

THE NEW "PUBLIC"

The Globalization of Public Participation

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Editor



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PROMOTING PUBLIC PARTICIPATION IN EUROPE AND CENTRAL ASIA

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I. BASICS

The main regional instrument on procedural rights in the region covering Europe (Western, Central, and Eastern, including the Central Asia states of the former Soviet Union) is commonly known as the Aarhus Convention. A variety of other regional legal instruments also contain some provisions relating to public participation.

The Aarhus Convention is formally titled the United Nations Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.¹ The Aarhus Convention was signed in Aarhus, Denmark in 1998 by 39 countries in Europe and Central Asia, as well as the European Community, and it entered into force October 30, 2001. As of July 31, 2002, 22 nations had ratified, adopted, or acceded to the Convention. This legal instrument is devoted entirely to environmental procedural rights—public access to information, participation, and justice—and detailed procedural duties applicable to all levels of government.

For the first time in international law, the public was intimately involved in conceptualizing and negotiating the convention. The Pan-European ECOForum, a non-governmental coalition, participated in all eleven sessions of negotiations, the process of ratification, the entering into force, and the early implementation of the Aarhus Convention. The type and degree of involvement by nongovernmental organizations (NGOs) in the negotiations that produced the Aarhus Convention were themselves a remarkable example of public participation and undoubtedly helped shape the final document.

In addition to the Aarhus Convention, other regional legal instruments containing environmental pro-

cedural rights include the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which was signed in Espoo, Finland, in 1991 (Espoo Convention),² and the Protocol on Water and Health, which was signed at the Ministerial Conference “Healthy Planet” in London in 1999.³ This chapter will discuss all three international legally binding instruments, but will focus primarily on the Aarhus Convention.⁴

A. FRAMING PROCEDURAL RIGHTS

The Aarhus Convention is an elaboration of Principle 10 of the Rio Declaration in the region of the United Nations Economic Commission for Europe. The procedures required under the Aarhus Convention move far beyond mere principles or goals to declare legal rights of individuals and specify definite and detailed legal obligations of the states that are parties to the Convention.

² UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo, Finland on Feb. 5, 1991 [hereinafter Espoo Convention].

³ Water and Health Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at London, England on June 18, 1999, U.N. Doc. E/ECE/MP/WAT/AC.1/1998/10, available at www.unece.org (last visited July 17, 2002).

⁴ Other UN/ECE instruments with provisions for public involvement include the (1992) Convention on Transboundary Effects of Industrial Accidents and the (1998) Protocol on Heavy Metals to the (1979) Convention on Long-Range Transboundary Air Pollution.

Furthermore, public participation provisions exist in some global international instruments that are beyond the scope of this chapter. The Convention on Biological Diversity (CBD) allows for public participation in environmental impact assessment procedure in Article 14.1. The Cartagena Protocol on Biosafety to this convention in Article 23 foresees providing information to the public, especially about living modified organisms; consulting with the public; and public participation in decisions concerning insurance of biosafety with consideration of risks for human health. In the United Nations Framework Convention on Climate Change (UNFCCC), Article 6 requires public participation in consideration of the issues of climate change and its consequences and in the development of reaction measures. See Carl Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428, 10430-31 (2002).

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¹ UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention].

The rights of individuals are expressed in the objective of the Convention contained in Article 1. Each party to the Convention "shall guarantee the rights of access to information, public participation in decision-making, and access to justice." These rights are generally stated, but their corresponding obligations on the state are specified in exacting detail.

For example, an individual's right to information in Article 1 is guaranteed by an obligation on the state in Article 4 to collect and provide environmental information without regard to any special interest of the individual, as soon as possible, subject to only specified exemptions, and at a reasonable cost.

Furthermore, Article 5 obligates public authorities to obtain and update specific environmental information and to establish mandatory systems for adequate flow of information to the public about proposed and existing activities that may significantly affect the environment. In the event of any imminent threat to human health or the environment, public authorities must disseminate immediately to members of the public who may be affected all information that could enable the public to take measures to prevent or mitigate harm arising from the threat.

Similarly, an individual's right to participation in Article 1 is reflected in detailed, corresponding obligations on the state in Article 6 to inform the public at an early stage of decisionmaking on certain activities, to involve the public in the decisionmaking process, and to take public opinion into account when making decisions.

