

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

The Aarhus Convention

An Implementation Guide



Securing the public's rights through
access to information, public
participation and access to justice
for a healthy environment



UNITED NATIONS

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE
Convention on Access to Information, Public Participation in Decision-making
and Access to Justice in Environmental Matters (Aarhus Convention)

The Aarhus Convention: An implementation guide

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UNITED NATIONS



FOREWORD

BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

More than a decade after its entry into force on 30 October 2001, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters is more important than ever. The Aarhus Convention remains the most ambitious venture in the field of environmental democracy under the auspices of the United Nations. The Convention is the only international legally binding instrument giving the public broad and concrete rights of participation in decision-making and access to information and justice regarding the environment. Last year, the importance of these rights was emphasized in the outcome document of the Rio+20 UN Conference on Sustainable Development.

The Aarhus Convention's twin protections for environmental and human rights, and its focus on involving the public, provide a mechanism for holding governments to account in their efforts to address the multi-dimensional challenges facing our world today, including climate change, biodiversity loss, poverty reduction, increasing energy demands, rapid urbanization, and air and water pollution.

The Guide is an essential reference for policy-makers, legislators and officials at all levels of government. It contains important guidance for members of the public, including non-governmental organizations, seeking to exercise their rights, as well as for those in the private sector engaged in activities that are subject to the Convention. The Guide will equally interest practitioners and academics specializing in the issues covered by the Convention, as well as States not currently party to the Convention.

The second edition of the Guide builds on the considerable experience amassed during the Convention's implementation. It provides practical examples and offers valuable insights from the findings of the Aarhus Convention Compliance Committee, a unique body inspired by human rights treaty mechanisms.

I commend this publication to all those with an interest in promoting environmental democracy and sustainable development.



Ban Ki-Moon

Secretary-General of the United Nations

PREFACE

The first edition of the *Aarhus Convention Implementation Guide* was published in 2000,¹ prior to the entry into force of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) on 30 October 2001. The book was written by Mr. Stephen Stec and Ms. Susan Casey-Lefkowitz in collaboration with Mr. Jerzy Jendrośka as editorial adviser.

In recognition that considerable experience in the Convention's implementation had been gained since the first edition of the Implementation Guide was published, the Meeting of the Parties to the Convention, at its third session (Riga, 13–15 June 2008), requested an updated edition of the Implementation Guide be prepared.²

The second edition of the Implementation Guide was authored by independent experts Mr. Jonas Ebbesson, Mr. Helmut Gaugitsch (assisted by Ms. Marianne Miklau), Mr. Jerzy Jendrośka and Mr. Stephen Stec, and by Ms. Fiona Marshall from the secretariat of the Aarhus Convention, who also served as the project coordinator.

In preparing the second edition, the objective was not to rewrite the Guide, but rather to update it in the light of the decade of practical experience gained in the Convention's implementation since the first edition. Prior to the commencement of the updating process, national focal points and other stakeholders were invited to provide their input on matters they wished to see addressed in the second edition. The draft text for the second edition was circulated to national focal points and stakeholders for three rounds of comments, in November 2010, June 2011 and July 2012.

All comments received were taken into account by the authors in the preparation of subsequent versions of the draft text.

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DISCLAIMER

The views expressed in the Implementation Guide do not necessarily reflect those of any individual, organization or Government involved at any stage in the preparation of its text. Similarly, the interpretations contained in the text do not necessarily represent the official opinion of any of the Parties to the Convention.

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HOW TO USE THIS GUIDE

The Aarhus Convention, which is open for global accession, offers powerful twin protections for the environment and human rights. It provides an effective model for ensuring public input in defining and implementing green economy programmes, in choosing the most appropriate road maps to sustainability and for increasing transparency and Government accountability, thereby putting Principle 10 of the Rio Declaration on Environment and Development into practice and paving the way for its universal application.

The Aarhus Convention Implementation Guide is therefore intended as a convenient non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in their daily work of implementing the Convention and of realizing the provisions of Principle 10 in practice. It is also hoped that it will assist members of the public and environmental non-governmental organizations to exercise their rights under the Convention.

The Implementation Guide provides both a general overview of the principles behind the Convention and a detailed article-by-article analysis of its provisions. In its analysis, the Guide draws on other international law instruments in the area of the environment and human rights, decisions adopted by the Meeting of the Parties to the Aarhus Convention, findings of the Aarhus Convention Compliance Committee, academic writings and examples from national legislation and practice.

With respect to terminology, the Convention refers in several places to “national” legislation, while at the same time being open to Parties which are regional economic integration organizations. The Guide thus uses the term to refer to any internal law of a Party, whether a State or a regional economic integration organization. The Guide also uses the term “domestic” to denote such internal law.

With respect to examples drawn from Parties’ national legislation or practice, the Guide cites a number of examples from the legislation or practice of the European Union (EU). Any references to EU legislation and practice in the text are intended to convey practical information and do not indicate any particular status of EU law with respect to the United Nations Economic Commission for Europe region.

The Aarhus Convention secretariat welcomes ongoing feedback on the text of the Guide and its practical application.

List of abbreviations

The following abbreviations have been used in this publication:

| | |
|----------|---|
| CBD | Convention on Biological Diversity |
| CIS | Commonwealth of Independent States |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| CJEU | Court of Justice of the European Union |
| CSCE | Conference on Security and Cooperation in Europe |
| ECHR | European Court of Human Rights |
| ECJ | European Court of Justice |
| EEA | European Environment Agency |
| EfE | “Environment for Europe” |
| EFSA | European Food Safety Authority |
| EIA | environmental impact assessment |
| EMAS | Eco-Management and Audit Scheme |
| EMS | environmental management system |
| ENVSEC | Environment and Security Initiative |
| ERA | environmental risk assessment |
| ESD | education for sustainable development |
| EU | European Union |
| Eurostat | Statistical Office of the European Union |
| FAO | Food and Agriculture Organization of the United Nations |
| GEF | Global Environment Facility |
| GMO | genetically modified organism |
| ICJ | International Court of Justice |
| ILO | International Labour Organization |
| IPPC | integrated pollution prevention and control |
| ISO | International Organization for Standardization |
| IUCN | International Union for Conservation of Nature |
| MEA | multilateral environmental agreement |
| NAFTA | North American Free Trade Agreement |
| NGO | non-governmental organization |
| NIPs | National Implementation Plans |
| OECD | Organization for Economic Cooperation and Development |
| OSCE | Organization for Security and Cooperation in Europe |
| PRTR | pollutant release and transfer register |

| | |
|--------|--|
| RIO+20 | United Nations Conference on Sustainable Development |
| SEA | strategic environmental assessment |
| TV | television |
| UNCED | United Nations Conference on Environment and Development (also Earth Summit) |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environment Programme |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNFCCC | United Nations Framework Convention on Climate Change |
| WHO | World Health Organization |
| WTO | World Trade Organization |

List of Aarhus Convention Compliance Committee findings

The following findings of the Aarhus Convention Compliance Committee are cited in the Implementation Guide:

| Compliance Committee findings | Findings endorsed, welcomed or noted by the Meeting of the Parties |
|---|--|
| ACCC/C/2004/1 (Kazakhstan) | Endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7) |
| ACCC/S/2004/1 and ACCC/C/2004/3 (Ukraine) | Endorsed by the Meeting of the Parties at its second session through decision II/5b (ECE/MP.PP/2005/2/Add.8) |
| ACCC/C/2004/4 (Hungary) | Noted by the Meeting of the Parties at its second session through decision II/5 on general issues of compliance (ECE/MP.PP/2005/2/Add.6) |
| ACCC/C/2004/5 (Turkmenistan) | Endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9) |
| ACCC/C/2004/6 (Kazakhstan) | Endorsed by the Meeting of the Parties at its third session through decision III/6c (ECE/MP.PP/2008/2/Add.11) |
| ACCC/C/2004/8 (Armenia) | Endorsed by the Meeting of the Parties at its third session through decision III/6b (ECE/MP.PP/2008/2/Add.10) |
| ACCC/C/2005/11 (Belgium) | Noted with appreciation by the Meeting of the Parties at its third session (ECE/MP.PP/2008/2, para. 47) |
| ACCC/C/2005/12 (Albania) | Endorsed by the Meeting of the Parties at its third session through decision III/6a (ECE/MP.PP/2008/2/Add.9) |
| ACCC/C/2005/15 (Romania) | Noted with appreciation by the Meeting of the Parties at its third session (ECE/MP.PP/2008/2, para. 47) |
| ACCC/C/2006/16 (Lithuania) | Endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12) |
| ACCC/C/2006/17 (European Community) | Noted with appreciation by the Meeting of the Parties at its third session (ECE/MP.PP/2008/2, para. 47) |
| ACCC/C/2006/18 (Denmark) | Noted with appreciation by the Meeting of the Parties at its third session (ECE/MP.PP/2008/2, para. 47) |
| ACCC/C/2007/21 (European Community) | Welcomed by the Meeting of the Parties at its fourth session through paragraph 4 of decision IV/9 (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2007/22 (France) | Welcomed by the Meeting of the Parties at its fourth session through paragraph 4 of decision IV/9 (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2008/23 (United Kingdom of Great Britain and Northern Ireland) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9i (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2008/24 (Spain) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9f (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2008/27 (United Kingdom) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9i (ECE/MP.PP/2011/2/Add.1) |

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| ACCC/C/2008/29 (Poland) | Welcomed by the Meeting of the Parties at its fourth session through paragraph 4 of decision IV/9 (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2008/30 (Republic of Moldova) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9d (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2008/33 (United Kingdom) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9i (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2008/35 (Georgia) | Welcomed by the Meeting of the Parties at its fourth session through paragraph 4 of decision IV/9 (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2009/36 (Spain) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9f (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2009/37 (Belarus) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9b (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2009/41 (Slovakia) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9e (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2009/43 (Armenia) | Endorsed by the Meeting of the Parties at its fourth session through decision IV/9a (ECE/MP.PP/2011/2/Add.1) |
| ACCC/C/2010/50 (Czech Republic) | Expected to be endorsed by the Meeting of the Parties at its fifth session |
| ACCC/C/2010/53 (United Kingdom) | Expected to be endorsed by the Meeting of the Parties at its fifth session |
| ACCC/C/2011/57 (Denmark) | Expected to be endorsed by the Meeting of the Parties at its fifth session |
| ACCC/C/2011/58 (Bulgaria) | Expected to be endorsed by the Meeting of the Parties at its fifth session |





INTRODUCTION

A new kind of environmental convention

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted at the Fourth “Environment for Europe” Ministerial Conference in Aarhus, Denmark, on 25 June 1998. It entered into force on 30 October 2001. As at April 2014, it had 47 Parties from the United Nations Economic Commission for Europe (ECE) region, which includes 46 countries plus the European Union (EU).

The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights, acknowledges that we owe an obligation to future generations and establishes that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection. It focuses on interactions between the public and public authorities in a democratic context and is forging a new process for public participation in the negotiation and implementation of international agreements.

The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also an agreement about government accountability, transparency and responsiveness.

The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation. It backs up these rights with access to justice provisions that go some way towards putting teeth into the Convention.³ In fact, the preamble directly links environmental protection to human rights norms and expressly recognizes that every person has the right to live in an environment adequate to his or her health and well-being.

Whereas most multilateral environmental agreements cover obligations that Parties have to each other, the Aarhus Convention covers obligations that Parties have to the public. It goes further than any other environmental convention in imposing clear obligations on Parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned. This is reinforced by the compliance review system under the Convention, which allows members of the public to bring issues of compliance before an international body.

Just as the public, and in particular non-governmental organizations (NGOs), played a crucial role in the negotiation of the Convention, they have a central role to play in its implementation. Given the wide range of social, economic and political characteristics throughout the ECE region, donors and international organizations also have an important role to play in supporting the effective implementation of the Convention.

Ultimately, however, the effective implementation of the Convention depends on the Parties themselves and their willingness to implement its provisions fully and in a progressive manner. The path towards full implementation will be an adventurous one, full of rewards and surprises as well as occasional obstacles. At the end of the trail, however, lies a blueprint for improved decision-making, a more active and engaged population, and greater availability of information on environmental matters.

The road to Aarhus

The Aarhus Convention was developed during two years of negotiations with input from countries and NGOs from throughout the region. However, the roots of the Convention go further back in the “Environment for Europe” process, in the development of international environmental and human rights law and in the development of national law over the years. Relevant developments in European Community law also played a significant role in setting the scene for the Convention.⁴

International declarations and resolutions, as well as international legal instruments played a decisive role in the creation of the Aarhus Convention (see box). A significant early initiative in ECE was a draft charter of environmental rights and obligations drafted in 1990.⁵ Although not adopted, the draft represents an early compilation of principles and themes similar to those ultimately found in the Aarhus Convention.

One of the main stepping stones on the way to the Aarhus Convention was the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (Sofia Guidelines), endorsed at the Third “Environment for Europe” (EfE) Ministerial Conference held in Sofia in October 1995. The idea of the Guidelines originated at the Second EfE Ministerial Conference in Lucerne, Switzerland, in April 1993. At that meeting, the Senior Advisers to ECE Governments on Environmental and Water Problems (which later became the Committee on Environmental Policy) identified public participation as one of seven key elements for the long-term environmental programme for Europe. Consequently, in paragraph 22 of their declaration, the ministers gathered in Lucerne requested ECE, inter alia, to draw up proposals for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision-making.

The Senior Advisers established the Task Force on Environmental Rights and Obligations, which in 1994 was given the task of drawing up draft guidelines and other proposals on effective tools and mechanisms promoting public participation in environmental decision-making. By January 1995 the draft guidelines had been developed and by May 1995 they were accepted by the Working Group of Senior Government Officials responsible for the preparation of the Sofia Conference. At the same time as endorsing the Guidelines, it was decided at the Third EfE Ministerial Conference that the drafting of a convention should be considered.

At its meeting on 17 January 1996, the Committee on Environmental Policy established the Ad Hoc Working Group for the preparation of a convention on access to information and public participation in environmental decision-making. The Committee also decided that the future convention should reflect the scope of the Sofia Guidelines.⁶ A “Friends of the Secretariat” group was formed to assist in drawing up a draft convention based on the Guidelines. The “draft elements” were then the starting point for negotiations among countries, which began in June 1996. Ten negotiating sessions under the chairmanship of Willem Kakebeeke of the Netherlands were held through March 1998, nine of them in Geneva and one in Rome. The Aarhus Convention negotiations were themselves an exercise in public participation. The negotiating sessions involved an unprecedented level of participation on the part of NGOs, among them a coalition of environmental citizens organizations established especially for the drafting sessions.

The road to Aarhus in international and regional instruments

- 1966** *International Covenant on Civil and Political Rights*, adopted by the United Nations General Assembly in New York on 16 December 1966. Article 19 deals with the “freedom to seek, receive and impart information”.⁷
- 1972** *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*: Principle 1 linked environmental matters to human rights and set out the fundamental right to “an environment of a quality that permits a life of dignity and well-being”.
- 1980** *Declaration of Salzburg on the Protection of the Right of Information and of Participation*, adopted at the Second European Conference on the Environment and Human Rights at Salzburg, Austria, on 3 December 1980.⁸
- 1981** *African Charter on Human and Peoples’ Rights*, adopted by the Organization of African Unity (African Union) at Banjul, Gambia, on 27 June 1981. An early reference to the right to a satisfactory environment favourable to human development.
- 1981** *Council of Europe Recommendation No. (81) 19 of the Committee of Ministers to member States on the access to information held by public authorities*, adopted at Strasbourg, France, on 25 November 1981.
- 1982** *World Charter for Nature*, adopted by the General Assembly in its resolution 37/7. The most relevant provisions for the Aarhus Convention can be found in chapter III, paragraphs 15, 16, 18 and 23, discussed in reference to the preamble, below.

