

THE NEW "PUBLIC"

The Globalization of Public Participation

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The New "Public": The Globalization of Public Participation

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TOWARDS GOOD PRACTICES FOR PUBLIC PARTICIPATION IN THE ASIA-EUROPE MEETING PROCESS

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The Asia-Europe Meeting (ASEM) process was created by 10 Asian nations, the 15 European Union (EU) member states, and the European Commission in 1996 as an informal process for dialogue and cooperation.¹ Its purpose is to strengthen the political, economic, and cultural relationship between Asia and Europe. The process is based on cooperation within three fields: political (e.g., human rights and globalization); economic and financial (e.g., the removal of obstacles to trade and investments); and cultural and intellectual (e.g., research cooperation and protection of cultural heritage).² In 1998, the second ASEM summit established the Asia-Europe Environmental Technology Centre (AEETC) as a nonprofit organization. The purpose of the AEETC was to contribute to the protection and enhancement of environmental quality among the ASEM partners and to promote cooperation in environmental matters, including the transfer of environmentally sound technologies, among the ASEM partner countries.

When the AEETC was established, four priority areas were identified. These are: mega-cities; bioremediation; involvement of the public in environmental matters; and disaster anticipation, management, and remediation. Within each of these priority areas, the AEETC was expected to initiate activities that would foster a dialogue among the ASEM partners in the form of projects, meetings, seminars, and a major European Commission-sponsored conference.

In the area of public participation, the AEETC initiated a project that led to the development of a draft document, *Towards Good Practices for Public Involvement in Environmental Policies*. This document was presented at an informal meeting of ASEM ministers in

January 2002 and then again at a meeting of Foreign Ministers in June 2002.³

This chapter will analyze the draft document, *Towards Good Practices for Public Involvement in Environmental Policies*. Due to the special nature of the ASEM, this analysis will emphasize the process of developing the document before considering its contents. A key finding in this chapter is that the lack of operative structures for the ASEM, such as a secretariat, has made it difficult to actively advance public involvement through political discussions.

I. PUBLIC PARTICIPATION AND THE AEETC AGENDA

The AEETC was established as a manifestation of the ASEM partners' commitment to environmental issues, as well as an avenue by which to foster a discussion of broader political issues. In the environmental field, it is often relatively easy to find common ground that can help overcome political barriers. For example, in 1974 the then seven Baltic coastal states managed to create for the first time a convention that covered all sources of pollution around an entire sea, despite the fact that the countries had widely differing political systems, history, and culture.⁴ In Asia, the Mekong River Commission has made similar strides, although it does not yet involve all the countries of the Mekong watershed.⁵

The AEETC's initial list of priority areas was generated during the political discussion that surrounded its establishment in 1998. The list was broad and reflected the many different interests of ASEM partners. From the beginning, the emphasis was on developing a mutually beneficial dialogue. Business interests and technology transfers were high on the agenda, reflecting a strong emphasis on economic development within

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¹The ASEM partners are Austria, Belgium, Brunei Darussalam, China, Denmark, Finland, France, Germany, Greece, Indonesia, Ireland, Italy, Japan, Luxembourg, Malaysia, the Netherlands, the Philippines, Portugal, Republic of Korea, Singapore, Spain, Sweden, Thailand, the United Kingdom, Vietnam, and the European Commission.

² See the EU website on ASEM, available at europa.eu.int/comm/external_relations/asem/intro (last visited June 30, 2002).

³ *Towards Good Practices for Public Involvement in Environmental Policies* (Draft June 28, 2001), produced by AEETC for the Consideration of the Environment Minister's Meeting, available at www.vyh.fi/eng/intcoop/regional/asian/asem/junedraft1.RTF (last visited Feb. 20, 2002) [hereinafter Good Practices Document].

⁴ Ain Lääne, *Protection of the Baltic Sea: The Role of the Baltic Marine Environment Protection Commission*, 30(4-5) *AMBIO* 260-62 (2001).

⁵ See www.mrcmekong.org (last visited June 25, 2002).

the ASEM in the second field of cooperation (economic and financial).

The priority area of developing public involvement clearly differs from the other technically oriented priorities such as mega-cities, bioremediation, and disasters. It does, however, relate directly to the first field of cooperation on political issues, such as human rights and globalization.

Public involvement and the development of civil society have been high on the agenda of many European ASEM partners, and their importance has also been recognized by some of the Asian partners. However, in recent years, several ASEM partners have been confronted with negative and unsolicited public involvement through violent protests against development projects or environmental problems. Therefore, while all ASEM partners are invested in the priority area of public involvement, the actual scope of public involvement is somewhat vague and different partners hold different priorities.

A. THE PROJECT ON PUBLIC PARTICIPATION

Finland was one of the ASEM partners that supported the AEETC financially through project funding. The Government of Finland, focusing on its foreign policy priorities of good governance and development of civil society, decided to provide support for the activities on public involvement.⁶ In line with its mandate, the AEETC coordinated activities on the public participation project. The AEETC contracted with the Finnish Environment Institute (SYKE) and the Thailand Environment Institute (TEI) to carry out the practical tasks related to the project. The general purpose of the project was to enhance networking among the ASEM partners' specialists on public involvement; to compile material on legislation, strategies, and practical experience; and to produce a set of guiding principles for good practices in public involvement in environmental issues.