In contrast to these mandatory state obligation in Article 6 for project decisions, Article 7 formulates the obligations of the state to allow public participation in decisionmaking in the preparation of plans, programs, policies, and legislation in a soft and general manner: "Each party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programs relating to the environment . . . To the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment." With regards to public participation in the preparation of executive regulations and other legally binding rules that may have a significant effect on the environment, the language in Article 8 is even weaker: "Each party shall strive to promote effective public participation at an appropriate stage . . ."

Finally, the right of access to justice in Article 1 is implemented through Article 9, which obligates states to make justice available, affordable, and effective.

Each of the obligations and requirements of the Convention will be discussed further in the sections below. Sections II, III, and IV examine access to information, participation, and justice, respectively. First,

though, the following subsection considers public involvement in transboundary matters.

B. PUBLIC INVOLVEMENT IN TRANSBOUNDARY MATTERS

The UN/ECE Conventions have been adopted in a political environment that has seen the emergence of a strengthened European Union that also faces the possibility of dramatic expansion in the coming years. In this context, environmental, social, and political boundaries have become more porous, and there is an accompanying recognition that the public needs to—indeed should have the legal right to—know about and be involved in transboundary decisions.

1. The Aarhus Convention

Public involvement in transboundary matters is envisaged by general provisions in Article 3 of the Aarhus Convention and by additional provisions in Articles 4, 6, 7, 8, and 9.

Article 3.9 broadly allows citizens of other countries to obtain information, participate in decision-making, or obtain access to justice "without discrimination as to citizenship, nationality, or domicile." This provision clearly includes public involvement in transboundary matters, as the place where someone lives (domicile) is irrelevant.

Article 4 provides that information may be requested "without an interest having to be stated," thus a state may not legislatively restrict information requests to its own citizens or residents. Therefore, applying the principle of nondiscrimination in Article in 3.9, a resident of another country has the right to request and receive a wide range of information, including that relating to transboundary issues.

Articles 6, 7, and 8 also impose no geographical restrictions for public participation. Article 6.2 requires that the "public concerned" be notified of a specific activity, and Article 6.6 authorizes access to relevant information free of charge, regarding any proposed specific activity. The term "public concerned" is defined in Article 2.5 to encompass those who are "affected or likely to be affected by, or have an interest in, the environmental decisionmaking." While not specifically stated, this definition could obviously include transboundary public notification and free access where a specific activity may have transboundary environmental effects. Furthermore, even if someone does not receive notification of a specific activity, he or she may nonetheless participate in the decision-making process. Articles 6.3 and 6.7 state that "the public" (not merely the "public concerned") may participate in making comments before the decision is taken. Since the "public" is defined in Article 2.4 to include any natural or legal

person, any member of the public anywhere has the right to comment on a transboundary matter, just as with any other matter. Article 7, regarding plans, programs, and policies, also uses the broad term “the public” for public participation. Article 8, regarding executive regulations and other generally applicable legally binding rules, likewise allows “the public” (without geographical restriction) the opportunity to comment.

The more difficult question is whether the access to justice provisions of the Convention explicitly envisage citizen litigation of transboundary matters. Does the Convention require that legislation guarantee the right of a member of the public to go to court (or a similar independent body) in transboundary situations? Article 9.2 states that the “public concerned” must have this right for specific activities (Article 6) and, if the country chooses, also for plans, programmes, policies, and executive regulations or legally binding rules. Since someone in a transboundary context may be affected by an activity or have an interest in it, this allows access to justice to such a person. Furthermore, members of the “public” (not only the “public concerned”) can file lawsuits against decisions, acts, or omissions under national environmental laws unless national law imposes criteria restricting such standing. Nonetheless, national law may not contravene the nondiscrimination requirement of Article 3.9.

In conclusion, the provisions of the Aarhus Convention provide both broad and specific rights of the public to obtain information and participate in decisions with transboundary impacts. The Aarhus Convention also promotes transboundary access to justice, albeit in a less clearly defined manner.

2. The Espoo EIA Convention

The Espoo Convention involves actions whose impacts are transboundary and requires parties to provide for participation by the public in an affected state. The Espoo Convention states in Article 2.6 that each party “shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the party of origin.” For example, if Moldova (party of origin) were to propose to build an oil terminal on the Danube river, which could impact the wildlife in the territory of Ukraine (affected party), Moldova must provide an opportunity for the Ukrainian public to participate in this decision. This opportunity should be the same opportunity given to the Moldovan public.