- 1985 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive).** Its practice on public participation in environmental impact assessment informed many of the Aarhus Convention negotiating parties.
- 1986 Resolution No. 171 of the Standing Conference of Local and Regional Authorities of Europe on regions, environment and participation,** adopted by the Congress of the Council of Europe (i.e., the Standing Conference of Local and Regional Authorities of Europe) at Strasbourg on 14 October 1986.
- 1987 Our Common Future: report by the World Commission on Environment and Development (Brundtland Report)** was a catalyst for the 1992 United Nations Conference on Environment and Development (UNCED) and its Rio Declaration on Environment and Development.
- 1988 Organization of American States Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),** adopted in San Salvador on 17 November 1988, established the right to a healthy environment.
- 1989 European Charter on Environment and Health,** adopted at the First European Ministerial Conference on Environment and Health in Frankfurt, Germany, recognized public participation to be an important element in the context of environment and health issues.
- 1989 Conference on Security and Cooperation in Europe (CSCE)⁹ Meeting on the Protection of the Environment, Sofia.** All countries present except Romania endorsed conclusions and recommendations affirming the rights of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues without legal and administrative impediments.
- 1990 General Assembly resolution 45/94 of 14 December 1990,** recognized that individuals are entitled to live in an environment adequate for their health and well-being.
- 1990 Draft charter on environmental rights and obligations of individuals, groups and organizations,** adopted by a group of experts invited by the Netherlands Government at the Bergen Conference, Norway, on 11 May 1990 and the ECE **draft charter of environmental rights and obligations,** adopted by an intergovernmental meeting at Oslo on 31 October 1990. These early drafts had an influence on later instruments.
- 1990 Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.** Its practice on access to environmental information informed the negotiating positions of many of the Aarhus Convention negotiating parties.
- 1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention),** adopted at Espoo, Finland, on 25 February 1991. The Espoo Convention shows the link between public participation and environmental impact assessment. Its article 4, paragraph 2, is especially relevant for public participation.
- 1992 ECE Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention),** adopted at Helsinki on 17 March 1992. Its article 9 deals with “information to, and participation of the public”.
- 1992 ECE Convention on the Protection and Use of the Transboundary Watercourses and International Lakes (Water Convention),** adopted at Helsinki on 17 March 1992, includes provisions on public information.
- 1992 Rio Declaration on Environment and Development (Rio Declaration), adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, on 14 June 1992.** Its principle 10 laid the groundwork for all three pillars of the Aarhus Convention.
- 1993 Declaration of the Second “Environment for Europe” Ministerial Conference (Lucerne Declaration)** adopted at Lucerne, Switzerland on 30 April 1993, declared public participation in environmental decision-making to be a key issue for further work in the region. In paragraph 22.2 of the declaration, ministers called, inter alia, “for the elaboration of proposals by [ECE] for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision-making, and for cost-efficient measures to promote public participation”.
- 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention),** adopted by the Committee of Ministers of the Council of Europe on 21 June 1993: The Lugano Convention was the first international agreement seeking to create rules concerning access to allow enforcement proceedings before national courts.¹⁰
- 1993 North American Agreement on Environmental Cooperation under the Free North American Free Trade Agreement (NAFTA),** established recommendatory bodies for access to information, public participation in decision-making and access to justice.¹¹
- 1994 Draft principles on human rights and the environment.**¹² Document of the Economic and Social Council of the United Nations published on 6 July 1994. The draft principles were annexed to the final report of the Special Rapporteur on Human Rights and the Environment, Mrs. Fatma Zohra Ksentini, often referred to as the “Ksentini Report”. Part III of the draft principles pertains to all three Aarhus pillars.
- 1995 ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (Sofia Guidelines)** were endorsed at the Third Ministerial ECE Ministerial Conference in Sofia on 25 October 1995. The 26 articles deal with all three pillars of the Aarhus Convention.
- 1996 International Union for Conservation of Nature recommendation 1.43 on public participation and right to know,** adopted by the World Conservation Congress of the International Union for Conservation of Nature (IUCN) at Montreal, Canada, on 23 October 1996.

Walking through the Convention

1. Preamble

The preamble to the Aarhus Convention sets out the aspirations and goals that show its origins as well as guiding its future path. In particular the preamble emphasizes two main concepts: environmental rights as human rights; and the importance of access to information, public participation and access to justice to sustainable and environmentally sound development.

Making the connection to human rights

The preamble connects the concept that adequate protection of the environment is essential to the enjoyment of basic human rights with the concept that every person has the right to live in a healthy environment and the obligation to protect the environment. It then concludes that to assert this right and meet this obligation, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.

Promoting sustainable and environmentally sound development

The preamble recognizes that sustainable and environmentally sound development depends on effective governmental decision-making that contains both environmental considerations and input from members of the public. When governments make environmental information publicly accessible and enable the public to participate in decision-making, they help meet society's goal of sustainable and environmentally sound development.

2. Laying the groundwork — the general part

The first three articles of the Convention include the objective, the definitions and the general provisions. These articles lay the groundwork for the rest of the Convention, setting goals, defining terms and establishing the overarching requirements that will guide the interpretation and implementation of the rest of the Convention.

Objective

Article 1 of the Convention requires Parties to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in order to contribute to the protection of the right of every person of “present and future generations” to live in an environment adequate to his or her health and well-being.

Definitions

In article 2, the Convention defines “Party”, “public authority”, “environmental information”, “the public” and “the public concerned”. These definitions guide the reader's understanding of these terms as they are used throughout the Convention.

The Convention primarily sets out obligations for Parties (contracting Parties to the Convention) and public authorities (government bodies and persons or bodies performing government functions at national, regional or other levels). In addition to national Government bodies, “public authority” can also refer to institutions of regional economic integration organizations, such as the EU, although it expressly does not apply to bodies acting in a judicial or legislative capacity.

The Convention also sets out rights for the “public” (natural or legal persons, and, in accordance with national law or practice, organizations, associations and groups) and “the public concerned” (those who are affected or likely to be affected by or having an interest in the environmental decision-making). For the purposes of the Convention, NGOs promoting environmental protection and meeting any requirements under national law are to be considered to be part of the “public concerned”.

Finally, environmental information is a concept that runs throughout the Convention. The Convention gives “environmental information” a broad definition, including, inter alia, any information in any material form on: (a) the state of elements of the environment; (b) factors (e.g., substances, energy and radiation) and activities or measures (e.g., agreements, legislation, plans and programmes) likely to affect these elements and economic analyses and assumptions used in environmental decision-making; and (c) the state of human health and safety, cultural sites and built structures inasmuch as they may be affected by the above elements or factors.

Principles

The general provisions of the Convention — article 3 — set the general principles that guide all the other, more detailed and specific provisions. They cover aspects important for the implementation of the Convention, such as establishing a clear framework to implement the Convention, ensuring compatibility among its elements, providing guidance to the public in taking advantage of the rights it conveys, promoting environmental education and awareness-building, supporting groups promoting environmental protection and prohibiting persecuting, harassing or discriminating against those exercising their rights under the Convention.

The general provisions make it clear that the Convention is a floor, not a ceiling. Parties may introduce measures for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention. The Convention also makes it clear that existing rights and protections that go beyond those of the Convention may be preserved. Finally, the general provisions call for the promotion of the Aarhus principles in international decision-making processes and organizations in matters relating to the environment.

3. The three “pillars”

The Aarhus Convention stands on three “pillars” — access to information; public participation; and access to justice — which are provided for under its articles 4 to 9. The three pillars depend on each other for full implementation of the Convention’s objectives.

Pillar I — Access to information

Access to information stands as the first of the pillars. It is fitting that it comes first in the Convention, since effective public participation in decision-making depends on full, accurate, up-to-date information. However, it is equally important in its own right, in the sense that the public may seek access to information for any number of purposes, not just to participate.

The access to information pillar is split in two. The first part concerns the right of the public to seek information from public authorities and the obligation of public authorities to provide information in response to a request. This type of access to information is called “passive”, and is covered by article 4. The second part of the information pillar concerns the right of the public to receive information and the obligation of authorities to collect and disseminate information of public interest without the need for a specific request. This is called “active” access to information, and is covered by article 5.

Pillar II — Public participation in decision-making

The second pillar of the Aarhus Convention is the public participation pillar. It relies upon the other two pillars for its effectiveness — the information pillar to ensure that the public can participate in an informed fashion, and the access to justice pillar to ensure that participation happens in reality and not just on paper.

The public participation pillar is divided into three parts. The first part concerns the participation of the public that may be affected by or is otherwise interested in decision-making on a specific activity, and is covered by article 6. The second part concerns the participation of the public in the development of plans, programmes and policies relating to the environment, and is covered by article 7. Finally, article 8 covers participation of the public in the preparation of laws, rules and legally binding norms.

Pillar III — Access to justice

The third pillar of the Aarhus Convention is the access to justice pillar, contained in article 9. It helps to enforce both the information pillar (specifically, article 4 concerning information requests) and the public participation pillar (specifically, article 6 on public participation in decisions on specific activities) in domestic legal systems, as well as any other provisions of the Convention that Parties specify in their domestic law to be enforced in this manner. The access to justice pillar also provides a mechanism for the public to enforce environmental law directly.

4. Final provisions: administering the Convention

A convention, as an obligation on sovereign entities (i.e., the Parties), requires institutions and formal mechanisms (for example, a secretariat, committees and other subsidiary bodies) to allow the Parties to confer and work together on implementation. The Aarhus Convention includes a number of provisions relating to such institutions and formalities, as do most international agreements. These provisions are found in articles 10 to 22. Among the more significant issues covered by the Convention's final provisions are its coming into force, the Meeting of the Parties, the secretariat, review of compliance and settlement of disputes.

While a ECE convention, the Aarhus Convention is also open to Member States of the United Nations from outside the ECE region. Over the years the Parties to the Convention have repeatedly expressed their support for accession to the Convention by States from outside the region¹³ and in support of this, through decision IV/5, the Meeting of the Parties agreed some simple procedural steps for approving such accessions.

5. Annexes

Finally, the Aarhus Convention includes two annexes. The first contains a list of activities that are presumed to have a significant effect on the environment, and to which the provisions of article 6 on public participation in decision-making on specific activities apply. The second annex contains the rules for arbitration between or among Parties in the case of a dispute.

Implementation and further development of the Convention

Several issues are worth mentioning, because at the time of the Convention's adoption they were pressing issues. The Convention took them into account, but as is often the case with matters in the early stages of development under international law, it did so on a preliminary basis. At the same time these issues were flagged as issues for further development by the Meeting of the Parties.

The first of these is public participation in decision-making on genetically modified organisms (GMOs). Article 6, paragraph 11, requires Parties to apply the Convention's provisions on public participation "to the extent feasible and appropriate" to decisions on whether to permit the deliberate release of GMOs into the environment. However, the application of the Convention's provisions to other types of GMO decision-making was left open for future deliberation. The resolution of the Signatories, adopted together with the Convention in Aarhus, Denmark, on 25 June 1998, called for the issue to be addressed at the first session of the Meeting of the Parties. In the light of this, the Meeting of the Parties, at its first session (Lucca, Italy, 21–23 October 2002) adopted the Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms,¹⁴ often known as the "Lucca Guidelines". Also at that session, a new Working Group was established to explore options for a legally binding approach to further developing the application of the Convention in the field of GMOs. As a result of this work, the Meeting of the Parties, through decision II/1 at its second session (Almaty, Kazakhstan, 25–27 May 2005), adopted an amendment to the Convention.

Another issue flagged in the Convention for further development was the possible negotiation of an international instrument on pollutant release and transfer registers (PRTRs). The Convention takes an affirmative approach to the development of pollution inventories or registers, which have been highly successful in those countries in which they have been put in place. The establishment of pollution inventories or registers at the national level is covered in article 5, paragraph 9. Article 10, paragraph 2 (i), revisits the issue, thus demonstrating the high priority the Convention gives to PRTRs. That provision requires Parties at their first meeting to review their experience in implementing article 5, paragraph 9, and to consider what steps are necessary to further develop their systems of PRTRs at the national level, including the elaboration of an international instrument to be annexed to the Convention. To this end, at the first Meeting of Signatories to the Aarhus Convention, a Task Force on Pollution Inventories or Registers was established, and this group recommended that a legally binding instrument be negotiated on PRTRs. Subsequently, the Protocol on Pollutant Release and Transfer Registers was adopted at an extraordinary session of the Meeting of the Parties to the Aarhus Convention on 21 May 2003, held on the occasion of the Fifth Efe Ministerial Conference in Kyiv.

The Protocol is the first legally binding international instrument on PRTRs. It is designed to be an open, global protocol, and all States can participate in the Protocol, including those that have not ratified the Aarhus Convention and those that are not members of ECE. The Protocol entered into force on 8 October 2009. For further information on the PRTR Protocol, [see the commentary to article 5, paragraph 9](#), and the *Guidance on Implementation of the Protocol on Pollutant Release and Transfer Registers*.¹⁵

Finally, in implementing any convention, Parties are concerned with ensuring compliance and effective implementation. The Convention contains provisions on reviewing both compliance and implementation, but its provisions as adopted left for future development the precise mechanisms through which these are to be achieved. These mechanisms have subsequently been developed by the Meeting of the Parties, as outlined in brief below.

With respect to reviewing implementation, article 10, paragraph 2, of the Convention requires the Parties at their meetings to keep under continuous review the implementation of the Convention on the basis of regular reporting by the Parties. The Meeting of the Parties, through decision I/8 adopted at its first session, agreed that each Party should prepare, for each ordinary meeting of the Parties, a report on the legislative, regulatory or other measures that it has taken to implement the provisions of the Convention, including their practical implementation, in accordance with the format annexed to that decision. At its fourth session (Chisinau, 29 June–1 July 2011), the Meeting of the Parties adopted a revised reporting format and requested Parties to use the revised format annexed to decision IV/4 in future reporting cycles.¹⁶ The Meeting of the Parties also invited Parties to follow the guidance on reporting requirements prepared by the Compliance Committee.¹⁷

With respect to review of compliance, article 15 of the Convention requires the Meeting of the Parties to establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention. While article 15 stipulates that the arrangements must allow for appropriate public involvement and may include the option of considering communications from members of the public, the exact form of the compliance mechanism was left open for future development. At the second meeting of the Signatories, an open-ended intergovernmental working group was established to draw up a text for a draft decision establishing a compliance mechanism. As a result of this work, the Meeting of the Parties, at its first session adopted decision I/7 on review of compliance and, in accordance with that decision, elected the first compliance committee for the Convention. The Convention's Compliance Committee is discussed in more detail in the [commentary to article 15](#).