An important source of guidance for the project was the process undertaken by the United Nations Economic Commission for Europe (UN/ECE) during the development of the 1998 Aarhus Convention.⁷ In par-

ticular, the UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (Sofia Guidelines),⁸ endorsed in Sofia on October 1995 by European Environment Ministers, provided a useful starting point in the development of guiding principles for the ASEM. The Sofia Guidelines contain the key elements of public involvement that were set forth in Principle 10 of the Rio Declaration.⁹ The non-binding and regional scope of the Sofia Guidelines made an ideal template for the ASEM. A non-binding document is the only viable option since the ASEM process is informal, a fact repeatedly stressed by the European Union (EU).¹⁰ The public participation project was launched in June 2000 during a workshop in Hong Kong on public involvement in development projects at the annual conference of the International Association of Impact Assessment.¹¹ The conference was chosen as a starting point because environmental impact assessment (EIA) has been one of the key mechanisms for advancing public participation. Asian and European nations have considerable experience in ensuring public participation through the use of EIAs, and this experience could be utilized as a starting point to identify good practices for public involvement generally.

B. THE PROCESS OF DEVELOPING THE GOOD PRACTICES DOCUMENT

As noted above, the ASEM is an informal process consisting of dialogue and cooperation among ASEM partners, and therefore ASEM cannot produce binding documents. The ASEM functions by convening summit-level meetings every second year. Apart from the summit meetings, the ASEM process is furthered through a series of ministerial and working-level meetings, as well as a number of smaller-scale activities arising from these meetings. A Senior Officials Meeting (SOM) prepares the agenda for the political discussions that occur at the ministerial level meetings of Ministers for Foreign Affairs. Some examples of the smaller-scale activities are special meetings for Senior Environmental Officials and an informal meeting of the Ministers

⁶ See Program of Prime Minister Paavo Lipponen's Second Government, Apr. 15, 1999, available at www.valtioneuvoisto.fi/vn/liston/base.1sp?r=696&k=en&old=385 (last visited June 25, 2002) ("Finland will continue to promote security as well as sustainable and balanced development in the world by working towards a strengthening of democracy, respect for human rights, the rule of law and equality").

⁷ 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]; see also Svitlana Kravchenko, *Promoting Public Participation in Europe and Central Asia*, in this volume.

⁸ UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making, adopted at Sofia, Bulgaria on Oct. 25, 1995, available at www.unece.org/env/documents/1995/cep/ece.cep.24e.pdf (last visited June 30, 2002).

⁹ Rio Declaration on Environment and Development, prin. 10, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1992).

¹⁰ For the European Commission's website on ASEM, see europa.eu.int/comm/external_relations/asem/intro/ (last visited June 30, 2002).

¹¹ Antonio Fernandez de Tejada et al., *Public Participation and Development Cooperation*, IAIA: Vision Statements and Road Maps (2000), available at www.iaia.org/ (last visited June 30, 2002).

of the Environment that occurred in 2002. There is no secretariat for the ASEM process. Instead the SOM prepares and facilitates the political meetings. These characteristics of the ASEM process were factored into the development of the Good Practices Document.

When the public involvement project was launched in June 2000 after an initiation phase in the spring of 2000, the AEETC, SYKE, and TEI agreed that there should be some form of guiding principles or guidelines to assist in the development and implementation of the public involvement project by the ASEM partners. The first draft of the Good Practices Document was developed during the year 2000 and presented to AEETC's Pilot Phase Guidance Group (PPGG) meeting in December 2000. In 2000, an advisory group consisting of representatives from six ASEM member countries (China, Finland, Korea, Thailand, United Kingdom, and Vietnam) supported the project team in developing the Good Practices Document by providing comments and examining the political acceptability of the Document from the countries' perspectives.

The PPGG did not provide any substantial comments on the first draft and generally approved the project. In January 2001, a revised version was produced with the aim of presenting it to the Foreign Ministers' Meeting in May 2001. At this stage the draft was posted on the project's website,¹² which is available to the public. The draft was open to anyone for review and comment, and comments were explicitly invited from all interest groups. The AEETC also sent the Document to the official ASEM contact points for comments. This round of review resulted in comments primarily from experts and interest groups. The official ASEM contact points provided little input, and the AEETC was unsuccessful in obtaining any response from this group.

The lack of official response meant that plans to present a draft at the Foreign Ministers' meeting in May 2001 had to be abandoned. Instead, a new draft was produced in May 2001 for the consideration of the PPGG, with the assumption that the PPGG would decide on whether to forward the Document to the political process. In June 2001, the PPGG met, but problems related to the financial and technical administration of the AEETC that had slowed the progress of all projects were increasing, and consequently the PPGG was unable to reach any firm decision on what to do with the Document.¹³

The name of the Document was changed from Guiding Principles on Public Involvement in Environmental Aspects in the ASEM Countries to Towards Good Practices for Public Involvement in Environmental Policies to reflect the Document's non-binding character. Some changes were also made in the text to this effect. These changes were made as the result of comments received from the PPGG. The intention of the AEETC and its public participation project team was then to submit the Document to the political process of the ASEM in order to give it a visible role. This process, however, turned out to be very complicated.