Furthermore, the Espoo Convention provides in Article 3.8 for a notification procedure in which the parties must ensure that the public of an affected party “be provided with possibilities for making comments or objections” regarding the proposed activity that may

have a transboundary effect. Reinforcing the EIA requirements of the Espoo Convention, the Aarhus Convention also provides in its Article 6.2(e) that the public concerned must be notified of any activity that is “subject to a national or transboundary environmental impact assessment procedure.”

In addition, a draft Protocol on Strategic Environmental Assessment to the Espoo Convention is being negotiated, and it is expected to be signed in 2003. This Protocol envisages public participation in plans and programs in both the national and transboundary contexts in its articles 4, 10, and 13. The possibility of developing a legally binding instrument such as the Protocol to expand upon Articles 7 and 8 of the Aarhus Convention was discussed during the Second Meeting of Signatories for the Aarhus Convention. The meeting decided to prepare the Protocol under the Secretariats of both the Aarhus and Espoo Conventions. Later, the Committee on Environmental Policy of UN/ECE decided to develop the SEA Protocol under the Espoo Convention with the involvement of the Aarhus Secretariat and experts, since the Aarhus Convention had not yet entered into force.

II. ACCESS TO INFORMATION

The access to information provisions of the Aarhus Convention have the potential to significantly restructure the relationship between governments and their citizens (and others) in a region of the world where information often has been kept secret or otherwise closely held.⁵

A. DEFINITION OF ENVIRONMENTAL INFORMATION

The Aarhus Convention gives a broad definition of environmental information. According to Article 2.3, environmental information includes information on the elements of the environment such as air, water, soil, landscape, and natural sites; biological diversity and its components, including genetically modified organisms and the interaction between them; and factors, such as energy, noise, and radiation. The definition also includes

⁵ In addition to the Aarhus Convention, the Protocol on Water and Health to the UN/ECE Convention on Protection and Utilization of Transboundary Watercourses and International Lakes, adopted at the Ministerial Conference in London in 1999, contains an article on Public Information. Article 10 of the Protocol requires that parties publish information and documents related to decision-making, take measures to make documents available to the public for wide discussion, and provide information requested by the public. This information includes water management plans; creation and development of systems of control and early prevention; and plans of activity in emergency situations. The article is modeled largely on Articles 4 and 5 of the Aarhus Convention.

activities, "administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment;" cost benefits and other economic analysis; state of human health and safety; and cultural sites, if they are affected or are likely to be affected by the state of the environment.

B. PASSIVE ACCESS TO INFORMATION

The Aarhus Convention ensures passive access to information, which means that governmental bodies must respond to requests of persons or NGOs and provide environmental information. Article 4.1 states that the response must be in the form requested—written, electronic, graphic, etc—unless it is only available in another form. The government must provide the actual documentation and not just a summary or explanation of the information.

An important aspect of the provision is that the requester has no necessity to prove his or her interest. Therefore, anybody may request any environmental information without having a specific interest or being personally affected. In some countries, this will mean significant changes from the way that public officials and bodies have functioned in the past.

According to Article 4.2, information should be given as soon as possible, but no longer than one month after the request was made, unless the volume and complexity of the requested information requires more time. In any case, the information must be provided no later than two months after the request.

There are some general exceptions to granting requests. According to Article 4.3, a request may be refused if the public authority does not hold such information or the request is unreasonable or formulated in too general a manner. A request can also be denied if it concerns material "in the course of completion" or if it concerns "internal communications" of a public authority. However, any such decision must be made only after "taking into account the public interest served by disclosure."

There are also more specific exceptions in Article 4.4, for example if information disclosure may adversely affect:

- the confidentiality of proceedings of a public authority;
- international relations, national defense, or public security;
- the course of justice, the ability of a person to receive a fair trial and the ability of the public authority to conduct an inquiry of a criminal or disciplinary nature;
- the confidentiality of commercial and industrial information when this confidentiality is

protected by law (but information on emissions that is relevant to the protection of the environment should be disclosed);

- intellectual property rights;
- the confidentiality of personal data; and
- information that could harm rare or endangered species.

There is a presumption in favor of access to information. For example, the Preamble states that citizens must have access to information in order to assert their right to live in a healthy environment, and Article 1 states that each party "shall guarantee" the right of information. Articles 4.1 and 4.4 state that the list of exceptions is exclusive and may not be interpreted broadly. Article 4.1 states that each party shall make information available subject to only the exceptions provided in the Article itself, and Article 4.4 states that the exemptions "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure."