The road from Aarhus

The Protocol on Water and Health (London, 1999) to the ECE Water Convention was the first international instrument to take the provisions of the Aarhus Convention into account. Its article 10 includes provisions on public information based on articles 4 and 5 of the Aarhus Convention, and its article 5 (i) establishes the principles of access to information and public participation in its application. Also, its article 15 on compliance contains a requirement for appropriate public involvement, as in the corresponding article of the Aarhus Convention.

The Plan of Implementation adopted at the World Summit on Sustainable Development (Johannesburg, South Africa, 2002), refers to the Aarhus Convention as one of the ECE region's ongoing efforts in furtherance of its commitment to sustainable development.¹⁸

The Aarhus Convention has been cited by the European Court of Human Rights in several cases, including *Tatar v. Romania*¹⁹ and *Branduse v. Romania*.²⁰

The safeguard policies of the International Bank for Reconstruction and Development and the International Development Association (collectively, the World Bank), as well as the International Finance Corporation, have been strongly influenced by the principles of the Aarhus Convention. The European Bank of Reconstruction and Development has also reviewed its environmental policies in the light of the Aarhus Convention.

At its eleventh special session (Bali, 24–26 February 2010), the Governing Council of the United Nations Environment Programme (UNEP) adopted Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines). Representatives of the Aarhus Convention participated in consultations regarding the drafting of the Guidelines and following their adoption the secretariat participates as a member of the Advisory Group to the UNEP project to promote the Guidelines.

PREAMBLE

A preamble is the introduction to a treaty. It is an integral part of the legal agreement, but does not establish binding obligations. Instead, it serves several functions, including placing the agreement in a wider legal and political context, establishing principles for guidance in interpretation and setting progressive goals for implementation.

A preamble is usually constructed as a sequence of secondary clauses setting forth the motives for the conclusion of the treaty and indicating shared principles underlying the text. The preamble helps to denote the objective and purpose of the treaty.²¹

The preamble may be relied upon for interpretation purposes. Article 31, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) states that the preamble is part of the context and is a primary source of interpretation. Therefore, the preamble can be of great importance for establishing the meaning of treaty provisions and clarifying their purport.²²

By referring to declarations and other “soft law” instruments, and relating them to the specific obligations that follow in the text of a treaty, a preamble may also help to confirm the soft law provisions and contribute to their eventual development into hard law.

The implications of a preamble often go beyond the obligations in the substantive articles that follow. The articles of an instrument might leave open certain matters because the subject is not yet ripe for specific obligations or because there is not yet a consensus among the contracting States. The relevant preambular paragraphs, therefore, may indicate directions for further work and may later be relied on in the development of future agreements.²³ An example is preambular paragraph 20 referring to genetically modified organisms.

The first five paragraphs to the Aarhus Convention’s preamble establish a structure that underpins the Convention. The first preambular paragraph sets out the fundamental right “to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being” by referring to principle 1 of the Stockholm Declaration. The second preambular paragraph recalls principle 10 of the Rio Declaration, which brings in the aspect of public participation in environmental issues. The third preambular paragraph further develops the concepts of fundamental rights in the field of the environment, and in the fourth and fifth preambular paragraphs these two linked concepts are placed in the context of human health and sustainable development.

This structure recognizes that public participation as laid down in the Aarhus Convention is a critical tool in guaranteeing the right to a healthy environment. The earlier preambular paragraphs present a kind of history of the parallel development of the recognition of environmental rights and the recognition of the role of public participation in the context of sustainable development. As later preambular paragraphs show the growing linkage between these concepts, they set the tone for the Convention as a whole. One of the most important paragraphs in the preamble is the seventh, which explicitly recognizes “that every person has the right to live in an environment adequate to his or her health and well-being”. One of the means for enjoying the right and for observing the duty to protect the environment is through the Convention’s guarantee of specific rights.

The preamble also sets out more practical policy considerations behind the Convention, such as its relationship to improved decision-making and greater social consensus. Transparency in government, freedom of information and the important roles that individuals, NGOs and the private sector can respectively play in environmental protection are all invoked. The preambular paragraphs emphasize the importance of education, capacity-building and the use of the media and electronic tools to improve communication. The sixteenth, seventeenth and twentieth preambular paragraphs touch upon the responsibilities of government and the relationship between the State and the people. The eighteenth preambular paragraph is an “access to justice” provision, noting the role of the judiciary in upholding the rules by which society is governed.

The preamble also places the Convention in the context of the wider role played by ECE in strengthening democracy in the region, as well as in ongoing international processes such as “Environment for Europe” and “Environment and Health”. It also recalls relevant provisions of other multilateral environmental agreements (MEAs) such as the Espoo Convention and the Water Convention.

The Parties to this Convention,

[1] *Recalling principle I of the Stockholm Declaration on the Human Environment,*

The United Nations General Assembly first called for a conference on the human environment in December 1968.²⁴ The Conference took place in Stockholm from 5 to 16 June 1972 and was attended by 114 States and a large number of international and non-governmental organizations as observers. The Conference adopted three non-binding instruments: a resolution on institutional and financial arrangements, a declaration of 26 principles and an action plan.

Principle 1 of the Stockholm Declaration of Principles states that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

The first sentence of principle 1 links environmental protection to human rights norms and raises environmental rights to the level of other human rights. The development of international human rights law traditionally proceeded independently of international environmental law, but increasingly these independent tracks have been intersecting.

This concept of environmental rights is echoed throughout the preamble of the Aarhus Convention by reference to other international texts, such as General Assembly resolution 45/94 of 14 December 1990 recognizing that individuals are entitled to live in an environment adequate for their health and well-being, and by referring specifically to the right to a healthy environment. Article 1 further includes this concept as a core objective of the Aarhus Convention.

[2] *Recalling also principle 10 of the Rio Declaration on Environment and Development,*

The Stockholm Conference in 1972 fostered concern for environmental matters at a multilateral level. The 1987 Brundtland Report was a further catalyst for the 1992 UNCED.

In December 1989, the United Nations General Assembly²⁵ set the agenda for UNCED. UNCED was held in Rio de Janeiro, Brazil, from 3 to 14 June 1992 and was attended by 172 States including 108 Heads of State, more than 50 intergovernmental organizations and several hundred NGOs. The EU also attended the Conference. In addition to the signing by more than 150 States of the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD), the Conference adopted three non-binding instruments: the Rio Declaration, the UNCED Forest Principles and Agenda 21: Programme of Action for Sustainable Development (Agenda 21). The Rio Declaration comprises 27 principles. Principle 10 states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 10 encapsulates what would later become the three pillars of the Aarhus Convention: access to information; public participation; and access to judicial and administrative proceedings in environmental matters. It is significant as the first clear global expression of these concepts together and provided an international benchmark against which the compatibility of national standards could be compared. It also foresaw the creation of new procedural rights which could be granted to individuals through international law and exercised at the national and possibly international level.²⁶

[3] Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Ten years after the Stockholm Conference the United Nations General Assembly adopted the World Charter for Nature.²⁷ The Charter emphasizes the protection of nature as an end in itself, whereas previous instruments focused more on the protection of nature for the benefit of mankind. The Charter was proposed by Zaire and strongly supported by developing countries that had not been as active 10 years earlier during the Stockholm process.²⁸

The most relevant provisions for the Aarhus Convention can be found in chapter III of the Charter. With respect to the Convention's first pillar, access to information, paragraphs 15 and 18 of the Charter underline the importance of the collection and dissemination of environmental information. Paragraph 15 emphasizes the importance of ecological education as an integral part of general education. Scientific research and the unimpeded dissemination of its results are stressed in paragraph 18.

Paragraph 16 of the Charter declares that "All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements shall be disclosed to the public by appropriate means in time to permit effective consultation and participation". It shows the important interdependence between the collection and dissemination of environmental information and effective public participation.

Paragraph 23 of the Charter further discusses public participation, while also stressing the importance of access to justice mechanisms: "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."

Finally, paragraph 24 states: "Each person has a duty to act in accordance with the provisions of the present Charter; acting individually, in association with others or through participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met", a clear statement of the individual obligation to protect the environment, which is concomitant to the enjoyment of a healthy environment.

In its resolution 45/94, the General Assembly recognized that all individuals were entitled to live in an environment adequate for their health and well-being and called upon Member States and intergovernmental and non-governmental organizations dealing with environmental questions to enhance their efforts towards ensuring a better and healthier environment. It also called for the United Nations Commission on Human Rights to study the problems of the environment and its relation to human rights. This study resulted in the final report on human rights and the environment to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.²⁹ For many years, this report was the most detailed official United Nations document on the link between environment and human rights, and the draft declaration of principles appended to the report was a subject of much study and debate. It also contains a useful annex compiling national constitutional provisions relating to the environment.³⁰

[4] **Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,**

The European Charter on Environment and Health recognizes public participation to be an important element in the context of environment and health issues. It provides an interpretation of the relationship between environment and health. The term “environment and health” encompasses the health consequences of interactions between human populations and a whole range of factors in their physical (natural and man-made) and social environment. The two main aspects in this discussion are: how well can the environment sustain life and health and how free is the environment of hazards to health. The introduction to the European Charter on Environment and Health itself gives a definition of “environmental health” by stating that the term “comprises those aspects of human health and disease that are determined by factors in the environment.” It also refers to the theory and practice of assessing and controlling factors in the environment that can potentially affect health. “Environmental health”, as used by the World Health Organization (WHO) Regional Office for Europe, includes “both the direct pathological effects of chemicals, radiation and some biological agents, and the effects (often indirect) on health and well-being of the broad physical, psychological, social and aesthetic environment, which includes housing, urban development, land use and transport”.³¹

Health is explicitly referred to in many parts of the Aarhus Convention. Article 1, which sets out the objective of the Convention, refers to “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”, and this statement is supported by similar phrases in the preamble. Human health is also referred to in article 5, paragraph 1 (c). In article 2, the Aarhus Convention defines “environmental information” to include a qualified but explicit reference to human health and safety and the conditions of human life. By implication, these factors are also included in the implied definition of “environment” under the Convention. Thus the entire Convention — not just its information provisions—should be interpreted as applying to health issues, to the extent that they are affected by or through the elements of the environment ([see the commentary to article 2, paragraph 3 \(c\)](#)).³²

In the first entitlement, the European Charter states that every individual is entitled to:

- an environment conducive to the highest attainable level of health and well-being;
- information and consultation on the state of the environment, and on plans, decisions and activities likely to affect both the environment and health;
- participation in the decision-making process.

In the eighth entitlement, the Charter also stresses the important role of NGOs “in disseminating information to the public and promoting public awareness and response”.

Environment and Health

The European Conference on Environment and Health held in Frankfurt, Germany, in December 1989, which adopted the European Charter on Environment and Health, was the first in a series of meetings of ministers of health and environment in the WHO European Region. The process can be compared to the EfE process ([see the commentary to twenty-fourth preambular paragraph](#)).

The Second European Conference on Environment and Health was held in Helsinki in June 1994. Working on a comprehensive assessment³³ which identified the common concerns in a number of environment and health issues across Europe, the ministers addressed these topics by endorsing the Environmental Health Action Plan for Europe. Furthermore, the ministers committed their respective health and environment departments to developing joint national environmental health action plans to tackle these problems.³⁴ The recognition of public participation as an important element in the context of environment and health matters was reflected in the emphasis given in the Environmental Health Action Plan for Europe to the goal of strengthening the involvement of the public and NGOs in environmental health decision-making.³⁵

The linkage between EfE and the Environment and Health processes came to the forefront during the Third Ministerial Conference on Environment and Health, held in London in June 1999. The London Conference provided a timely opportunity to offer some direction on the application of the Aarhus Convention, especially with respect to health issues, which could also be taken into account at a later stage by the Meeting of the Parties. Health issues as such were not central in the negotiation of the Aarhus Convention, although they were explicitly included in the definition of "environmental information". Article 30 of the Declaration of the Third Ministerial Conference on Environment and Health affirms the ministers' "commitment to giving the public effective access to information, improving communication with the public, securing the role of the public in decision-making and providing access to justice for the public in environment and health matters."³⁶

Furthermore, the declaration warmly welcomes the conference background document "Access to information, public participation and access to justice in environment and health matters" and recommends it for consideration, inter alia, by the Signatories to the Aarhus Convention, in further deliberations in this field.³⁷

The Fourth Environment and Health Conference, which took place in Budapest in 2004, adopted the Children's Health and Environment Action Plan for Europe, and called for the establishment of "environment and health information systems" ensuring timely access to information. The Conference declaration called upon international organizations, including through the relevant Aarhus Convention processes, to develop guidelines for risk communication as an important tool for heightening public awareness.

At the Fifth Environment and Health Conference, which took place in Parma, Italy, in March 2010, ministers confirmed the need for participation of the public and stakeholders in tackling environment and health issues and established a new institutional framework for the renamed European Environment and Health Process.

The Resolution of the Signatories of the Aarhus Convention, called for close cooperation between ECE, other bodies involved in the EfE process and other relevant international and non-governmental organizations on, inter alia, implementation of national environmental health action plans. (For more on the EfE process, [see the commentary to the twenty-fourth preambular paragraph below](#).)

[5] **Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,**

The term "sustainable development" has been used to embody a set of values in which better account is taken of previously uncaptured environmental impacts arising from traditional forms of development. In general, it refers to an environmentally oriented approach towards economic development that meets the needs of the present generation without depriving future generations of the ability to meet their own needs. The definition found in the watershed Brundtland Report *Our Common Future* is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁸

The Rio Declaration's principle 3 states "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Taken together with other Rio principles (principles 2 and 4 in particular)³⁹ sustainable development requires the integration of environmental and developmental (i.e., social and economic) policies.

The International Court of Justice (ICJ) has also taken under consideration notions related to sustainable development, particularly in its judgment in the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, in which Hungary

had sought to abandon a project to build a system of barrages on the Danube partly on sustainable development grounds.⁴⁰ The Court stated in paragraph 140 of the judgment:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

In the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the ICJ found that the existing river management agreement between the States reflected the “need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development.”⁴¹

The concept has steadily grown in scope and significance.⁴² In 2002, on the tenth anniversary of the Rio Conference and the thirtieth anniversary of the Stockholm Conference, the World Summit on Sustainable Development was held in Johannesburg, South Africa. At that summit a Declaration and Plan of Implementation were adopted that elaborated practical measures to achieve sustainable development, with a focus on poverty eradication. Paragraph 128 of the Plan of Implementation called upon States to:

Ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the Declaration.⁴³

From 20 to 22 June 2012, on the twentieth anniversary of the Rio Conference, the United Nations Conference on Sustainable Development (Rio+20), was held in Rio de Janeiro. Rio+20 was a follow-up to the 1992 UNCED held 20 years before in the same city. The primary result of the Conference was a 49-page non-binding document entitled *The Future We Want*.⁴⁴ In it, Heads of State and high-level representatives of the 192 Governments in attendance renew their political commitment to sustainable development and declare their commitment to the promotion of a sustainable future. They reaffirm all the principles of the 1992 Rio Declaration and their commitment to the Declaration’s full implementation.⁴⁵ *The Future We Want* underscores that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development.⁴⁶ It also encourages action at the regional, national, subnational and local levels to promote access to information, public participation and access to justice in environmental matters, as appropriate.⁴⁷

Sustainable development became one of the main objectives of the EU following the adoption of the 1997 Treaty of Amsterdam.⁴⁸ Part one, article 1, paragraph 2 of the Treaty of Amsterdam provided that the EU members had to take into account “the principle of sustainable development” while promoting economic and social progress for their peoples.