C. DELIVERING THE GOOD PRACTICES DOCUMENT TO THE POLITICAL ARENA

In the summer of 2001, China invited all Ministers of the Environment to Beijing later in the year. China also distributed a draft Statement of the Chair that it considered a first step in guiding the outcome of the meeting. This draft document mentioned stakeholder cooperation but did not include explicit reference to public involvement. The European ASEM partners were confused by the rapid progress of the preparations for the ministerial meeting and were, as a group, unable to respond in a meaningful way to the Chinese initiative. There was confusion over the dates of the meeting, the status of the meeting, and the role of any documentation.

Despite these uncertainties, the AEETC and the project on public involvement initiated preparations for a side event to publicize the issue and focus attention on the Good Practices Document. Due to the uncertainties surrounding the ministerial meeting, only preliminary planning for the side event could be undertaken. The uncertainties continued throughout the autumn of 2001, during which time the statement of the Chairman was redrafted, with input from the AEETC, so that it mentioned public involvement.

In December 2001, the European ASEM partners were finally able to agree on the dates for the ministerial meeting—January 16-18, 2002. In conjunction with the preparations of the ministerial meeting, the AEETC accepted the Center for Environmental Education and Communication of the Chinese Environmental Protection Agency's (SEPA) offer to organize a seminar immediately preceding the ministerial meeting in Beijing. Once the dates for the ministerial meeting were set, the preparations for a seminar—Asia-Europe Dialogue on Public Participation and Environmental Decision Making—were finalized. Due in large part to the initiative of the SEPA, the side event seminar materialized on January 14-15, 2002 in Beijing. The seminar attracted considerable interest in the Chinese media and successfully brought together approximately 80 specialists from

¹² The Development of the Guiding Principles Document is available at www.ymparisto.fi/eng/intcoop/regional/asian/asem/asem.htm (last visited July 8, 2002).

¹³ One example of the technical difficulties was that some delegations had not seen the Document in advance, despite the fact that it had been distributed twice during the spring of 2001 to all official ASEM contact points, including the PPGG.

universities, administration, media, and civil society. The majority of attendees were from China, but attendees also came from six European and three other Asian countries, as well as embassy personnel from the EU and the United States.

This side event contributed to a positive reception by ASEM governments towards the issue of public involvement. However, despite this positive reception, there were questions as to whether the Document on Good Practices would even be noted at the ministerial meeting. Since the AEETC did not have an official role in the preparations of the meeting or any formal status during the meeting, the AEETC could not take any initiative and was not able to present documents to delegates without being asked to do so by the ASEM partners. Thus, the Senior Environment Officials Meeting (SEM) received the Good Practices Document only after Finland had taken the initiative to ask for its distribution. After its distribution, it was possible to formally take note of the Document at the SEM and introduce statements reflecting its existence into the Chairman's statement of the ministerial meeting. The statement ultimately noted that the Environmental Ministers had agreed that the "exchange of experiences concerning good practices for public involvement should be promoted."¹⁴

This statement was crucial for obtaining recognition for the Document in the official political arena of the ASEM, that is at the Senior Officials Meeting (SOM) and the Foreign Ministers' Meeting. At this point, the formal role of the AEETC in advancing the Document diminished greatly because only ASEM partners can participate in the political process. The discussions on dismantling the AEETC after the pilot phase ends in October 2002 further distanced the AEETC from the ongoing political discussions. The uncertain status of the AEETC has for a considerable time negatively affected the visibility of the Good Practices Document because at the SEM and SOM some delegates have been reluctant to recognize any results of the AEETC's activities. Discussions about the fate of the AEETC replaced discussions and negotiations on the substance of the Document.

Finally, in the spring of 2002 the Good Practices Document was distributed at the SOM, and it was also recognized by the Foreign Ministers' Meeting, held June

6-7, 2002.¹⁵ It remains to be seen whether the Document will also be noted at the ASEM summit in autumn 2002 and at the Environment Ministers' Meeting in Italy in 2003. The Document was disseminated and discussed at the International AEETC Conference on Public Participation, held in Bangkok, Thailand on June 10-12, 2002, which drew nearly 400 participants.¹⁶ At the Conference representatives of the UN/ECE and the United Nations Economic and Social Commission for Asia Pacific (UN/ESCAP) agreed to initiate a dialogue on how to promote the contents of the Document further within UN/ESCAP, building on the experiences of the UN/ECE in developing the Aarhus Convention.

II. THE CONTENTS OF THE GOOD PRACTICES DOCUMENT

In refining the Good Practices Document, the editorial team included elements from the ASEM and AEETC mandates and deleted references to the processes within the United Nations system. This section describes the key elements of the Document as submitted to the Environment Ministers in January 2002. In particular, the Document will be compared to the Aarhus Convention, a geographically broad, binding international document on public involvement that also applies to a significant number of ASEM members.

The Document is still in draft form, as no political ASEM institution has formally approved it. Even though the title—Towards Good Practices for Public Involvement in Environmental Policies—does not refer to recommendations or guidance, the brief paragraph-based style of the Document suggests a guidance or guiding principles document rather than a set of cases of good practice. Therefore, developing a political document on guiding principles will be easier than if the Document contained lengthy descriptions of how to develop practices.