Any refusal must be in writing, according to Article 4.7. The refusal must provide information on review procedures available under Article 9 for appealing the decision.

Public authorities may be allowed to charge a fee for supplying information, but the charge should be reasonable. Public authorities also must indicate when charges might be levied or waived and when the supply of information is conditional on advance payment. In addition, Article 5.2(c) specifies that information should be given free of charge if it is available in publicly accessible lists, registers, or files.

C. ACTIVE ACCESS TO INFORMATION

The Aarhus Convention in Article 5 establishes active access to information and a mandatory system to ensure a flow of information about proposed or existing activities that may significantly affect the environment. Public authorities shall possess, update, and disseminate relevant environmental information, using lists, registers, or files,⁶ electronic databases,⁷ national reports,⁸ and a system of pollutant release and transfer registers involving pollution from private or other facilities.⁹

In emergency situations, all information that may enable the public to take measures to prevent or mitigate harm to the environment or health and that is held by public authorities should be given to the members of public who may be affected immediately.¹⁰ There are, however, no special mechanisms for ensuring that this dissemination will occur.

⁶ Aarhus Convention, *supra* note 1, art. 5.2.

⁷ *Id.* art. 5.3.

⁸ *Id.* art. 5.4.

⁹ *Id.* art. 5.9.

¹⁰ *Id.* art. 5.1(c).

In addition, Article 6 of the Aarhus Convention, which generally concerns public participation, also contains many provisions related to the active provision of information to the public in the course of decision-making on specific activities or projects. For example, under Article 6.2, the public concerned shall be informed early in an environmental decision-making procedure and in an adequate and effective manner about the proposed activity and its significant effects on the environment. Each party shall require the competent public authorities to give the public concerned access to all information relating to the decision-making. This may be provided upon request, if the national law so requires. The public concerned must have the right to examine the information free of charge and as soon as it becomes available.

D. ENVIRONMENTAL IMPACT ASSESSMENT (EIA) PROCEDURES

The Aarhus Convention does not set forth environmental impact assessment procedures, but the public must be told if an EIA procedure applies, according to Article 6.2(e), and information must be provided, as described in the previous section.

The Espoo Convention sets national procedures for evaluating the likely transboundary impacts of a proposed activity on the environment. Each party must take the necessary legal, administrative, and other measures to implement the EIA provisions for proposed activities listed in Appendix I (i.e., those that are likely to cause significant adverse transboundary impacts). The party of origin must initiate an EIA procedure that permits public participation and prepare EIA documentation, described in Appendix II, that it provides to the affected party.¹¹

E. STATE OF THE ENVIRONMENT REPORTS

The Aarhus Convention in Article 5.4 obligates parties to provide a National Report on the State on the Environment regularly, with an interval that should not exceed three or four years. In some countries of the region (for example, Moldova, Russia, and Ukraine) a National Report is prepared every year, published (usually with a one year delay), and posted on the internet. The National Report should include information about the quality of the environment and pressures on the environment. In addition, Article 5.5 obligates a party to disseminate to the public new policy and legislation, treaties, and other significant international documents.

F. POLLUTION INVENTORIES

Article 5.9 of the Aarhus Convention requires each country to develop a coherent, nationwide system of pollution inventories or registers. These inventories or registers are to be based upon a structured, computerized, and publicly accessible database compiled through standardized reporting. It has been agreed that a legally binding instrument in the form of a protocol is needed, which will set forth more specific provisions. A draft Protocol on Pollutant Release and Transfer Register (PRTR) is being negotiated by an Intergovernmental Working Group created under the Aarhus Convention, with participation by NGOs.

The Protocol will contain detailed provisions on PRTR, such as what will be in registers; what substances must be reported and how often; monitoring and record-keeping; and public access to the information.

The Protocol will likely be open to countries that are not parties to the Aarhus Convention as an independent instrument. This PRTR Protocol will be ready for signature at the Fifth Ministerial Conference of the "Environment for Europe" process, to be held in Kyiv in May 2003.

G. ACCESS TO OTHER RELEVANT INFORMATION

Article 5.6 of the Aarhus Convention has a provision that while not mandatory, could enhance the flow of information to the public. It states, "Each party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labeling or eco-auditing schemes or by other means." For example, some companies label their food products as not containing genetically modified organisms or that they were produced without the use of chlorine. Market pressure in such circumstances can lead to industry-wide change. Article 5.8 provides furthermore that parties must ensure that consumer information on products is made available so that consumers can make "informed environmental choices."