With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the European Union was given binding legal effect equal to the Treaties. Article 37 of the Charter of Fundamental Rights requires that a high level of environmental protection and the improvement of the quality of the environment be integrated into policies of the EU and ensured in accordance with the principle of sustainable development.

“Sustainable use” is defined in article 2 of the CBD as “the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations”.

The CBD uses a special formulation of sustainable development by including the words “environmentally sound”.⁴⁹ This clarification is in fact a repetition of a formulation found in other international instruments, made necessary by the tendency of some to enlist the term “sustainable development” in the cause of sustained economic growth with little regard for environmental considerations. The General Assembly resolution calling for the Rio Conference, for example, consistently included the term “environmentally sound”.⁵⁰ It can also be found in the 1981 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, also known as the Abidjan Convention. If the Brundtland Report’s philosophy had been consistently followed, the use of “environmentally sound” would be redundant, but emphasis of the words heads off any backtracking by countries that wish to emphasize development over environment.

The formulation used in the Aarhus Convention emphasizes that development, to be sustainable, must fully take the environment into account and must have a solid basis in environmental values. In the context of the Convention, this preambular paragraph establishes that not only are the three pillars important for the realization of the right to a healthy environment, but they also have a role to play in the attainment of sustainable development by helping to “protect, preserve and improve the state of the environment”.

[6] *Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,*

[7] *Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,*

The sixth preambular paragraph is a more express statement of the link between human rights and environmental protection. This well-founded principle was established as early as 1968 by a General Assembly resolution,⁵¹ by principle 1 of the Stockholm Declaration and by other international instruments (see above). The seventh preambular paragraph goes a significant step further, however, by deducing from this linkage that the precondition of a healthy environment for the enjoyment of basic rights gives rise to a right in and of itself. This statement, even though contained in a preamble, was nonetheless the first express recognition of the right to a healthy environment in an international instrument in the European region (see the [commentary to article 1](#)). In contrast, the right has been recognized in human rights instruments in the African and Latin American regions since the 1980s.⁵² The seventh preambular paragraph couples the right with language pertaining to the duty to protect the environment, a duty that is often mentioned in national law and international instruments, including the Stockholm Declaration and the World Charter for Nature.⁵³ These two paragraphs together reflect constitutional and statutory developments and a growing jurisprudence worldwide giving substance and rights-based content to the previously aspirational goal of a basic right to a healthy environment.

In the 2000s, discussions on environmental rights at the United Nations level often focused on specific aspects of these rights, such as the “rights of indigenous peoples” or the “right to water”. In 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples.⁵⁴ It was the first General Assembly declaration which explicitly recognized the conservation and protection of the environment and resources as a human right, albeit for indigenous people only. Article 29 of the Declaration declares, inter alia, that indigenous peoples have the right to the conservation and protection of the environment and that States must take effective measures to ensure that no storage or disposal of hazardous materials takes place in the lands or territories of indigenous peoples without their free, prior and informed consent. In resolution 64/292 of 28 July 2010, the General Assembly for the first time expressly recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.⁵⁵

In the 2010s, discussions at the United Nations level began to consider the right to a safe, clean, healthy and sustainable environment more generally. At its nineteenth regular session (Geneva, 27 February–23 March 2012), the Human Rights Council adopted a resolution appointing a Special Rapporteur, for a period of three years, on human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment, who would be required to, inter alia, make recommendations for the achievement of the Millennium Development Goals, take account of the outcome of the Rio+20 Conference, and contribute to follow-up processes.⁵⁶

In addition, the right to a healthy environment has increasingly been recognized at the national level. Many countries in the ECE region, especially in central and eastern Europe, the Caucasus and Central Asia, have provisions recognizing the right in their constitutions or in domestic law.⁵⁷

Furthermore, the recognition of such rights is not an empty aim. Related provisions have been successfully used in the courts to defend the rights of individual members of the public to a particular level of environmental protection. Notable

cases have been decided in India,⁵⁸ Pakistan⁵⁹ and the Philippines.⁶⁰ Concerning the question of the nature of the right to a healthy environment, the Supreme Court of the Philippines has said:

Although the rights to a decent environment and to health were formulated as State policies, i.e. imposing upon the State a solemn obligation to preserve the environment, such policies manifest individual rights not less important than the civil and political rights enumerated under the Bill of Rights of the Constitution.⁶¹

In the ECE region, countries whose national courts have considered a constitutional right to a healthy environment include Hungary,⁶² Belgium,⁶³ Latvia,⁶⁴ Slovenia⁶⁵ and Spain.⁶⁶ Such cases help to elaborate upon the meaning of the right. At the regional level, to date all Parties to the Aarhus Convention with the exception of Belarus, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan are also members of the Council of Europe, and thus Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Article 8, paragraph 1, of the European Convention on Human Rights, which states that “Everyone has the right to respect for his private and family life, his home and his correspondence”, has been interpreted by the European Court of Human Rights (ECHR) in a manner that approaches a right to a healthy environment. In the 2006 case of *Giacomelli v. Italy*, which concerned a plant for the treatment of toxic industrial waste, the ECHR held:

Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person’s home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person’s right to respect for his home if it prevents him from enjoying the amenities of his home.⁶⁷

In that judgement, the ECHR noted that article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private sector activities properly.⁶⁸ In its 1998 judgement in *Guerra v. Italy*, the ECHR also found that article 8 could be breached by a public authority’s failure to provide adequate environmental information. In that case, the public authority had failed to provide the local population with information about risk factors and how to proceed in the event of an accident at the nearby chemical fertilizer factory. In *Giacomelli v. Italy*, the ECHR summarized some of its previous environmental jurisprudence under article 8:

In *Powell and Rayner v. the United Kingdom* ... the Court declared Article 8 applicable because “in each case, albeit to greatly differing degrees, the quality of the applicant’s private life and the scope for enjoying the amenities of his home ha[d] been adversely affected by the noise generated by aircraft using Heathrow Airport”. In *López Ostra* ..., which concerned the pollution caused by the noise and odours generated by a waste-treatment plant, the Court stated that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”. In *Guerra and Others* ... the Court observed: “The direct effect of the toxic emissions on the applicants’ right to respect for their private and family life means that Article 8 is applicable.” Lastly, in *Surugiu v. Romania* ... which concerned various acts of harassment by third parties who entered the applicant’s yard and dumped several cartloads of manure in front of the door and under the windows of the house, the Court found that the acts constituted repeated interference with the applicant’s right to respect for his home and that Article 8 of the Convention was applicable.⁶⁹

While noting that article 8 contains no explicit procedural requirements, in *Giacomelli v. Italy*, the ECHR held that article 8 nevertheless requires the consideration of environmental impacts before decision-making, the provision to the public of information generated through the environment impact studies, the opportunity for individuals to have their views taken into account⁷⁰ and the opportunity to appeal against any decision in which they consider their interests or comments have not been given sufficient weight in the decision-making process:



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A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake (see *Hatton and Others* ...). The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, *mutatis mutandis*, *Guerra and Others* ... and *McGinley and Egan v. the United Kingdom* ...). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis*, *Hatton and Others* ... *Taşkın and Others* ...).⁷¹

The seventh preambular paragraph of the Aarhus Convention specifically recognizes the rights of "present and future generations". This phrase is also found in article 1 of the Convention. The need to take an intergenerational approach, in which actions taken today should not jeopardize the opportunities and benefits for future generations, was also recognized in principle 1 of the Stockholm Declaration, but has much earlier origins. The idea that as "members of the present generation, we hold the Earth in trust for future generations"⁷² is well-known in international law. It can be traced back to the nineteenth century in the 1893 Pacific Fur Seals Arbitration, even though the argument was rejected by the tribunal in that case.⁷³ This part of the paragraph also builds on the conclusions drawn by the World Commission on Environment and Development in the Brundtland Report, *Our Common Future*.⁷⁴

While not the first international legal instrument to recognize the right to a healthy environment, the Aarhus Convention does appear to be the first hard-law text to recognize the rights of future generations. The ICJ has used similar language in recognizing that the very health of generations yet unborn is represented by the environment.⁷⁵ The Aarhus Convention takes this jurisprudential recognition a step further by incorporating it into an international legal instrument.

The issue of intergenerational equity is increasingly important in the context of sustainable development. A much-discussed case globally is the *OPOSA Minors' case*.⁷⁶ This was a 1993 case before the Supreme Court of the Philippines in which a group of minors formed an organization with their parents and brought a suit against the Secretary of the Department of Environment and Natural Resources aimed at cancelling all existing logging permits in order to protect the forests against deforestation.

In the *OPOSA case*, the plaintiff children claimed to represent their generation as well as generations yet unborn. The Supreme Court of the Philippines held that the principle of intergenerational responsibility was legally recognizable, and that the assertion of the children in *OPOSA* was a legitimate expression of their interest in protecting the rights of future generations.⁷⁷ The Court granted that the plaintiffs had the legal capacity to sue on behalf of succeeding generations "based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned".⁷⁸

[8] Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

The earlier paragraphs laid the groundwork for the linkage between public participation and basic human rights, including the right to a healthy environment, as well as the duty to protect the environment for the benefit of present and future generations. This linkage is made express in the eighth preambular paragraph. In particular, it specifies the three pillars of public participation which make up the fundamental structure of the Convention. These are access to information, public participation in decision-making, and access to justice. The Convention has determined that these three elements are essential to the achievement both of the right to a healthy environment and, no less important, ensuring the possibility for individuals to fulfil their responsibilities towards others, including future generations.

Significantly, the paragraph goes further to state in direct terms that citizens might need assistance in exercising their rights. Basic human rights related to the environment and basic civic responsibilities are interwoven, but both the rights and the responsibilities may remain unfulfilled as long as persons do not have the capacity to act in civil society. This may

involve the establishment of proper institutions, the guarantee by the State of clear and transparent frameworks for action and, in some cases, affirmative assistance programmes to level the playing field. This point is revisited in more detail in article 3, paragraphs 2 and 3.

[9] *Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,*

The ninth preambular paragraph sets forth some of the core values of public participation, from the point of view of public authorities. It lists four separate practical benefits of public participation. The first is the enhancement of the quality and implementation of decisions. The quality of decisions can be improved by the public's provision of additional information, as well as through the influence that advocacy of alternative solutions can have on the careful consideration of possible solutions. The public will often have special knowledge of local conditions and of the practical implications of proposed activities.

The implementation of decisions can be improved where the members of the public that are interested in the result have been included in the process and have had their concerns considered. In such cases they can be expected to support the decision more strongly. Increased public awareness is a side benefit of public participation that results in a more sophisticated public in terms of the nature of their involvement and their potential support for good decisions. Opportunities for the public to express their concerns and to have those concerns taken into account is a matter of self-fulfilment that increases confidence in society generally.

[10] *Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,*

This paragraph emphasizes the societal implications of the practical benefits discussed in the ninth preambular paragraph, and is echoed in the twenty-first. The active involvement of the public in a transparent decision-making process confirms the accountability of the public authorities and increases respect for them and for their decisions, even among those members of the public that may be adversely affected by the final decision. As most decisions to be effective require some measure of support from the public at large, the absence of such confirmation may increase the likelihood of failed projects.

Moreover, those members of the public that have had the possibility of substantially participating in the decision-making process could be the best advocates for the implementation of the given decision. They know the limitations and constraints the authority was facing, have witnessed the consideration given to the various interests at stake, including environmental protection, and can appreciate that the decision may be a justifiable one in the circumstances, even if their particular point of view did not prevail.

[11] *Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,*

This paragraph acknowledges that the general principles contained in the Aarhus Convention can help in developing transparency in all branches of government and in assisting them in the discharge of their responsibilities. It is also one of the places in the preamble, along with its eighteenth and twenty-first paragraphs, that goes beyond a specifically environmental context and points to larger issues of democratization and the relationships among individuals, organizations and the State.

Many of the Convention's governmental negotiators were reluctant to interfere with the balance of powers by prescribing requirements for the legislative process. The definition of public authority in article 2, paragraph 2, of the Convention thus expressly excludes bodies or institutions acting in a legislative capacity. However, in September 1997, a group of parliamentarians actively taking part in the negotiations issued the "Stockholm Statement", in which they endorsed the applicability to parliaments of the information provisions of the Convention in particular, and developed principles for public participation in "legislative work".⁷⁹ The Resolution of the Signatories also emphasized that parliaments have a key role to play in the implementation of the Convention. In keeping with this, the eleventh preambular paragraph invites legislative bodies to implement the provisions of the Convention on a voluntary basis.

[12] *Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,*

That the public may need assistance to make use of the rights and opportunities provided by the Convention has already been acknowledged in the eighth preambular paragraph. One of the first ways of doing so is for Parties to provide information to the public about their opportunities to participate in environmental decision-making. This paragraph applies some of the principles of environmental education to the context of public participation, in particular the importance of so-called "meta-information", i.e., information about how to acquire and use information. Effective use of the tools of public participation requires the public to have knowledge not only of the information that will be relevant to a particular decision-making process, but also of information about their opportunities to participate in the decision-making process.

The final part of the twelfth preambular paragraph takes this knowledge a step further, to recognize the importance not only of the public knowing of their opportunities to participate but also how to effectively use those opportunities. This implies that the public should have a real practical understanding of the public participation procedures open to them, including various methods in which they may use them effectively and the nature of the results that might be expected from their participation.

The twelfth preambular paragraph also mentions free access. Free access may be understood to mean free, open, unfettered and non-discriminatory access to procedures for public participation. It does not imply that the government should subsidize all the costs of any member of the public to participate in a given procedure. However, the costs borne by the member of the public should be the normal costs associated with participation in any procedure. The State should not impose financial constraints on members of the public that wish to participate. The issue of costs is further developed in the Convention.

[13] Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

The Convention talks about the respective roles that individuals, NGOs and the private sector can play in environmental protection. Individuals may play a role in terms of their personal behaviour in protecting the environment and their interactions in society to convince others to do so, and may also act in association with others. NGOs and private business entities are two means for the latter.

The formation of an NGO is a common means to exercise the right of association of any group with a common purpose or common interests. The term “non-governmental organization”, while often connoting environmental protection organizations, is a generic term applying to not-for-profit organizations formed for any lawful purpose. The special recognition of environmental NGOs under the Convention is discussed in the [commentary to article 2, paragraph 5](#), and [article 9, paragraph 2](#).

The role of business and industry in environmental protection is increasingly being recognized. On the one hand, the environmental impact of some sectors of business and industry means it is critical that they are engaged and encouraged to meet their responsibilities for minimizing the adverse impacts of their activities. On the other hand, industry, whether “green” or not, is a key player in the search for solutions. Furthermore, the notion of “corporate social responsibility” has developed in recent years, which have seen a growing number of businesses, either voluntarily or under government regulation, establish policies and goals and measure performance on a number of criteria, including environmental protection and social responsibility.