"Public involvement" was chosen as the general term for the topic because the responsible officer at the AEETC was concerned that there would be opposition to the concept of public participation. He felt that "participation" may be construed to hint at a right to interfere strongly with decisionmaking and thought that "public involvement" was a more neutral term. A further justification for the use of the term public involve-

¹⁴ Chairman's Statement of the ASEM Environment Ministers' Meeting, para. 18, done at Beijing on Jan. 17, 2002, available at europa.eu.int/comm/external_relations/asem/min_other_meeting/env_min1.htm (last visited June 30, 2002).

¹⁵ Chair Statement, Fourth ASEM Foreign Ministers' Meeting, done at Madrid on June 6-7, 2002, para. 5, available at europa.eu.int/comm/external_relations/asem/min_other_meeting/for_min4.htm (last visited June 30, 2002) ("Ministers gave special recognition to the valuable work carried out by the AEETC in promoting public participation in environmental affairs...").

¹⁶ AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, available at www.aeetc.org/int_publ.html (last visited July 7, 2002).

ment was found in the World Bank's use of the terms, in which "public involvement" is the generic term that covers access to information, participation in decisionmaking, and access to justice. In practice, however, it turned out that the concern for the concept of public participation was largely unfounded because both involvement and participation are normally translated into the same word in Chinese, as well as in some other languages.

The Document divides public involvement into access to environmental information, public participation, and access to justice following, with some modification, the three main pillars of the Aarhus Convention. A fourth section addresses implementation, and an appendix defines the different types of involvement referred to in the Document. Public participation in the Document is not restricted to decisionmaking processes but also recognizes participation in planning. Due to the Document's nonbinding character,¹⁷ the text of the entire document is less legally oriented and more directed towards practice. Still, the document is brief, with only 36 paragraphs.

The basis of the Document is that any natural or legal person should have the opportunity to be involved. For example, paragraph 1 states that "Any natural or legal person will have free access to environmental information at their request, subject to the terms and conditions contained in these elements of good practice." Authorities on levels ranging from the local to the supranational are responsible for providing these opportunities with respect to the three pillars of involvement.¹⁸ The importance of facilitating the involvement of environmental organizations is also emphasized.¹⁹ The Document stresses collaboration among the ASEM members to fulfill the recommendations. For example, possibilities to collaborate regionally should be explored to facilitate harmonized regional assessments and com-

parisons concerning the transparency and participatory features of planning and decisionmaking procedures.²⁰

A notable feature of the Document is its emphasis on cultural issues, especially cultural differences.²¹ This is not emphasized in the Aarhus Convention, which was developed in a region where cultural differences and changes are more modest. In contrast, though, completely different cultures are represented among the ASEM partners and the differences are very stark.

Cultural diversity is also emphasized in the context of access to information by requiring publication of up-to-date environmental information²² in a form and media that accommodates the linguistic and cultural variety and different levels of literacy.²³ The section that addresses public participation emphasizes the right to participate regardless of gender, cultural or ethnic identity, language, citizenship, nationality, or domicile.²⁴ The Document further stresses the integrity of those who use their right to participate: lawful activities should not lead to penalties.²⁵

The Document supports collaborative capacity building among the ASEM partners in their efforts to respond to the demands of public involvement.²⁶ This element is specifically stressed with respect to collaboration among authorities on a supranational level. While this collaboration does not necessarily address transboundary matters, there is one paragraph that pro-

¹⁷ See Good Practices Document, *supra* note 3, pmb. ("These are not binding and not intended to replace existing procedures, including those that guarantee the rights of public involvement, adopted by international, national or provincial laws, law claim agreements, regulations or guidelines within the ASEM region.")

¹⁸ *Id.* ("the promotion of public involvement requires that public authorities raise the public's environmental awareness in order to promote greater public understanding and support for environmental policies and enforcement and ensure transparency in their activities and are accountable for their actions, and that the information they provide is readily accessible to all, thus improving their credibility and strengthening support for their activities in their own socio-cultural context.")

¹⁹ *Id.* para. 22 ("ASEM members are encouraged to establish formal and informal networks and other consultative processes to facilitate the involvement of environmental organizations and other interest groups in decision-making processes having significant environmental implications and to eliminate impediments or obstacles to public participation.")

²⁰ *Id.* para. 36 ("ASEM members will support ongoing activities and facilitate exchange of experiences of following the elements of good practice in the ASEM region and promote regular evaluation of the application of the public involvement.")

²¹ *Id.* at pmb. ("Recognizing the importance of cultural diversity and the close links between culture, society and the environment, and that ASEM members provide abundant examples of this diversity ...")

²² *Id.* para. 4 ("Public authorities will regularly collect and update relevant environmental information, including social, health and cultural data ...")

²³ *Id.* para. 11 ("ASEM members will actively publicize the availability of the texts of international legal instruments, to which they are a party, and which establish procedures for public access to environmental information or public participation rights, preferably in their own language(s) and taking into account the needs of illiterate persons together with relevant conference resolutions or recommendations.")

²⁴ *Id.* para. 19 ("ASEM members will promote participation of the public, regardless of gender, cultural or ethnic identity, language, citizenship, nationality or domicile ...")

²⁵ *Id.* para. 26 (ASEM members "will ensure that persons involved in public participation in environmental matters are not penalized in any way for activities that are lawful.")