The Aarhus Convention in Article 5.3 also foresees the establishment of publicly accessible websites that should contain electronic versions of state of environment reports; text of environmental legislation; environmental plans, programs, and policies; and other information.

III. PUBLIC PARTICIPATION

The Aarhus Convention has the potential to bring about major changes in the way democracy is practiced in Europe and Central Asia. The Convention requires

¹¹ Espoo Convention, *supra* note 2, art. 2.2.

public participation in governmental decisionmaking far beyond previous practices and legislation in the region, particularly regarding specific development projects. The Convention also expresses the need for public participation in the formulation of policies, executive regulations, plans, and programs, but its requirements in this regard are much weaker.

A. AVENUES FOR PUBLIC PARTICIPATION

1. Aarhus Convention

Article 6 of the Aarhus Convention addresses public participation in specific, project-level activities that may impact the environment. This Article sets out procedures for public participation in decisions regarding specific activities that are listed in Annex I. Annex I includes 20 categories of activities impacting the environment, such as mining, the chemical industry, energy sector, production and processing of metals, waste management, and industrial plants. In accordance with a party's national law, these procedures may also apply to decisions on proposed activities, which are not listed in Annex I, but which may have a significant effect on the environment, including transboundary matters.

Some exceptions to public participation in proposed projects are possible. For example, Article 6.1(c) allows parties to decide on a case-by-case basis, depending on national law provisions, not to apply the provisions of this Article to activities that propose to serve national defense purposes, provided that the party deems that its application would have an adverse effect on national defense. Each party shall determine whether such a proposed activity is subject to these provisions.

Each party must provide possibilities for public participation early in the process, when "all options are open" and effective public participation can take place.¹² Moreover, the public must have an opportunity to participate in all stages of decisionmaking, not just at the beginning.

In many countries of Europe, national legislation provides that the "public concerned" shall be informed about a planned activity that may impact the environment. Article 2 of the Aarhus Convention defines the "public concerned" to mean "the public affected or likely to be affected by, or having an interest in, the environmental decision-making." For the purposes of this definition, NGOs promoting environmental protection and meeting any requirements under national law are deemed to have an interest.

The public may send written comments to the responsible governmental authority or express its opin-

ions orally during public hearings organized by the public authority or project proponent.¹³

According to Article 6.8, the governmental authority should take into account and incorporate public input into the decision on the proposed activity, or it should comment on and respond to the comments. The decision on the proposed activity must be made available to the public along with the reasons and considerations on which the decision is based.¹⁴

2. Espoo Convention

The Espoo Convention, in Articles 3.8 and 4.2, requires parties to notify the public and to provide the opportunity for public participation in environmental impact assessment procedures regarding proposed activities likely to cause transboundary environmental harm. In the final decision on the proposed activities, parties must take due account of the environmental impact assessment, including the outcome of consultations with public.¹⁵

B. PUBLIC PARTICIPATION IN THE DEVELOPMENT OF REGULATIONS, POLICIES, PLANS, AND PROGRAMS

Participation in decisionmaking at the strategic level (i.e., in the development of regulations, policies, plans, and programs) is provided in two parts of the Aarhus Convention and in a Protocol being drafted under the Espoo Convention. In addition, the Protocol on Water and Health requires the provision of information for participation.

1. Aarhus Convention

Article 7 of the Aarhus Convention encourages public participation in the preparation of plans and programs relating to the environment. Each party shall make appropriate provisions for the public to participate during the preparation of plans and programs. The language of Article 7 is advisory, especially on public participation in the preparation of policies: "To the extent appropriate, each party shall endeavor to provide opportunities for public participation in the preparation of policies relating to the environment."

In Article 8, governing public participation in executive regulations, the language is also somewhat soft. Rather than stating strict requirements, it provides: "Each party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation of executive regu-

¹⁴ *Id.* art. 6.9.

¹⁵ Espoo Convention, *supra* note 2, art. 6.

¹² Aarhus Convention, *supra* note 1, art. 6.4.

¹³ *Id.* art. 6.7.

lations and similar rules affecting the environment.” Draft rules should be published and the public given an opportunity to comment on them.