[14] Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

The fourteenth preambular paragraph is related to the twelfth in that it deals in part with meta-information (i.e., information about how to acquire and use information) concerning decisions affecting the environment and sustainable development. It goes further, however, in that it expresses the desire of the negotiating parties to promote environmental education on a more general level and to encourage widespread public awareness and participation. The link between environmental education and participation has been made in several international instruments, including the ECE Strategy for Education for Sustainable Development (Strategy for ESD). The Strategy, adopted by ECE ministers, vice-ministers and other representatives of environment and education ministries at their high-level meeting in Vilnius in March 2005, is intended as a practical instrument to promote sustainable development through education. The meeting also adopted the Vilnius Framework for Implementation setting up a Steering Committee and an expert group on indicators in order to facilitate coordination and review of the Strategy’s implementation.

The United Nations declared 2005–2014 the United Nations Decade of Education for Sustainable Development, with the United Nations Educational, Scientific and Cultural Organization (UNESCO) as the lead agency for the Decade’s initiatives. Earlier instruments include the 1997 Declaration of Thessaloniki of the UNESCO International Conference on Environment and Society: Education and Public Awareness for Sustainability,⁸⁰ which built upon declarations made at the Belgrade Conference on Environmental Education (1975), the Tbilisi Intergovernmental Conference on Environmental Education (1977), the Moscow International Congress on Environmental Education and Training (1987), and the Toronto World Congress for Education and Communication on Environment and Development (1992). Promoting education, public awareness and training are also a subject of Agenda 21, chapter 36.

[15] *Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,*

The importance of information to all three pillars of the Convention cannot be overstated. The media is very often the public's first source of information regarding environmental matters. This preambular paragraph also indirectly takes note of the rapid advances made in information technology in recent years and declares their importance to the effective implementation of the Convention. In particular, advances such as electronic means of storing and retrieving information and the possibility of instant access to worldwide information through the Internet have greatly improved the capacity of the public and public authorities to process and use information and to engage in public participation electronically. The Convention makes reference to information technology, in its article 2, paragraph 3 (information in electronic form), and in its article 5, paragraphs 3 (accessible electronic databases) and 9 (structured, computerized and publicly accessible database for pollutant releases).

[16] *Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information,*

A major tenet of sustainable development is the integration of environment and development. One means for achieving this is through the consideration of potential environmental impacts in decision-making and policymaking, generally known as "environmental assessment". Specific procedures for environmental assessment in different contexts include "environmental impact assessment" (EIA), "ecological expertise" (with its OVOS⁸¹ element) or "strategic environmental assessment" (SEA). In order to take proper account of environmental considerations, it is obviously necessary for information to be accurate, comprehensive and up-to-date. As stated in previous preambular paragraphs, one of the functions of public participation is to assist public authorities in gathering high-quality information.

The Convention thus translates the idea that all of society must work together to solve environmental problems for the benefit of present and future generations into a legal principle conveying definite responsibilities on public authorities, including not only environmental ones, as was the assumption in the past.⁸² Agenda 21 provides some guidance, in chapter 40 on "Information for decision-making".

The ICJ has referred to environmental assessment as a necessary mechanism in complex decision-making to enable the principle of sustainable development.⁸³ As mentioned above, the ECHR has also discussed the necessity of environmental assessment as a means to ensure that the right to family and private life in article 8 of the European Convention on Human Rights is respected.⁸⁴ Article 37 of the EU Charter of Fundamental Rights, also mentioned previously, requires that a high level of environmental protection and the improvement of the quality of the environment be integrated into policies of the EU.

[17] *Acknowledging that public authorities hold environmental information in the public interest,*

The seventeenth preambular paragraph, along with the ninth, the tenth and the twenty-first, places the Convention in the context of democratic principles. While the legislature establishes public policies and the government executes them, the system of rights and responsibilities in society acts as a further check on abuses of power. In a democracy, the government holds the public trust and discharges its duties on behalf of the public welfare. Openness in the sphere of public authority guarantees that the public can check the ways in which public authorities discharge their duties. A basic underlying principle that ensures openness is the notion that the information held by public authorities is held on behalf of the public. This includes information held by private persons and enterprises to the extent that they come within the definition of "public authority" under the Convention ([see the commentary to the definition of "public authority" in article 2, paragraph 2 \(b\) and \(c\)](#)). In such contexts it is improper to talk of ownership of such information. Moreover, this principle includes the notion that public authorities must serve the needs of the public, including individual members of the public, so long as this does not interfere with the rights of others.

Earlier international instruments with similar provisions include Council of Europe Recommendation No. (81) 19 of the Committee of Ministers to member States on the access to information held by public authorities (Strasbourg, 1981), and Council of Europe Recommendation No. 854 (1979) of the Parliamentary Assembly on access by the public to government records and freedom of information (Strasbourg, 1979).

[18] *Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,*

The eighteenth preambular paragraph contains several important points. The first is that judicial mechanisms should be effective. This includes the notion of the independence, impartiality and professional integrity of the judiciary, which in turn requires the judiciary to have a solid financial base and to be essentially self-regulating. It further requires that the judgements of the judicial authorities should be ultimately enforceable in society. Other issues in connection with the effectiveness of judicial mechanisms include the scope of remedies and the length of the process.

The next point in this paragraph is that judicial mechanisms for enforcement of the law and for redress in the case of infringement of rights should be accessible to the public. One major aspect of accessibility is cost, which is addressed several times in the Convention. The length of the process, to the extent that expected delay might bar members of the public from using it, is an issue of accessibility as well as effectiveness. Finally, if there are technical barriers to access to the courts, such as unreasonable standing requirements, justice may not be accessible to the public. Convention negotiators expressed their concern that NGOs as well as individuals should have standing in representing their rights and interests in the courts, and the standing of NGOs promoting environmental protection is thus specifically mentioned in article 2, paragraph 5, and article 9, paragraph 2.

Finally, this preambular paragraph makes reference to the reasons for access to justice. Access to justice is necessary so that the public's legitimate interests — that is, those interests recognized by a particular society according to law, custom or practice — are protected and the law is enforced. The protection of the public's interests and the enforcement of the law stand behind the obligations contained in the rest of the Convention. Access to justice is the primary means for enforcement of the Convention, essentially protecting the other two pillars.

[19] *Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,*

In response to interest from consumers, particularly in Europe and North America, in environmentally friendly products, producers and distributors increasingly make claims on product labels that products are, in some way, environmentally responsible, for example, that the products are made from recycled or biodegradable material. To enable consumers to make informed environmental choices, it is important that the information provided be adequate and not false or deceptive.

The International Organization for Standardization (ISO) has adopted four international standards on eco-labelling: ISO 14020:2000, ISO 14021:1999, ISO 14024:1999 and ISO 14025:2006.

Council Regulation No. 880/92/EEC of 23 March 1992 on a Community eco-label award scheme established a regulated programme and procedures for adopting the specific ecological criteria that must be met before an eco-label may be awarded. Article 6 of the Regulation specifically provides that environmental organizations should be consulted in defining the ecological criteria.⁸⁵ European Council Resolution 93/C 138/01, dated 1 February 1993, adopted a policy to establish a Community-wide ecological labelling system as a component of product standards regulation. The eco-label award scheme was amended by Regulation (EC) No. 1980/2000 and Regulation (EC) No. 66/2010.

[20] *Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,*

The Aarhus Convention gives special treatment to information and decisions pertaining to GMOs. In addition to the twentieth preambular paragraph, GMOs are expressly addressed in the definition of environmental information in article 2, paragraph 3 (a), and in article 6, paragraph 11, on public participation in decision-making. Article 5, paragraph 8, on product labelling, is also of relevance to GMOs.

The fact that the drafting of the Convention had to take into account many different systems, interests and traditions among the countries in the ECE region is particularly apparent in its dealing with GMOs. During the negotiation of the Convention, the negotiating parties could not reach agreement on the extent to which its provisions should apply to the deliberate release of GMOs into the environment and they agreed to keep the issue open for further determination in the light of future developments. At its second session (Almaty, 25–27 May 2005), the Meeting of the Parties adopted a new article 6 bis and annex I bis to the Convention, the so-called GMO amendment to the Convention.⁸⁶ The amendment addresses public participation in decisions on the deliberate release into the environment and placing on the market of GMOs. These developments, together with relevant developments under the Cartagena Protocol on Biosafety, are discussed in more detail in the [commentary on article 6, paragraph 11](#).

[21] *Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),*

Participatory democracy has long been considered a way to increase public confidence in leaders and to reduce tensions within society. Environmental protection has been one of the main fields in which participation has developed. Several of the preceding preambular paragraphs, including the ninth, tenth and seventeenth paragraphs, address ways in which democratic institutions can be strengthened through the application of the Convention. This paragraph focuses on strengthening democracy in the ECE region in particular.

ECE is the forum at which 56 countries of North America, Western, Central and Eastern Europe and Central Asia come together to forge the tools of their economic cooperation. Its main purpose is to harmonize the policies and practices of its member countries. Through these activities, ECE reduces the risk both of cross-border tensions and of disagreements within or between such regional institutions and bodies as the EU and the Commonwealth of Independent States (CIS), which embody the dynamism of subregional integration movements. Through its cooperation with all United Nations organs, it is one of the instruments by which the region assumes its responsibilities towards the rest of the world.

Parts of the ECE region experienced large shifts in political systems and great leaps in democratization within the decade prior to the Convention's adoption. In many cases, this saw a reformulation of the relationship between the State and the individual and associations in society. Even where the changes were not so dramatic, however, greater democratization was an important part of the historical landscape in the ECE during the 1990s. These historical events contributed to many former communist States being among the first countries to ratify the Aarhus Convention.

In the midst of the democratic changes in 1989, the Organization for Security and Cooperation in Europe (OSCE), then known as the Conference on Security and Cooperation in Europe, held a significant meeting on the protection of the environment in Sofia.⁸⁷ The meeting was interrupted by accredited journalists telling of beatings of peaceful demonstrators (members of the environmental organization Ecoglasnost) taking place outside the hall. In its report, the Meeting, inter alia, adopted the following conclusions:⁸⁸

[The participating States] recall their commitment in the Vienna Concluding Document to acknowledge the importance of the contribution of persons and organizations dedicated to the protection and improvement of the environment, and to allow them to express their concerns. They reiterate their willingness to promote greater public awareness and understanding of environmental issues.

The participating States reaffirm their respect for the right of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues, without legal and administrative impediments inconsistent with the CSCE provisions. These individuals, groups and organizations have the right to participate in public debates on environmental issues, as well as to establish and maintain direct and independent contacts at national and international level.

A decade later, at the OSCE Summit in Istanbul on 18 and 19 November 1999, OSCE Heads of State adopted the OSCE Charter of European Security, which in paragraph 32 declares:

In the spirit of the 1998 Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, we will in particular seek to ensure access to information, public participation in decision-making and access to justice in environmental matters.

At the first Meeting of Parties (Lucca, Italy, 21–23 October 2002), the Parties brought attention to the link between the Aarhus Convention and the concept of “good governance”. Paragraph 2 of the Lucca Declaration states:

Access to information, public participation and access to justice are fundamental elements of good governance at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy.⁸⁹

In the Riga Declaration, adopted at the third Meeting of Parties (Riga, 11–13 June 2008), the Parties acknowledged that the Convention had promoted more democratic values and practices in the environmental field, but also stated that “it can and should serve as an inspiration for promoting greater transparency and accountability in all spheres of government”.⁹⁰

In the Chisinau Declaration, adopted at the fourth Meeting of the Parties (Chisinau, 29 June–1 July 2011), the Parties reiterated their conviction that “environmental rights and democracy are essential elements of good governance and informed decision-making and a prerequisite for achieving the objective of sustainable development”.⁹¹

[22] *Conscious of the role played in this respect by ECE and recalling, *inter alia*, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference “Environment for Europe” in Sofia, Bulgaria, on 25 October 1995,*

ECE has played a major role in the democratization of Europe through environmental protection mechanisms, in the form of international agreements, projects and charters and involvement in the Efe process. A review of the ECE environmental conventions reveals a progression towards greater rights and opportunities in access to information, public participation in decision-making and access to justice in environmental matters, culminating in the Aarhus Convention.

One of the main stepping stones on the way to the Aarhus Convention was the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed by ministers at the Third Efe Ministerial Conference in Sofia, Bulgaria, in October 1995 known as the Sofia Guidelines. For an overview of the development of the Sofia Guidelines and how they in turn contributed to the development of the Convention itself, see “The Road to Aarhus” above.

[23] Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

In the 1990s, countries in the ECE region were very active in concluding a series of environmental treaties on subjects such as transboundary EIAs, transboundary effects of industrial accidents and transboundary watercourses. All of these conventions addressed access to information and public participation to some degree and several also addressed access to justice in environmental matters. The Aarhus Convention was based in part on the experience of applying these conventions. Its article 10, paragraph 2 (b), requires the Parties to exchange information regarding experience gained in concluding and implementing other multilateral agreements having relevance to the purposes of the Convention.

The 1991 Espoo Convention obliges Parties to assess the environmental impact of certain activities at an early stage of planning and requires States to notify and consult each other on all major projects that are likely to have a significant adverse environmental impact across boundaries. It includes the most advanced public participation provisions in any ECE convention before the Aarhus Convention, in recognition of the importance of including the public concerned on all sides of the borders in relevant decision-making.⁹² Subsequent to the adoption of the Aarhus Convention, other ECE instruments have included public participation provisions modelled on the Convention, notably the Protocol on Water and Health to the ECE Water Convention. The table below lists the main provisions of the three ECE conventions mentioned in the twenty-third preambular paragraph that relate to access to information, public participation in decision-making and access to justice in environmental matters.

| Name of convention | Purpose of convention | Aarhus-related provisions |
|--|---|--|
| Convention on Environmental Impact Assessment in a Transboundary Context | Assessment of the environmental impact of certain activities at an early stage of planning, to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. | Article 1, para (x); article 2, paras. 2 and 6; article 3, para. 8; article 4, para. 2; and appendices III and IV, para. 11. |
| Convention on the Transboundary Effects of Industrial Accidents | Prevention of, preparedness for and response to industrial accidents capable of causing transboundary effects, including the effects of such accident caused by natural disasters and international cooperation concerning mutual assistance, research and development, exchange of information and exchange of technology in the area of prevention of, preparedness for and response to industrial accidents. | Article 1, para (j); article 3, paras. 1 and 2; article 9. |
| Convention on the Protection and Use of Transboundary Watercourses and International Lakes | Prevention, control and reduction of any transboundary impact relevant for the protection and use of transboundary watercourses. | Article 11, para. 3; article 16. |

[24] Conscious that the adoption of this Convention will have contributed to the further strengthening of the “Environment for Europe” process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

The EfE process is one of the main political frameworks for cooperation on environmental protection in Europe. It brings together ECE member States, organizations of the United Nations system represented in the ECE region, other intergovernmental organizations, regional environment centres, NGOs and other stakeholders at pan-European conferences to formulate new environmental policies. Those conferences allow the environment ministers from 56 countries to meet and to share experiences and ideas.

“Environment for Europe”

To date, seven ministerial conferences within the EfE process have been held: in 1991 at Dobris, Czechoslovakia, in 1993 at Lucerne, Switzerland, in 1995 in Sofia, in 1998 in Aarhus, Denmark, in 2003 in Kyiv, in 2007 in Belgrade and in Astana in September 2011.