²⁶ *Id.* para. 36 ("ASEM members will support ongoing activities and facilitate exchange of experiences of following the elements of good practice in the ASEM region ...")

vides explicit recommendations on public involvement when there are transboundary environmental impacts.²⁷

In Europe, international collaboration (including public participation) on transboundary environmental issues is a familiar task due to the EU cooperation and three UN/ECE Conventions: the Convention on Environmental Impact Assessment in a Transboundary Context (1991), the Convention on the Transboundary Effects of Industrial Accidents (1992), and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992).²⁸ Transboundary issues are therefore a natural part of the Aarhus Convention. In the development of the Good Practices Document, the issue of transboundary impacts was not self-evident in part because there are only few supranational mechanisms addressing transboundary environmental impacts in Asia. There is, however, growing interest in this issue from groups such as the Mekong River Commission.²⁹ Apart from this, the issue is not touched upon in supranational instruments among the Asian ASEM partners. Thus, this recommendation brings to light new features of public involvement, particularly in Asia.

The Document not only recommends that governmental administrations provide opportunities for involvement, but also recognizes that public commitment is a precondition for effective and successful public involvement.³⁰ This is an important aspect especially among the Asian partners of ASEM where the causes for an interest in participation can be complex. Interviews conducted during the project have suggested that participation sometimes may be motivated by economic rather than environmental interests.

A. ACCESS TO INFORMATION

The most extensive section in the Document addresses access to information. The list of issues addressed in the Document is broad and shares many approaches with the Aarhus Convention, including the list of conditions under which access can be denied. The Document recommends requirements for the collective development of transparent and participatory planning and decisionmaking processes among the ASEM partners. This section addresses mechanisms for systematic

collection and updating of information³¹ and suggests mandatory mechanisms where voluntary efforts are not sufficient.³² The publishing of information is recommended through regular reports on the state of the environment. The EU Dobris reports³³ and the Association of South-East Asian Nations (ASEAN) reports on the environment³⁴ are cited as examples. No direct references to national legislation are made regarding access to information. The need for public awareness is emphasized in many parts of the Document, including the section on access to information.³⁵

In the Document, the definition of environmental information is broad, covering natural, public health, and cultural elements, as well as activities "or other measures" that could significantly affect these components.³⁶ The definition seems slightly dated in referring to fauna and flora instead of biodiversity, and it does not specifically include GMOs. On the other hand, cultural aspects such as cultural sites and human settlements are mentioned as well as policies, plans and programs, and administrative measures and environmental management programs for environmental protection.

The Document urges authorities to provide information, including information on international issues.³⁷ There are no specific recommendations on time limits for providing the information, but the importance of setting time limits is emphasized.³⁸ The cost of obtain-

³¹ *Id.* para. 4 ("Public authorities will regularly collect and update relevant environmental information...").

³² *Id.* ("ASEM members will establish, where voluntary systems are inadequate, mandatory systems for ensuring that there is an adequate flow of information about activities significantly affecting the environment to the public authorities.")

³³ The Dobris report has been followed by several reports. *E.g.*, EUROPEAN ENVIRONMENT AGENCY, ENVIRONMENTAL SIGNALS 2001 – BENCHMARKING THE MILLENIUM, Environmental Assessment Report No. 9 (2002), available at reports.eea.eu.int/environmental_assessment_report_2002_9/en (last visited July 27, 2002).

³⁴ ASEAN State of the Environment Report, available at www.aseansec.org/viewpdf.asp?file=/pdf/soer00.pdf (last visited July 8, 2002).

³⁵ Good Practices Document, *supra* note 3, para. 15 ("ASEM members will cooperate in developing methods for enhancement of environmental awareness...").

³⁶ *Id.* app. 1 ("In the context of elements of good practice, environmental information means any information on the state of water, air, soil, fauna, flora, land, cultural and natural sites, human settlements and health, and on activities, policies, plans, programmes or other measures significantly affecting or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.")

³⁷ *Id.* para. 10 ("ASEM members will actively publicize the availability of important national and international documents on the environment...").

³⁸ *Id.* para. 7 ("Public authorities will respond to a person requesting information within specified time limits.")

²⁷ *Id.* para. 17 ("In the case of transboundary environmental impacts between two ASEM countries, the two countries will cooperate in ensuring that the public in the affected country is also informed.")

²⁸ The UN/ECE website on environmental issues is available at www.unece.org/env/ (last visited July 4, 2002).

²⁹ Personal communication with Wiek Schrage, UN/ECE, 2002.

³⁰ Good Practices Document, *supra* note 3, at pmb1. ("Recognizing that public commitment is needed for the successful use of the tools given for public involvement...").

ing information is raised as a potential barrier to access. The general recommendation is that as much information as possible should be made available at no charge, although there are some cases where sharing of costs with the authorities is mentioned as appropriate.³⁹

The Document encourages private enterprises to report regularly on how the impact of their activities on the environment has changed over time.⁴⁰ In a separate paragraph, enterprises are encouraged to use voluntary environmental management systems.⁴¹ The section on access to information does not explicitly suggest good practices for EIA procedures, but since EIA is referred to in the section on public participation, the relevant elements of good practice related to access to information are applicable also in EIAs.