The public participation requirements of Articles 7 and 8 indicate that the states negotiating the Convention were not willing to go as far in the field of policies and legal norms as they were under Article 6 for actions involving a specific project, such as licensing or permitting. Subsequently, as discussed in section I above, the UN/ECE Committee on Environmental Policy decided to develop a Protocol on Strategic Environmental Assessment under the Espoo Convention, with the participation of Signatories of the Aarhus Convention, since the Espoo Convention had already entered into force.

2. SEA Protocol to the Espoo Convention

A draft Protocol on Strategic Environmental Assessment is being prepared under the Espoo Convention. The Protocol will develop a procedure for public participation in plans and programs. It may also cover policies and legislation, but the provisions on public participation in policy and legislation are still under discussion. The Protocol is expected to be ready for signing at the Fifth Ministerial Conference of “Environment for Europe” process in Kyiv in 2003.

3. Protocol on Water and Health

The London Protocol on Water and Health,¹⁶ encourages public participation in decisions on water and health related issues. Article 5(i) requires that decision-making concerning water and health be guided by the principle that public participation, access to information, and access to justice should be provided. Article 5(i) provides few details, but is not restricted only to projects, and therefore would appear to be applicable also for plans, programs, and similar decisions.

IV. ACCESS TO JUSTICE

The access to justice provisions of the Aarhus Convention—set forth in Article 9—are both progressive and insufficient. They are progressive in that they establish legal standing for NGOs without having to prove any interest in the matter, they reduce financial and other barriers to justice, and they ensure that courts can grant adequate remedies, including injunctions. The Article 9 provisions are insufficient in that they do not provide much guidance on the specifics of ensuring access to justice, the pillar of public involvement, and one of the most difficult topics to implement.

The Aarhus Convention provides for access to justice in three circumstances: (1) for violations of national environmental laws, (2) if a request for information under Article 4 is improperly denied, and (3) to review any act or omission relating to public participation under Article 6, or other Articles if a party decides to do so.

A. REDRESSING ENVIRONMENTAL VIOLATIONS

Article 9.3 of the Aarhus Convention requires parties to the Convention to provide “administrative or judicial review” procedures for “members of the public” who meet the criteria, if any, in national law, to challenge “acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.” This article provides for enforcement by the public against private entities, such as polluting companies or developers, and also for remedies against governmental bodies that violate the law.

Members of the public may seek access to justice under the Convention against private persons, including corporations, which are “legal persons” under the law.

The public may also seek access to justice against public authorities. This provision potentially includes both public enforcement authorities, such as a Ministry of Justice or local prosecutors who fail to enforce the environmental laws, and also other public authorities, whether or not environmental, such as a forestry department, Ministry of Transportation, or local housing authority, that act contrary to the national environmental law or fail to fulfill required duties.

Members of the public may be provided with direct or indirect enforcement. Article 9.3 states that a party to the Convention may provide judicial review (in which members of the public can file lawsuits themselves in the court system) or administrative review (in which members of the public can formally invoke administrative procedures to stimulate public enforcement authorities to take action against the private persons or public authorities).

Article 9.3 allows members of the public, when they meet any applicable requirements of national law, to have the access to justice that the law provides. Neither Article 9 nor Article 2 (Definitions) defines “members of the public,” but Article 2.4 of the Convention does define “the public” to include both natural and legal persons, encompassing individuals and groups. If a country has specified criteria for determining which members of the public have access, these may be applied. However, whether there are limits to such criteria (in light of the broad goals of the Convention, including access to justice) will have to be resolved in the future.

¹⁶ See *supra* note 5.

B. ENSURING ACCESS TO INFORMATION

Article 9.1 of the Aarhus Convention allows access to a court of law or another independent and impartial body established by law if a request for information under Article 4 has been ignored, wrongfully refused, or inadequately answered. Final decisions by the court or independent body "shall be binding on the public authority holding the information." Since "any person" has this right of access to justice under Article 9.1, no test of the legitimacy of a person's interest can be imposed. In fact, even citizens or residents of another country can seek information—access to justice to enforce their right to information—under Article 3.9 of the Convention.

Access to justice regarding acts or omissions of public authorities under Article 5 of the Convention (relating to active collection and dissemination of information, such as publicly accessible lists of information, electronic access to information, information for consumers, and pollutant registers) is not covered by Article 9.1. Nevertheless, Article 5 duties could be considered to be part of national law "relating to" the environment, and thus covered by Article 9.3, discussed above.