At Dobris (1991) the ministers set out basic guidelines for a pan-European cooperation strategy and called for a report describing the state of the environment in Europe, which became “Europe’s Environment: the Dobris Assessment” of 1995. At Lucerne (1993), the ministers endorsed a broad strategy codified in the Environmental Action Programme for Central and Eastern Europe. The agenda of the Sofia Conference (1995) included a review of the implementation of the Action Programme and the further development of the Environmental Programme for Europe. Furthermore, the Conference decided that a regional convention on public participation should be developed with appropriate involvement of NGOs, which became the negotiations for the Aarhus Convention.

The Fourth EfE Conference was held in June 1998 in Aarhus. This Conference marked the signing of the Aarhus Convention.⁹³ Other results included the signing of Protocols to the Convention on Long-range Transboundary Air Pollution on Heavy Metals and on Persistent Organic Pollutants, endorsement of the Pan-European Strategy to Phase Out Leaded Petrol, and acknowledgement of the Guidelines on Energy Conservation in Europe.

In Kyiv (2003), the Fifth EfE Conference marked the adoption of three protocols to ECE environmental conventions: the Kyiv Protocol on PRTRs to the Aarhus Convention; the Protocol on SEA to the Espoo Convention; and the Protocol on Civil Liability for Damage and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters to the Water and Industrial Accidents Conventions. In parallel, the Carpathian countries adopted the Framework Convention on the Protection and Sustainable Development of the Carpathians.

At the Sixth EfE Conference in Belgrade (2007), ministers agreed to undertake a reform of the EfE process in order to ensure that it remained relevant and valuable, and to strengthen its effectiveness as a mechanism for improving environmental quality and the lives of people across the region. Following the reform, the ECE Committee on Environmental Policy became the convening body for the preparatory process.

The Seventh EfE Conference, held in Astana (2011), focused on the themes “Sustainable management of water and water-related ecosystems” and “Greening the economy: mainstreaming the environment into economic development”.

The signing of the Aarhus Convention by 35 countries and the EU⁹⁴ was one of the central events of the Fourth EfE Ministerial Conference. The declaration by the environment ministers stated:

We regard the Aarhus Convention, which provides recognition for citizens’ rights in relation to the environment, as a significant step forward both for the environment and for democracy. We encourage all non-signatory States to take appropriate steps to become Parties to the Convention.⁹⁵

Have agreed as follows:



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GENERAL PART

The General Part of the Aarhus Convention consists of the objective (article 1), the definitions (article 2) and the general provisions (article 3). The objective of the Convention establishes its overall goals and places it within the context of the greater body of international environmental law and the international law on sustainable development. It should be kept in mind at all times in the interpretation and implementation of the more specific provisions of the Convention.

Definitions also play an important role in the interpretation and implementation of the Convention. Because of the wide variety of legal systems in the ECE region, it is important to define as precisely as possible terms that are at the heart of the Convention. By doing so, a more consistent implementation of the Convention in the framework of the domestic legal systems of all the Parties can be assured.

Finally, the Convention states rules and principles that must be applied in its application. These general provisions have more effect than the preamble, since they are binding obligations found in the body of the Convention. They provide an overall structure for its implementation and express certain values that must be adhered to in doing so.

Taken as a whole, the General Part establishes the foundation of a convention that is an instrument of good governance, respect for basic rights and public empowerment. The Lucca Declaration, adopted by ministers and heads of delegations at the first session of the Meeting of Parties in 2002, states: "Access to information, public participation and access to justice are fundamental elements of good governance at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy."⁹⁶ The same link is made in paragraph 4 of the Johannesburg Plan of Implementation of the 2002 World Summit on Sustainable Development.⁹⁷



ARTICLE 1

OBJECTIVE

This provision sets the overarching goals and values of the Convention. Because it is part of the Convention's main text, it has even more weight than the preamble in shedding light on the interpretation of the remaining provisions. Its wording is strongly rooted in pre-existing international and domestic environmental and human rights law, pulling these elements together into a succinct new formulation. In spite of its brevity it is densely packed with language significant not only to the Convention itself, but to the overall development of international law regarding the environment and sustainable development.

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The most remarkable thing about article 1 is that it clearly states that the Aarhus Convention is about basic human rights — the rights of every person. It is one of the clearest statements in international law of a fundamental right to a healthy environment.⁹⁸ Whereas the 1992 Rio Declaration on Environment and Development states that human beings “are entitled to a healthy and productive life in harmony with nature”, this concept has subsequently been built upon by a succession of domestic and international legal and political developments linking well-established rights, such as the right to life and the right to health, with the requirement of a healthy and well-conserved environment.⁹⁹ While the Convention does not expressly state that the right exists, it does refer to it as an accepted fact, although the exact formulation and meaning of the right may be a matter of debate for some time to come. (For more about the link between environmental protection and human rights, [see the commentary to the preamble](#), especially the first, fifth, sixth and seventh paragraphs.)

The concept of intergenerational equity — that the impact of current actions on the well-being of future generations must be taken into account — significantly is mentioned here. Taking future generations into account is one of the fundamental tenets of sustainable development. The basic human responsibility to protect and improve the environment for the benefit of present and future generations was expressed on the global level as early as 1972, in principle 6 of the Stockholm Declaration, but the Aarhus Convention is the first international legal instrument to extend this concept to a set of legal obligations.

Rather than stating the right to a healthy environment in aspirational terms, as has so often been the case in the past at the national level, article 1 instructs Parties on how to take steps to guarantee the basic right of present and future generations to live in an environment adequate to their health and well-being, in particular through the (mostly) procedural rights of access to information, public participation in decision-making and access to justice. In so doing it establishes the linkage between practical, easily understandable rights, such as those relating to information and decision-making, and the harder-to-grasp complex of rights included in the right to a healthy environment.¹⁰⁰ As seen in the preamble, the Aarhus Convention forges links between the development of one set of human rights, in particular those relating to the basic conditions of life, including the environment, and another set of human rights, those relating to human self-fulfilment, expression and action. By harnessing the energy of public participation, States can do more to stop environmental degradation and can work towards sustainability.

Article 1 makes clear that it is the role of the State to help to reach this goal. Under the framework of the Aarhus Convention, it is up to the Party to provide the necessary administrative, legal and practical structures to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters. This represents a new approach to the role of the State. Instead of solving all of society's problems itself, the State acts as a sort of referee in a process involving larger societal forces, leading to a more homegrown and complete result. This notion of the role of the State is increasingly replacing the discredited notion that society's problems can be solved through engineering by experts.

According to this view, once transparent and fair processes have been worked out, the main role of the State is to provide the necessary guarantees to maintain the framework. The Aarhus Convention provides a set of minimum standards to

Parties to guide them on how to protect the right to a healthy environment. The obligations of the Convention must be considered in this light — not as commitments among nations for the promotion of good-neighbourly relations, but as important benchmarks for contributing to the basic welfare of the public.

Authorities should not look at the Convention as a set of strict and burdensome obligations to be minimized — if not avoided altogether — but rather as a valuable tool to support them in discharging their responsibility to help the public to overcome the challenges of the times.

The Aarhus Convention and the Council of Europe

To date, all Aarhus Convention Parties except for Belarus, Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan are also members of the Council of Europe. A condition for membership in the Council of Europe is the ratification of the 1950 European Convention on Human Rights. Council of Europe member States agree to submit questions relating to the protection of rights under the European Convention on Human Rights to the jurisdiction of the ECHR.

Article 8 of the European Convention on Human Rights concerns the right to respect for private and family life, home and correspondence. As discussed in the [commentary to the seventh preambular paragraph](#), the ECHR has interpreted article 8 of the European Convention to approximate a right to a healthy environment in a series of cases. The ECHR has also recognized a right of access to information under article 10 (freedom of expression). It has referred specifically to the Aarhus Convention in some of its decisions. (For further information on the jurisprudence of the ECHR, [see the commentary on articles 4 and 9](#)).

In the Council of Europe's 2005 Warsaw Declaration and Action Plan, member States referred to the entitlement to live in a balanced, healthy environment.

In 2008, the Council of Europe adopted the Council of Europe Convention on Access to Official Documents, the first international treaty on the right of access to information in general. The Convention will enter into force once it attains 10 ratifications. As at April 2014 it has six ratifications.

ARTICLE 2

DEFINITIONS

Definitions play an important role in the interpretation and implementation of any convention. As the Aarhus Convention deals in part with the development of international standards for domestic legal systems, definitions are exceptionally important. Because of the wide variety of legal systems in the ECE region, it is important to define as precisely as possible the terms that are at the heart of the Convention. By doing so, a more consistent implementation of the Convention in the framework of the domestic legal systems of all the Parties can be assured.

The terms whose definition is important under the Convention include “public authority”, “public”, “public concerned” and “environmental information”. They help to define the scope of the Convention, in terms of the persons who should be bound by its obligations, as well as those who should be allowed to use the rights described. While the Convention does not attempt a definition of the term “environment” or of “environmental matters”, some indication of the meanings of these terms in the sense of the Convention can be deduced from the definition of “environmental information”.

In reading any definition, it is important to distinguish between the core of the definition and the use of elements, lists or explanations. The Convention uses both exhaustive and non-exhaustive lists. Words such as “including”, “such as” or “inter alia” indicate that the elements following are non-exhaustive. Furthermore, “such as” and “inter alia” also suggest that there are known elements not named, whereas “including” is less specific on this count.

Every convention includes terms that one wishes had been defined. The Aarhus Convention is no exception (see box below).

Terms not defined in article 2

“in accordance with national legislation”

This and very similar phrases can be found at several instances in the Convention. For example, the expressions “in accordance with national legislation” is used in article 2, paragraph 4, and article 6, paragraph 6 (f). The expression “in accordance with national law” is used in article 6, paragraph 1 (b), and “in accordance with the requirements of national law” in article 9, paragraph 2. The related phrase “meeting any requirements under national law” is found in article 2, paragraph 5. During the Convention’s negotiation, these phrases were regarded by some as having a moderating effect on specific obligations, by others as pertaining only to the method of implementation, though their meaning was never elaborated further.

Article 31, paragraph 1, of the Vienna Convention requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus the various contexts in which these phrases are used throughout the Convention may have a bearing on how they should be interpreted in each case.

The first possible interpretation is that the terms introduce some flexibility in the means of implementation but not in the extent to which the basic obligation in question must be met. This interpretation owes much to the notion that the obligations of international agreements should, as far as possible, be certain. On this view, the phrases introduce some flexibility in the means that Parties may use to meet the obligations of the Convention, taking into account different national systems of law. According to this interpretation, the failure to introduce legislation cannot excuse the Party from the basic obligation, nor would a Party be excused from applying the particular provision if there was pre-existing national law on the subject. While legislation may have to be introduced to cover the obligation, specifications of the law can be spelled out differently, Party to Party, taking national systems into account. This flexibility is not unlimited, however. It does not give Parties a licence to introduce or maintain national legislation that undermines or conflicts with the obligation in question.

This “flexibility-in-method” interpretation provides useful space for Parties to improve their national legal framework over time. For example, under article 2, paragraph 5, NGOs promoting environmental protection and “meeting any requirements under national law” are deemed to have an interest in the environmental decision-making and thus among the “public concerned” in that decision-making. Country A’s national legislation might require NGOs to have a minimum of 10 members with a certain geographical distribution. In the future, the requirements for NGOs might be reduced to a minimum of eight members or the geographical distribution requirement might be dropped. So long as the change did not run afoul of some other provision of the Convention, it would automatically be incorporated under the regime of the Convention.

A second possible interpretation is that the terms introduce flexibility not only in the means of implementing obligations, but also as to the scope and/or content of the obligations themselves. In some instances, it is more or less clear that differences in national legislation or in legal systems may have an effect on the scope of a particular provision in practice. Returning to the example of article 2, paragraph 5, while Country A's national law might require an NGO to have a minimum of 10 members with a certain geographical distribution to be considered among the "public concerned", Country B's national law might require an NGO to have a minimum of 20 members but impose no geographical requirement. The different requirements may have practical consequences for which NGOs come within the definition of the "public concerned" in each country. It is possible, however, that such differences may be ironed out over time by the Meeting of the Parties, resulting in the upward harmonization in such provisions' implementation.

More broadly, however, the idea that the phrase "in accordance with national legislation" introduces flexibility in the content of the basic obligations of the Convention is somewhat problematic. Allowing Parties to avoid certain obligations on this basis would result in uneven implementation of the Convention and promote basic differences in interpretation. It would allow some Parties to take provisions less seriously than others and would thereby undermine the Convention as a whole. This does not alter the fact that this interpretation would give Parties slightly more flexibility in interpretation and implementation. However it should be observed that the consistent use of the terms indicates an intention to introduce consistency in the Convention, rather than the reverse. The "flexibility-in-method" approach thus seems the more appropriate of the two interpretations discussed above.

"within the framework of its national legislation"

The phrase "within the framework of national legislation" is found in article 4, paragraph 1, article 5, paragraphs 2 and 5, and article 9, paragraphs 1 and 2. The phrase "within the framework of national law" is found in article 6, paragraph 11. These phrases are open to several interpretations. As above, in line with the Vienna Convention, the context in which the phrase is used throughout the Convention may have a bearing on the correct interpretation in each case.

First, the phrase may be interpreted as a direct instruction to the Parties that they must take legislative measures in order to meet the obligation, i.e., to take measures "within the framework of national legislation". Customary national practice that is generally in accordance with the particular obligation of the Convention at issue would not be enough — legislative measures that ensure compliance are required. On this view, the phrase has parallels with, but goes beyond, article 3, paragraph 1, which requires each Party to take the necessary legislative, regulatory or other measures to implement the Convention, by requiring Parties specifically to take legislative measures to implement the provision concerned. In its findings on communication ACCC/C/2005/11 (Belgium), the Compliance Committee held that article 3, paragraph 1, requires that where international agreements have direct applicability and are superior to national law, a Party must still take the necessary legislative and other measures to ensure the effective implementation of the Convention.¹⁰¹ By analogy, the phrase "within the framework of its national legislation" will require that in those countries where international agreements are directly applicable, specific legislative measures must still be taken to implement the provisions concerned.

Second, the phrase may be interpreted as introducing some flexibility into the means of implementation, but not into the extent to which the basic obligation in question must be met. This is the "flexibility-in-method" interpretation discussed with respect to the term "in accordance with national legislation" above.

A third, and somewhat related interpretation of this phrase takes into consideration the legal system of many countries in the ECE region according to which international agreements are directly applicable and may operate to override contrary domestic legislation and even displace it systematically. It may therefore be necessary to include a phrase like the present one to indicate that the Convention should only qualify and not displace the existing national legislation on the subject.

Note that in the case of the EU as a Party, EU legislation has the characteristics of national legislation. Similarly, as noted by the Compliance Committee to the Aarhus Convention in its findings on communication ACCC/C/2006/18 (Denmark), applicable EU law relating to the environment should be considered to be part of national law of EU member States.¹⁰²

For the purposes of this Convention,

1. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;

Intent to be bound by a convention can be indicated in various ways, namely ratification, acceptance, approval or accession, depending on the constitutional order of the subject State or regional economic integration organization and whether it had already signed the convention before it entered into force. It should be noted that it is the whole State, and not just the administrative or executive branch of government, that is bound by the international obligations of a treaty.