B. PUBLIC PARTICIPATION

The section in the Document on public participation is shorter than the section on access to information. In part, this reflects the fact that to date there is less experience with participatory procedures than with distribution of information, and also that participatory procedures are more context-dependent than access to information. The Document does, however, recognize two tenets of participation: first, that there must be pre-conditions for participation in the form of basic rules and principles, and second that it is equally important to have the willingness and skill to implement those rules and principles in practical situations.

The section on public participation stresses participation in both planning and decisionmaking. The Document also stresses participation in policymaking,⁴² which reflects a relatively recent development. Some ASEM partners, such as the Philippines, and the Nordic countries, actively encourage participation in the develop-

ment of legislative proposals and have specific procedures for achieving this goal.⁴³ The Document encourages this kind of development and implicitly assumes that the likelihood of properly functioning participatory procedures in environmental matters can be increased by encouraging participation at the stage when the procedures are designed and not just when they are implemented.

The need for effective communication between authorities and the public is a basic recommendation of the Document, as well as the necessity of taking into account the information received from participants. Many ASEM partners are starting to experience planning processes in which nongovernmental organizations (NGOs) and other interest groups have been widely represented in the planning committees.⁴⁴ The need for responsive communication between environmental organizations and other interest groups is also emphasized in the Document.⁴⁵

The Document urges ASEM partners to promote the education of the public on the rights and responsibilities of participation. It suggests that ASEM members utilize various available forms of mass media to reach wide audiences and enhance public knowledge. In this way, it is possible to ensure that persons involved in public participation in environmental matters have sufficient knowledge on how to participate, but this also recognizes that the responsiveness of the authorities is

³⁹ *Id.* para. 8 ("Environmental information will be available to the public for inspection free of charge. Any person requesting information will be provided with adequate facilities for obtaining copies of such information, subject to copyright provisions, on payment of cost of reproduction and dissemination, if appropriate. In specifying payments, a fee waiver will be considered in cases where the information is to be used in the public interest and disseminated to the public, since this may be viewed as cost-sharing with the authorities.")

⁴⁰ *Id.* para. 13 ("ASEM members will encourage entities whose activities have or possibly have an adverse impact on the environment to report regularly to the public on the environmental impact of their activities in order to show their efforts of mitigation.")

⁴¹ *Id.* para. 14 ("Public distribution of information stemming from such voluntary schemes as eco-audits and management systems (e.g. EMAS and ISO14001) will be encouraged, as will eco-labeling schemes, such as the various regional and national eco-labels, for environmentally friendly products.")

⁴² *Id.* para. 19 ("ASEM members will promote participation of the public, regardless of gender, cultural or ethnic identity, language, citizenship, nationality or domicile, in policy-making with environmental implications...")

⁴³ Roselita C. Paloma, *Environmental Law-Making with a Difference*, presentation at the AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, available at www.aeetc.org/int_output.htm (last visited July 7, 2002). In the Nordic countries, public hearings are frequently organized in connection with the preparation of bills, and both preparatory material and bills are available at websites of the government or the parliament. E.g., www.valtionneuvosto.fi/vn/liston/base.jsp?k=en; www.finlex.fi/english/index.html (for approved legislation, including revisions) (last visited July 7, 2002).

⁴⁴ Experiences from the United Kingdom, available at www.the-environment-council.org.uk/dialogue/mn_dialogue_casestudies.shtml (last visited July 8, 2002); see JULIE FISHER, *NGOs AND THE POLITICAL DEVELOPMENT OF THE THIRD WORLD* 48-50 (1998).

⁴⁵ Good Practices Document, *supra* note 3, para. 21 ("Before decisions possibly affecting or significantly affecting the environment are taken, ASEM members will introduce measures and procedures to ensure that the public's opinion is solicited and taken into account, including the views of environmental organizations and other interest groups."); *id.* para. 22 ("ASEM members are encouraged to establish formal and informal networks and other consultative processes to facilitate the involvement of environmental organizations and other interest groups in decision-making processes having significant environmental implications and to eliminate impediments or obstacles to public participation.")

equally important.⁴⁶ A high educational level of both the public and the authorities also reduces the risk of people being penalized for participatory activities that are lawful.

There is a need in many ASEM countries to raise both public awareness and the level of technical skills used to provide opportunities for public participation. This need is emphasized in the public participation section of the Document. Capacity building in the field of public participation is encouraged through recommendations to train public officials and educate the public about rights and responsibilities in participation.⁴⁷ EIAs are mentioned as an important means of participation in planning, and also reflect participation at an early stage when options are still flexible.⁴⁸ Participation in decisionmaking, on the other hand, is connected with the approval, permitting, and licensing of activities and the preparation of policies, plans, and programs.⁴⁹

C. ACCESS TO JUSTICE

The section on access to justice is very brief. It includes two guiding principles, which are fairly broad in scope. First, in addition to the general recommendations for ASEM members to promote practices where a natural or legal person may seek judicial or administrative review related to access to information or right to participate, the Document provides a recommendation on the characteristics of processes that enable access to

⁴⁶ *Id.* para. 20 ("ASEM members recognize that effective participation of the public will not occur unless there is effective internal communication and responsive management within the government authorities involved.")

