance with articles 6 and 9 of the Convention, including, as appropriate, any further developments in legislative framework and detailed procedures, and in particular, their practical application in connection with providing the public with various effective means of participation in decision-making, ensuring that due account is taken of the public's comments and ensuring that activities subject to article 6 of the Convention are not carried out prior to the completion of the corresponding permitting process with the required level of public participation;

(i) Request the secretariat, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to the Party concerned as necessary in the implementation of these measures;

(j) Undertake to review the situation at its fourth meeting.