C. GUARANTEEING PUBLIC PARTICIPATION

Article 9.2 provides access to justice to "members of the public concerned" to challenge the substantive and procedural legality of any decision, act, or omission subject to the provisions of Article 6 (public participation in decisionmaking regarding specific activities). Decisions, acts, or omissions subject to Article 7 (plans, programs, and policies) or Article 8 (executive regulations) can also be challenged if "so provided for under national law."

Unlike Article 9.1, the terms of Article 9.2 do not extend to "any person" but only to "members of the public concerned." This wording limits standing to those legal or natural persons "having a sufficient interest" or, when national law so requires, those "maintaining the impairment of a right." Although standing is to be determined "within the framework of national legislation," parties do not have complete freedom to determine who has an interest or a right. Article 9.2 states that this shall be determined both "in accordance with the requirements of national law," and "consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention." Thus, parties cannot interpret "sufficient interest" or "right" restrictively.

Furthermore, "NGO standing" is explicitly provided in Article 9.2. Article 9.2 provides that "the interest of any non-governmental organization" that meets the requirements of Article 2.5 of the Convention (those

"promoting environmental protection") "shall be deemed sufficient." Such NGOs are also deemed to have "rights capable of being impaired" in a legal system that requires an impairment of a right to seek judicial redress.

D. CONDITIONS TO ENABLE ACCESS TO JUSTICE

Article 9.4 imposes general requirements applicable to all categories of access to justice. A review procedure should be "fair, equitable, timely, and not prohibitively expensive." A fair review procedure means a process that is impartial and free of prejudice. Article 3.9 separately requires that access to justice be made available "without discrimination as to citizenship, nationality or domicile." The Article 9.4 requirement of fairness thus requires the judicial and administrative system to be non-discriminatory in a broader sense and free of prejudice, favoritism, or self-interest.

Access must also be effective. Article 9.4 states that remedies must be "adequate and effective," and include "injunctive relief as appropriate." This is significant, as injunctive remedies have traditionally not been as available in Europe as in some other parts of the world.

In addition, the Aarhus Convention provides that "Each party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted, or harassed in any way for their involvement."¹⁷ This is a significant protection for freedom of speech and advocacy.

V. CONCLUSION

Public participation is becoming part of the political landscape in the UN/ECE region. The Aarhus Convention has given people a voice. This international legally binding instrument has declared the environmental rights of citizens—the right to a healthy environment, the right to information, the right to participation in decisionmaking, and the right to access to justice in environmental matters. Now begins the hard work of turning these declarations into reality.

According to Kofi Annan, the Secretary-General of the United Nations, the Aarhus Convention is the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations.¹⁸ Its adoption is a remarkable step forward in the development of international law as it relates to participatory democracy and citizens' environmental rights. On the occasion of the Aarhus Convention entering into force, Dr. Annan commented that the active participation of

¹⁷ Aarhus Convention, *supra* note 1, art. 3.8.

¹⁸ STEPHEN STEC & SUSAN CASEY-LEFKOWITZ, *THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE V* (2000).

countries from Eastern Europe and Central Asia “clearly demonstrates that environmental rights are not a luxury reserved for rich countries.”

The Aarhus Convention is not perfect, however. For example, its provisions on public participation are detailed for the approval of specific projects affecting the environment but are comparatively weak for the development of policies and executive regulations. In addition, its provisions on access to justice are progressive compared to the traditional laws in many countries, but they still contain too many compromises regarding existing national legislation.

Working groups created by the Meetings of Signatories are continuing to develop provisions through protocols and guidelines on pollutant release and transfer registries, genetically modified organisms, and public participation at the strategic level—in plans, programs, policies, and legislation. This has led to protocols on PRTRs and on SEA that are expected to be open for signature in 2003.

In furtherance of the goals of the Aarhus Convention, NGOs have been treated as partners from the beginning of negotiations for the Convention. At the First Meeting of the Parties in October 2002, a Compliance Mechanism and Rules of Procedures will be adopted. In continuation of the tradition of recognizing the public’s right to speak and to be heard in Aarhus processes, the draft Compliance Mechanism provides that NGOs can participate in nominating independent experts for election to the Compliance Committee. Furthermore, the draft Rules of Procedure will allow an NGO representative to have a seat as an observer in the Bureau of the Convention.

The Aarhus Convention is only the beginning of the dialogue between government and civil society. There is still much work to be done in terms of its implementation, and the public will have a significant role to play in its implementation.