⁴⁷ *Id.* para. 25 ("The relevant authorities will promote training of public officials to improve their understanding of their responsibilities in granting the public access to information and facilitating public participation in environmental decision-making.")

⁴⁸ *Id.* para. 23 ("Consultations will take place early in the decision-making process, at a stage when options are still open and public input can effectively be received. ASEM members will establish transparent procedures by providing relevant information, and permitting sufficient time for public discussions. Environmental impact assessment (EIA) is an environmental planning tool that provides a consultative process in which the public may be involved in decisions that could affect them and the environment. Where appropriate, the relevant authorities will give the public additional assistance and explanations.")

⁴⁹ *Id.* para. 24 ("ASEM members will ensure public participation of all concerned in the approval, permitting and licensing of activities that significantly affect the environment and in the preparation of policies, plans and programmes, preferably by means of explicit rights governing relevant administrative procedures. Such rights include, inter alia, the right to be heard, the right to propose alternatives, the setting of specified time limits, the right to a decision with justifications and the right of recourse.")

justice.⁵⁰ Second, this section also recommends that the proceedings are "fair, open, transparent, and equitable" and that they are timely.⁵¹

Although the recommendations are clear and broad, they do not provide the details of how access to justice should be ensured. This vagueness reflects the different situations and opinions among the ASEM partner countries with respect to access to justice in environmental matters.

In the first distributed draft, the issue of legal standing was explicitly mentioned.⁵² However, some representatives of ASEM partners felt that the consequences of the recommendation were difficult to grasp and it was therefore deleted in the final draft. This deletion reflects the fact that legal standing has traditionally been given a relatively narrow interpretation in many countries, i.e., appeals are possible only for those who can prove a direct material (i.e., economic) interest.

D. IMPLEMENTATION OF THE GOOD PRACTICES DOCUMENT

The implementation section in the Document reiterates the need for an appropriate legislative framework, practical measures, and capacity building. Some of the recommendations may be quite demanding in practice and could, if fully implemented, require important regulatory reforms.

The implementation of the Good Practices Document is closely linked with its draft status. As long as the Document is a draft, the Document cannot be implemented as a finalized document, although many of the individual measures and recommendations can be undertaken with the Document serving as a frame of reference.

Although the Document is nonbinding and establishes no obligations to modify national legislation, it

⁵⁰ *Id.* para. 28 ("ASEM members will promote an approach where a natural or legal person may seek judicial or administrative review in accordance with the relevant national legal system if the person believes that his or her request for information has been wrongfully refused or ignored, the response of the public authority to the request has been inadequate, or that he or she has been overcharged for the request, or if the person has been denied access to public participation.")

⁵¹ *Id.* para. 29 ("Suitable legal guarantees will ensure that the judicial and administrative proceedings are fair, open, transparent and equitable and fall within specified time limits.")

⁵² Good Practices Document, January 2001 draft, para. 33 ("It is desirable that legal standing will be given a wide interpretation in proceedings involving environmental issues.")

does articulate the need for regulations.⁵³ The Document further encourages national institutions to follow the proposed good practices and suggests that this will require a procedural and institutional basis.⁵⁴ The Document suggests a framework for the collaboration of ASEM partners in applying the recommendations within their national practices, and also encourages active cooperation among ASEM partners in the field of public involvement in order to ensure continuous improvement of practices and applications.

The future cooperation and exchange of experiences will require a special effort from the ASEM. However, the ASEM Foreign Ministers' Meeting of June 6-7, 2002, decided that the AEETC would be closed after its pilot phase.⁵⁵ Without the AEETC to collect and distribute information, it will be difficult to ensure that the activity continues in a systematic manner. Yet, the AEETC International Conference on Public Participation,⁵⁶ held in June 2002, demonstrated that there are a number of institutions, including those of the United Nations and several NGOs, that are working to promote the exchange of experiences related to public involvement in the ASEM region.

III. FUTURE ROLE OF THE GOOD PRACTICES DOCUMENT

Due to the current informal nature of the ASEM, it is not clear what status the Document will ultimately be given. The political meetings of the ASEM have expressed appreciation for the progress of the public involvement work and the Document, but the Document has not yet been the subject of a formal political negotiation by the ASEM partners. This option is not, however, out of the question. For example, the ASEM Ministerial Conference on Cooperation for the Management of Migratory Flows between Europe and Asia resulted in a dec-

laration⁵⁷ similar in format to the Good Practices Document. Indeed, the Document still may become formally endorsed at a future ministerial meeting.

The potential role of the Document can be compared to the role of the Aarhus Convention in Europe. Although 38 percent of the countries that signed the Aarhus Convention are EU members (that is, 15 countries of 40 signatories), only 2 EU member countries are among the 21 countries that have ratified or acceded to the convention.⁵⁸ Currently, Denmark and Italy are the only EU countries that have ratified the Convention. Interesting patterns can be seen when these results are reflected against the general ratification status of the Convention. Most of the countries that have already ratified the Aarhus Convention are those which have limited traditions in public involvement due to their history.⁵⁹ Many are states that used to be part of the Soviet Union. These countries have been forced to revise their overall legislation due to political changes. This has provided them with opportunities to develop their national legislation to generally follow the requirements of the Aarhus Convention.