The Aarhus Convention was open for signature to States and to regional economic integration organizations in the ECE region until 21 December 1998 (see article 17). In accordance with article 20, the Convention entered into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession, that is, on 30 October 2001. For States that deposited or will deposit their instruments of ratification, acceptance, approval or accession after 30

October 2001, the Convention enters into force on the ninetieth day after the date of their deposit. The Aarhus Convention website includes up-to-date information on the status of ratification of the Convention (for more on signature, deposit, ratification, acceptance, approval or accession, and entry into force, [see the commentary to articles 17–20](#)).

The term should not be confused with “party” in the usual legal sense. For example, article 4, paragraph 4 (g), refers to a “third party”, that is, a person who is not a party to a particular agreement or transaction but who may have rights or interests therein. The Implementation Guide sometimes uses the term “party” when referring to a legal or natural person who takes part in a particular proceeding (for example, [see the commentary to article 6, paragraph 9](#)) or whose interest is otherwise affected. In the Convention text and in the Implementation Guide, the term in its defined sense is always capitalized, whereas the term used in its ordinary legal sense is not capitalized.

2. “Public authority” means:

The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken into three parts to provide as broad coverage as possible. Recent developments in privatized solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public information, participation or justice.

(a) Government at national, regional and other level;

“Public authority” includes “government”— a term which includes agencies, institutions, departments, bodies, etc., of political power — at all geographical or administrative levels. In a typical situation, national ministries and agencies and their regional and local offices, State, regional or provincial ministries and agencies and their regional and local offices, as well as local or municipal government offices, such as those found in cities, towns or villages, would be covered.

It must be emphasized that public authorities under the Convention are not limited to “environmental authorities” within government. It is irrelevant whether a particular official works in an environmental ministry or inspectorate, or even understands that his or her responsibilities have links to the environment. All governmental authorities of whatever function are covered under subparagraph (a).

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

“Public authority” also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities, as determined according to national law. What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations. As in subparagraph (a), the particular person does not necessarily have to operate in the field of the environment. Though the subparagraph expressly refers to persons performing specific duties, activities or services in relation to the environment as examples of public administrative functions and for emphasis, any person authorized by law to perform a public function of any kind falls under the definition of “public authority”.

A natural person is a human being, while “legal person” refers to an administratively, legislatively or judicially established entity with the capacity to enter into contracts on its own behalf, to sue and be sued, and to make decisions through agents, such as a partnership, corporation or foundation. While a governmental unit may be a legal person, such persons would already be covered under subparagraph (a) of the definition of “public authority”. Public corporations established by legislation or legal acts of a public authority under (a) fall under this category. The kinds of bodies that might be covered

by this subparagraph include public utilities and quasi-governmental bodies such as water authorities.

For example, in its findings on communication ACCC/C/2004/01 (Kazakhstan), the Compliance Committee held that a state-owned enterprise with responsibilities for the atomic power industry was a legal person performing administrative functions under national law, including activities in relation to the environment, and thus fell under this subparagraph of the definition.¹⁰³

While the Convention is not entirely clear on this point, it would seem that a single body may perform public administrative functions with respect to a part of its activities, while other of its activities will be of a private nature. It would be reasonable, therefore, to apply the Convention only to those activities that fall under the definition.

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

In addition to government and persons performing public administrative functions, the definition of public authority also includes other persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of the other categories of public authorities. There are two key differences between this subparagraph and the others.

The first key difference between subparagraph (c) and (b) is the source of authority of the person performing public functions or providing public services. It can be distinguished from subparagraph (b) in that the bodies addressed derive their authority not from national legislation, but indirectly through their control by those defined in subparagraphs (a) and (b). The difference is also reflected in the terminology used, since this subparagraph uses the term “public responsibilities or functions”, a broader designation than “public administrative functions” used under subparagraph (b) to denote the connection between law and State administration.

The provision is somewhat similar to that of article 6 of the now-superseded Council Directive 90/313/EEC, which referred to bodies with public responsibilities and under the control of public authorities. However, article 2, paragraph 2 (c), includes not only persons under the control of governmental authorities but also persons that might not be under the control of governmental authorities but are under the control of those persons referred to in article 2, paragraph 2 (b). Such persons might be service providers or other companies that fall under the control of either public authorities or other bodies to whom public functions have been delegated by law. For example, water management functions might be performed by either a government institution or a private entity. In the latter case, the provisions of the Convention would be applicable to the private entity insofar as it performs public water management functions under the control of the governmental authority. When Council Directive 90/313/EEC was replaced by Directive 2003/4/EC, the latter’s definition of “public authority” was made to conform to the Convention.

The second key difference distinguishes subparagraph (c) from both previous subparagraphs. While subparagraphs (a) and (b) define as public authorities, bodies and persons without limitation as to the particular field of activities, subparagraph (c) expressly includes such a limitation. Only persons having public responsibilities or functions or providing public services in relation to the environment can be public authorities under this subparagraph.

This subparagraph clearly covers natural or legal persons that are publicly owned, for example, community-owned public service providers. In its findings on communication ACCC/C/2004/01 (Kazakhstan) mentioned above, the Aarhus Convention Compliance Committee held that the State-owned enterprise with responsibilities for the atomic power industry fell under this subparagraph of the definition as well as subparagraph (b), since it was also a legal person performing public functions under the control of a public authority.¹⁰⁴

Furthermore, subparagraph (c) covers entities performing environment-related public services that are subject to regulatory control.

The provision reflects certain trends towards the privatization of public functions that exist in the ECE region.¹⁰⁵ During the Convention’s negotiation, Belgium, Denmark and Norway issued an interpretative statement relating to this definition. They considered that an entity for which policy and other major issues were subject to approval or decision by the public authorities would be considered under the control of such authorities for the purposes of this article. Some of these

entities are government-created and/or -financed corporations that perform certain functions normally within the sphere of public authority competence.

There may be some overlap between subparagraphs (b) and (c) of the definition, but it is clear that any person providing public services in relation to the environment under the control of a body or person falling within subparagraphs (a) or (b) is a “public authority”. Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public.

As noted with respect to subparagraph (b) above, while the Convention is not entirely clear on this point, it would seem that a single body may fall under this definition with respect to a part of its activities, while other of its activities will be of a private nature. It would be reasonable, therefore, to apply the Convention only to those activities that fall under the definition.

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

Finally, the institutions of a regional economic integration organization that meets the requirements of article 17 and is a Party to the Convention are also public authorities under the Convention. Article 17 refers to regional economic integration organizations constituted by sovereign States members of the ECE if these States have transferred to them their competence over matters governed by the Convention (for more details, [see the commentary to article 17](#)). The only regional economic integration organization to become a Party to the Convention to date is the EU. EU institutions such as the European Commission, the Council of the EU, the Economic and Social Committee, the Committee of the Regions, the European Environment Agency (EEA) and the Statistical Office of the European Commission (EUROSTAT) may be considered public authorities under the Convention.

The Convention’s application to EU institutions has had a significant impact on the transparency of EU decision-making, marking a big step forward from the provisions of now-superseded Council Directive 90/313/EEC. Although mandatory for all EU member States, that Directive did not apply to the institutions of the EU itself, which instead were governed by voluntary codes of conduct. In 2006, the European Parliament adopted Regulation No. 1367/2006 to bring EU institutions in line with the Aarhus Convention’s requirements (see box below).

The Aarhus Convention and the institutions of the EU

The EU signed the Aarhus Convention in June 1998 and submitted its instrument of approval on 17 February 2005, becoming a Party 90 days later. The Convention required the EU to adopt new legislation concerning the application of the Convention to EU institutions and bodies. To this end, on 6 September 2006 the European Parliament and Council adopted Regulation No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the so-called “Aarhus Regulation”).

Some of the major provisions of the Aarhus Regulation are as follows:

- The Regulation applies to any public institution, body, office or agency established by, or on the basis of, the Treaty establishing the European Community, except when acting in a legislative or judicial capacity (save for access to information as discussed below).
- For reasons of consistency with Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents (the so-called “Transparency Regulation”), the Aarhus Regulation’s provisions on access to environmental information exceptionally do apply to EU institutions and bodies acting in a legislative capacity.
- Public authorities are defined in a “broad and functional” way in order to meet the Convention’s requirements.
- The rules pertaining to access to documents under the Transparency Regulation are extended to information in any form, at least with respect to environmental information.
- The grounds for excluding information from disclosure under the Transparency Regulation are incorporated by reference, but a public interest test in conformity with the Convention’s requirements is added.
- A minimum period of eight weeks is required for the public to submit comments regarding the preparation, modification or review of plans and policies relating to the environment.
- To have standing to request internal administrative review of an administrative act or alleged omission by an EU institution, NGOs must have existed for more than two years.
- Following a request for an internal administrative review, such NGOs have opportunities to appeal to the Court of Justice of the EU (CJEU).

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

Bodies or institutions acting in a legislative or judicial capacity are not included in the definition of public authorities. This is due to the different character of such decision-making from many other kinds of decision-making by public authorities. Regarding decision-making in a legislative capacity, elected representatives are in theory directly accountable to the public through the election process. Regarding decision-making in a judicial capacity, tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention are not suitable to be applied directly to bodies acting in a judicial capacity, given the need to guarantee an independent judiciary and to protect the rights of parties to judicial proceedings ([see also the commentary to article 9](#)).

This exception applies not only to parliaments and courts, but also to executive branch authorities when they perform legislative or judicial functions. For example, municipal councils sometimes serve in both legislative and executive capacities. Where they are acting in an executive capacity they are subject to the Convention's obligations on "public authorities"; where they are acting in a legislative capacity they are not.

The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in law-making is recognized in article 8. As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the Convention. Conversely, if legislative branch authorities engage in activities outside their legislative capacity, they might fall under the definition of "public authority" under the Convention. For example, when the European Parliament adopts resolutions on environmental questions or in relation to international environmental agreements, it is possibly not acting in a legislative capacity, and some provisions of the Convention might apply.

It should be mentioned that there is nothing in the Convention that would prevent a Party from deciding to extend legislation to cover these bodies and institutions, even if it is not obligated by the Convention to do so. For example, the Aarhus Regulation's provisions on access to environmental information apply also to EU institutions and bodies acting in a legislative capacity (see box above). Likewise, bodies or institutions acting in a legislative or judicial capacity may voluntarily decide to apply the rules of the Convention, *mutatis mutandis*, to their own proceedings. While legislative activities are excluded from the definition of public authorities under the Convention, the preamble, in its eleventh paragraph, invites legislative bodies to implement the Convention's principles. A group of parliamentarians issued the "Stockholm Statement" in September 1997, in which they endorsed the applicability to parliaments of the information provisions of the Convention in particular, and developed principles for public participation in "legislative work".¹⁰⁶ Similarly, the 1998 Resolution of the Signatories to the Aarhus Convention emphasized the key role to be played by parliaments, regional and local authorities, and NGOs in the implementation of the Convention. Regarding bodies acting in a judicial capacity, the national access to information laws of many Parties to the Convention apply equally to the judiciary. In 2009, the ECHR issued a judgement finding Hungary in breach of article 10 of the European Convention on Human Rights on freedom of expression because the Constitutional Court had denied an NGO access to a complaint filed before it by a Member of Parliament and other individuals.¹⁰⁷

It should also be remembered that, while bodies or institutions acting in a legislative or judicial capacity do not fall under the definition of "public authorities," a number of the Convention's obligations, in particular those found in articles 3 and 9, are placed not on public authorities but rather upon the Party itself. Legislative or judicial bodies frequently need to take action as a part of each Party's obligation to take measures to implement the Convention. Legislative bodies may need to enact legislation to adjust a particular Party's legislative framework to comply with the Convention. Judicial bodies play an important role in the administration of access to justice under article 9 of the Convention and to enforce national law related to the Convention more generally. In addition, legislative and judicial bodies may need to take steps to address the incorrect or inconsistent application of the law by public authorities, including by other judicial bodies or administrative tribunals. In its findings on ACCC/C/2008/33 (United Kingdom), the Compliance Committee noted "the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action ... also in view of the Convention".¹⁰⁸ The Committee endorsed the calls by the judiciary and suggested that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.¹⁰⁹ The Compliance Committee, in its findings on communication ACCC/C/2005/11 (Belgium), noted that the independence of the judiciary, which is presumed and supported by the Convention, cannot be taken as an excuse by a Party for not taking the necessary measures to implement the Convention.¹¹⁰



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3. “Environmental information”

The term “environmental information” is expressly used in the preamble, in article 4 on access to environmental information, in article 5 on the collection and dissemination of environmental information and in article 6, paragraph 2 (d) (iv), regarding public participation on decisions on specific activities. However, because of the interlinkages between the Convention’s provisions, the term is by implication relevant to the rest of the Convention as well.

The Aarhus Convention does not contain a definition of “environment”. Article 2, paragraph 3, is therefore important, not only for its obvious relation to the Convention’s provisions concerning information, but also because it is the closest that the Convention comes to providing a definition of the scope of the environment. It is logical to interpret the scope of the terms “environment” and “environmental” accordingly in reference to the detailed definition of “environmental information” wherever these terms are used in other provisions of the Convention.

Article 2, paragraph 3, does not attempt to define “environmental information” in an exhaustive manner but rather breaks down its scope into three categories and within each category provides an illustrative list. These lists are likewise non-exhaustive, and so they require a degree of interpretation on the part of authorities in a given case. The clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.

In any event, the definition of environmental information is, of course, a minimum requirement; Parties may use a broader definition. Several countries in the ECE region have not differentiated between environmental information and other kinds of information held by public authorities. In these countries, legislation or administrative tradition provides that all information, with certain limitations, held by public authorities is accessible to the public. Finland, the Netherlands and Sweden are among the countries with general access to information laws that make the question of whether information is “environmental” or not unnecessary. In contrast, Denmark has both a general information law and a specific law on environmental information. Where both kinds of laws exist, attention should be paid to consistency. For example, the EU Aarhus Regulation provides access to environmental information in any form, whereas the Transparency Regulation, which applies also to non-environmental information, only provides access to “documents”.

means any information in written, visual, aural, electronic or any other material form on:

Environmental information may be in any material form, which specifically includes written, visual, aural and electronic forms. Thus, paper documents, photographs, illustrations, video and audio recordings and computer files are all examples of the material forms that information can take. Any other material forms not mentioned, existing now or developed in the future, also fall under this definition ([see also the commentary to the fifteenth preambular paragraph about electronic or other, future means of communication](#)).

It is also important to distinguish between documents and information. The Convention guarantees access to *information*. The “material form” language is not meant to restrict the definition of environmental information to finished products or other documentation as that may be formally understood. Information in raw and unprocessed form (sometimes referred to as “raw data”) is covered by the definition as well as documents.