A study on the policies and practice of public involvement in European ASEM members was undertaken as a part of the process in developing the Document.⁶⁰ The study compared the hard law and soft law in 14 EU countries and analyzed 18 cases from various regions and sectors. In connection with the study on national legislation and soft law, the attitudes towards the Aarhus Convention were examined. In many EU member states, participatory procedures and other forms of involvement are well developed for many, but not necessarily all, sectors of society. There are various historical reasons for this situation, and the process around the Aarhus Convention has highlighted these discrepancies.⁶¹ Although general legislation exists in most countries on all three pillars of public involvement, there are frequently gaps with respect to sectors and specific

⁵³ Good Practices Document, *supra* note 3, para. 31 ("ASEM members will distribute these elements of good practice to encourage national institutions to follow them."); *id.* para. 32 ("The effective implementation of access to environmental information and public participation in decision-making processes with environmental implications calls for the establishment of clear regulations providing procedural and institutional guarantees and programmes for their proper enforcement.").

⁵⁴ *Id.*: see also *id.*, para. 33 ("Where appropriate, ASEM members will set up organizational structures to facilitate the effective operation of the above guarantees.").

⁵⁵ Chair Statement, Fourth ASEM Foreign Ministers' Meeting, held in Madrid on June 6-7, 2002, para. 5, available at europa.eu.int/comm/external_relations/asem/min_other_meeting/for_min4.htm (last visited July 6, 2002).

⁵⁶ AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, available at www.aeetc.org/int_publ.html (last visited July 4, 2002).

⁵⁷ ASEM Ministerial Conference on Cooperation for the Management of Migratory Flows between Europe and Asia, held at Lanzarote on Apr. 5 2002, at Declaration, available at europa.eu.int/comm/external_relations/asem/min_other_meeting/mig.htm (last visited July 7, 2002).

⁵⁸ UN/ECE website for the Aarhus Convention, available at www.unece.org/env/pp/ (last visited July 8, 2002).

⁵⁹ Magda Toth Nagy et al., *Regional Overview: Central and Eastern Europe – Legal and Institutional Framework and Practices for Public Participation*, available at www.rec.org/REC/publications/PPDoors/CEE/overview1.html (last visited May 15, 2002).

⁶⁰ Eeva Furman et al., Signals for the Future Policy Support and Practice Concerning Public Involvement in Environmental Issues in the Member States of the European Union, AEETC International Conference on Public Participation, held in Bangkok on June 10-12, 2002, available at www.aeetc.org/int_output.htm (last visited July 4, 2002).

⁶¹ *Id.*

issues. The Good Practices Document underscores these gaps further, even though it does not specify new requirements relative to the Aarhus Convention.

Although some countries have been able to rapidly develop the legal basis for ratifying the Aarhus Convention, the lack of legal tradition often leads to difficulties in implementing the requirements of the Convention in practice. The ratification of the Convention has, however, compelled these countries to address the matter nationally.⁶² The Convention has also enhanced the activities of many NGOs in these countries both at a national and at an international level.⁶³

The Good Practices Document could have similar impacts on the ASEM partners by forming a basis for pilot projects and as a reference document in legislative development. However, the lack of an international institutional framework for developing and advancing the Document may be a serious barrier for its continued effectiveness. Within the UN/ECE region, the UN/ECE has had an important role in providing material and maintaining the issue on the political agenda.⁶⁴ Since the ASEM is an informal process without a secretariat, the Good Practices Document lacks such an institutional champion. Therefore the effectiveness of the Good Practices Document in terms of true enhancement of public involvement will probably require that institutional players on the political scene adopt its key message. These parties might include the UN/ESCAP, the UNEP, the Asian Development Bank, and others, including international NGOs, which are able to play the role that the UN/ECE, the EU, the OECD, and many environmental NGOs have played in securing the

position of public involvement on the political agenda in Europe.

It seems that the United Nations organizations are best suited for providing an institutional basis for the Document and the related activities. In particular contrast with the informal ASEM, the United Nations is more suited and accustomed to developing formal international documents.

Transforming from a non-status document to a non-binding but endorsed Guiding Principles Document to something more binding is a slow process. Binding international law can be viewed as a final goal. There is, however, evidence that soft law with high political status can contribute significantly to the development of national legislation and practices—and this may be done more rapidly and with a more modest commitment of resources. The Sofia Guidelines certainly led to considerable activities at the national level in the ECE region, and similar processes are also ongoing, especially within the OECD.⁶⁵

The lack of ratifications of the Aarhus Convention among the European ASEM partners indicates that the development of laws and institutions ensuring public involvement can take a long time. Even after the legal guarantees have been developed for public involvement, gaps in the practical application of the legislation prevail. Institutional arrangements may be inadequate for genuine involvement, and there may be a lack of capacity to undertake the tasks. There is still a need for pilot studies and recommendations that would support continuous improvement after the formal adoption of legislation that supports extensive public involvement. The Good Practices Document will hopefully support this kind of development among the ASEM partners.

⁶² See www.unece.org/env/pp/national/rec.pdf (last visited July 4, 2002) (activities by organizations supporting the implementation of the Aarhus Convention).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ The OECD Public Management Programme (PUMA), available at www1.oecd.org/puma/ (last visited July 7, 2002).