By way of contrast, in Case T-264/04, *WWF-EPO v. Council of the European Union*,¹¹¹ the European Court of First Instance ruled that the “concept of document must be distinguished from that of information”. Thus, under the Transparency Regulation, the Community institutions were only obliged to disclose information held in the form of a formal document, as opposed to “... any information in written, visual, aural or electronic or any other material form” as defined in article 2, paragraph 3, of the Aarhus Convention (and article 2, paragraph 1 (d), of the Aarhus Regulation). At the time the case was brought, the Aarhus Regulation had not yet been promulgated and today this unduly narrow interpretation of document/information would no longer apply.¹¹²

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

Under the Convention, environmental information includes any information in any material form relating to the state of the elements of the environment. The Convention lists examples to illustrate what is meant by “elements of the environment”. The elements in this non-exhaustive list include “air and atmosphere”, “water”, “soil, land, landscape and natural sites”, and “biological diversity and its components, including genetically modified organisms”. Some of these terms have common sense definitions and it is not necessary to develop technical definitions. However, it is worth noting that some international agreements may be relevant in delineating the scope of the elements of the environment. For example, with respect to “air and atmosphere”, it may be useful to compare the definition of “ambient air” found in EU Directive 2008/50/EC on ambient air quality and cleaner air for Europe. The Directive defines “ambient air” as “outdoor air in the troposphere, excluding work places”.¹¹³ By implication, the Aarhus Convention’s definition, which is broader, invites Parties to include both indoor and workplace air as well as all levels of the atmosphere. Furthermore, “soil, land, landscape and natural sites” are grouped together under the Convention to ensure a broad application and scope. The whole complex of these descriptive terms might be used in connection with, for example, natural resources, territory and protected areas. “Natural sites” may refer to any objects of nature that are of specific value, including not only officially designated protected areas, but also, for example, a forest, a tree or a park that is of localized significance, having special natural, historic or cultural value. Landscape and natural site protection have become important elements in conservation for many reasons, including aesthetic appeal, protection of unique historical or cultural areas, or preservation of traditional uses of land.

“Biological diversity and its components, including genetically modified organisms” requires a more complex explanation. Article 2 of the CBD gives the following definition of biological diversity: “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”. Biodiversity includes, but is not limited to, ecosystem diversity, species diversity and genetic diversity. In addition, tangible entities identifiable as a specific ecosystem (a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit),¹¹⁴ are considered components of biodiversity.¹¹⁵

While genetically modified organisms are explicitly included as one of the components of biodiversity under the Aarhus Convention, they are not defined. At the international level, the Cartagena Protocol on Biosafety uses the term “living

modified organism”, rather than “genetically modified organism”. The Cartagena Protocol defines “living modified organism” as “any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology” and “living organism” to mean “any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids”.¹¹⁶ Article 3 of EU Directive 2001/18/EC¹¹⁷ on the deliberate release into the environment of genetically modified organisms provides the following definition of genetically modified organism: “an organism . . . in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination”. It may be that the term “genetically modified organism” as defined in EU Directive 2001/18/EC is potentially broader than that of “living modified organism” under the Cartagena Protocol, but the extent of any difference in scope has not been resolved in practice. (For more on GMOs, [see the commentary to article 6, paragraph 11.](#))

The list of “elements of the environment” is non-exhaustive — the use of “such as” in the text to introduce the list indicates that there may be others in addition to those specifically mentioned. For example, radiation, while being mentioned in subparagraph (b) as a “factor”, may also be considered as an element of the environment.

Finally, the subparagraph includes “the interaction among these elements”. This provision recognizes that the interactions among environmental elements are as important as the elements themselves. Instruments such as the EU Industrial Emissions Directive,¹¹⁸ for example, aim to achieve integrated prevention and control of pollution from a wide range of activities by means of measures to prevent or, where that is not practicable, to reduce emissions from industrial facilities to air, water and land, including measures concerning waste, in order to achieve a high level of protection of the environment as a whole.

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

Environmental information under the Convention goes beyond information on the elements of the environment and their interaction to include information on human and non-human factors and activities or measures that affect or are likely to affect the elements of the environment. Furthermore, the definition also includes economic analyses and assumptions used in environmental decision-making.

At the outset, an important issue of the translation of the text into the three official languages of ECE must be discussed. In the English version of the text, the words “likely to affect the elements of the environment” are used. The literal translation of the Russian and French versions of the text is the lower standard of “that may affect”. The Russian and French wording would appear to be more inclusive definitions, covering any factors, activities or measures that possibly “may” affect elements of the environment, even those not “likely” to do so. Given that article 22 of the Aarhus Convention states that the English, French and Russian texts are equally authentic, this situation at first sight creates some lack of clarity for those seeking to implement the provision. However, the 1969 Vienna Convention establishes a framework for how to proceed in such situations.

Article 31 of the Vienna Convention (somewhat paraphrased) states that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 32 (also paraphrased) provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure. Of particular relevance to the present case, under article 33 of the Vienna Convention, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text should prevail. The terms of the treaty are presumed to have the same meaning in each authentic text. Except where the treaty provides or the parties agree that a particular text prevails, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, should be adopted.

Applying the Vienna Convention's framework to the current situation, it may be that given the object and purpose set out in article 1 of the Convention, and the context provided by the preamble, the meaning which best reconciles the texts is the more inclusive approach found in the Russian and French versions. There has been no determination on this point by the Meeting of the Parties, however.

Turning to consider the other parts of subparagraph (b), it may be that its complex formulation requires some deconstruction. It can be diagrammed as follows:

[Factors (such as substances, energy, noise and radiation), **and**
activities or measures (including administrative measures, environmental agreements, policies, legislation, plans and programmes),
affecting or likely to affect the elements of the environment within the scope of sub-paragraph (a) above,] **and**
[cost-benefit and other economic analyses and assumptions used in environmental decision-making:]

It can thus be seen that the subjects of information covered by subparagraph (b) can be broken down into two major categories: (i) factors and activities or measures, and (ii) economic analyses and assumptions. The first category is further qualified in that only those factors and activities or measures likely to affect the environment as defined under subparagraph (a) can be considered. The second category is further qualified by reference to the context in which the economic analyses and assumptions are made — that is, they must be used in environmental decision-making. Thus, the second category has particular pertinence to the information requirements of article 6, for example, the requirement to indicate in the notification of the decision-making procedure what environmental information relevant to the proposed activity is available (article 6, paragraph 2 (d) (vi)) and the requirement to give the public concerned access to all information relevant to the decision-making (article 6, para. 6).

Within the first category, several examples are given to explain what is meant by the terms. "Factors" likely to affect the environment include "substances, energy, noise and radiation". These may generally be categorized as physical or natural agents. "Activities or measures" likely to affect the environment expressly include "administrative measures, environmental agreements, policies, legislation, plans and programmes". These terms imply human action. The definition certainly includes decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment as well. While the examples of activities or measures lists can be seen to be primarily acts of public authorities — though environmental agreements may of course involve private actors — there is no logical reason to limit the activities or measures covered in such a way. Most importantly, the activities or measures do not need to be a part of some category of decision-making labelled "environmental". The test is whether the activities or measures may have an effect on the environment. So, for example, information related to planning in transport or tourism would in most cases be covered by this definition. Many countries' national legislation contains lists of environmental information, which includes applications for permits, decisions on whether to permit an activity, conclusions of environmental expertise, EIA documentation, etc.

The definition makes specific mention of environmental agreements, which are also mentioned in article 5, paragraph 3 (c). This phrase applies to voluntary agreements, such as those negotiated between government and industry, and may also apply to bilateral or multilateral environmental agreements among States. In the case of voluntary agreements or "covenants", these result from the government's power to make rules regulating a certain subject area, for example, the content of detergents or a prohibition on the use of volatile chlorinated hydrocarbons.



These agreements are sometimes published, and sometimes not published, and may be negotiated by committees dominated by either representatives of the regulated industry or by the officials who will be responsible for enforcing the regulations, a situation that has led to some criticism.¹¹⁹ The Convention's listing of them under article 2, paragraph 3 (b), creates a presumption that they will be publicly accessible.

Finally, the second category of information covered by subparagraph (b) includes the economic analyses and assumptions used in environmental decision-making, such as cost-benefit analyses. This category establishes the relevance of economic analysis to environmental issues. As economic analyses may have a great impact on whether or not a particular project will go ahead, it is important to be able to examine the thinking that went into them. The quantification of environmental values and the "internalization" of environmental costs are among the most difficult questions for economists. It is therefore also important to be able to analyse the assumptions behind economic modelling used in environmental decision-making.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Aarhus Convention Compliance Committee found that rental contracts for lands administered by the State Forestry Fund fell under the Convention's definition of environmental information in article 2, paragraph 3 (b).¹²⁰

Likewise, in its findings on communication ACCC/C/2004/08 (Armenia), the Compliance Committee found that stand-alone government decrees relating to land use and planning constitute "measures" and therefore fall under the definition of "environmental information" in article 2, paragraph 3 (b).¹²¹

The Compliance Committee considered whether financing agreements are covered by article 2, paragraph 3 (b), in its findings on communication ACCC/C/2007/21 (European Community). The Committee held that:

Financing agreements, even though not listed explicitly in the definition, may sometimes amount to "measures ... that affect or are likely to affect the elements of the environment" under article 2, paragraph 3 (b). For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis.¹²²

In its findings on communication ACCC/C/2004/01 (Kazakhstan), the Compliance Committee considered that a feasibility study related to draft legislation that would allow the import and disposal of low- and medium-level radioactive waste fell under this subparagraph of the definition.¹²³

At the national level, radio waves that pass through the atmosphere from a cellular base station to any solid component of the natural world have been found to fall under the Convention's definition of "environmental information" by the United Kingdom's Information Tribunal. The Tribunal has held that the names of mobile network operators for each cellular base station also fall under the definition of "environmental information" under the Convention.¹²⁴

It should be noted that the above examples are given by way of illustration, and by no means represent as exhaustive list of the types of "environmental information" within the definition of article 2, paragraph 3 (b).

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

The Convention takes note of the fact that the human environment, including human health and safety, cultural sites, and other aspects of the built environment, tends to be affected by the same activities that affect the natural environment. They are explicitly included here to the extent that they are or may be affected by the elements of the environment, or by the factors, activities or measures outlined in subparagraph (b). The Convention requires a link between information on human health and safety, conditions of human life, etc., and the elements, factors, activities or measures described in subparagraphs (a) and (b), in order to impose a reasonable limit on the vast kinds of human health and safety information potentially covered. Those involved in the negotiation of the Convention were faced with a situation in which looser

language would have brought a whole range of human health and safety information unrelated to the environment under the definition, such as information relating to specific medical procedures or safety rules for the operation of specific tools.

Human health and safety are not identical to the terms “environmental health” or “environment and health”, as used, for example, in the context of the WHO European Region ministerial meetings on environment and health ([see the commentary to the fourth preambular paragraph](#)). For example, human health may include a wide range of diseases and health conditions that are directly or indirectly attributable to or affected by changes in environmental conditions. Human safety may include safety from harmful substances, such as chemicals, factors, such as radiation, or other natural or man-made conditions that affect human safety through manipulation of environmental elements.

Discussions about the existence of a right to a healthy environment often refer to a healthy environment as a basic condition for human life. The Convention echoes this notion when it includes “conditions of human life” as one of the things that may be included as environmental information. “Conditions of life in a general sense may include air quality, quality and availability of water and food, housing and workplace conditions, relative wealth and various social conditions.

The term “cultural sites” covers specific places or objects of cultural value. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) gives the following definition: “works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view”.¹²⁵ “Built structures” refers to man-made constructions. It is not limited to large buildings and objects such as dams, bridges, highways, etc., but also covers small constructions, and even landscaping or other transformation of the natural environment.

The matters covered by subparagraph (c) depend upon a linkage with those covered in subparagraphs (a) and (b). If the subparagraph (c) matters are potentially affected by the elements in (a) or their interaction, they qualify as subjects of environmental information. If the subparagraph (c) matters are potentially affected by the factors, activities or measures in (b), they also qualify as subjects of environmental information, so long as the effects pass through an environmental filter or medium in the form of subparagraph (a) elements. For example, if decisions about what land to conserve and what land to develop affect social conditions as described above in a particular area by changing the quality of air or water:

- Information relating to the quality of air or water would be environmental information under subparagraph (a);
- Information relating to the decision-making would be environmental information under subparagraph (b); and
- Information about the affected social conditions would be environmental information under subparagraph (c).

4. “The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

The definition of “public” should be interpreted as applying the “any person” principle (for an explanation of natural and legal persons, see comment to article 2, paragraph 2). For emphasis, the Aarhus Convention also explicitly mentions associations, organizations and groups. By way of comparison, the definition of “public” in article 1 (j) of the Industrial Accidents Convention is simply “one or more natural or legal persons”. The same definition can currently be found in article 1, paragraph (x), of the Espoo Convention, although the 2004 amendment to the Espoo Convention, once in force, adopts the Aarhus Convention approach and will extend the definition to explicitly include associations, organizations and groups. In most cases, an association, organization or group of natural or legal persons will itself have legal personality, and therefore will already fall under the definition. The language can only be interpreted, therefore, to provide that associations, organizations or groups *without legal personality* may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice. Thus, ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention’s objective of securing broad access to its rights.

The term “public” in article 2, paragraph 4, is not in itself subject to any conditions or restrictions. Thus, where the Convention conveys rights on “the public” without expressly adding any further qualifications on who of the public may enjoy those rights, the public are entitled to exercise those rights irrespective of whether they personally are “affected” or otherwise have an interest. Articles 4, 5, 6, paragraph 7 and 9, and article 8 are examples of provisions which follow this approach.

Moreover, article 3, paragraph 9, requires that no person be excluded from the definition on the grounds of nationality,



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domicile, citizenship, or place of registered seat. Persons who are non-citizens, therefore, have rights and interests under the Convention. For example, the rights under article 4 relating to requests for information apply to non-citizens and non-residents as well as citizens and residents.

Further explanation may be needed to ensure consistent application of the Convention. Where it talks about the obligation of public authorities to act in a certain way towards the public, for example by providing information, the term does not mean “one or more natural or legal persons” in the sense that the public authority has met the obligation by providing information to any one person of its choosing. Each individual natural or legal person enjoys all the substantive and procedural rights covered by this Convention. For example, where a particular member of the public makes a request for environmental information under article 4, paragraph 1, it is insufficient for the public authority to make, or to have made, the requested information available to one or several individuals or organizations, selected randomly or because they are best-known to the public authority. If there is any doubt about this, it is only necessary to examine article 9, paragraph 1, which provides that it is the *applicant* who has the right to seek independent review of the public authority’s response to the request for information.

Along the same lines, the active distribution of information, under article 5, will not be sufficient if the information is distributed to a few natural and/or legal persons. And, when a public hearing, enquiry or other opportunity for the public to comment is organized under article 6, paragraph 7, it is not sufficient to allow one or several organizations, selected randomly or because they are best-known to the governmental officials, to submit comments. Any member of the public must be granted the right to submit comments. Thus, those Parties that traditionally allow for the public to be considered in a representative fashion — that is, where certain persons have been granted authority to act as representatives of the opinion of the public or a part of it — must adopt a different approach towards the rights of the public.

5. “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

The term “public concerned” is used to define the persons entitled to exercise the rights in article 6 and, with some further qualifications, article 9, paragraph 2 (which addresses access to justice with respect to decisions, acts or omissions subject to article 6). The persons entitled to exercise the public participation rights in article 7 and 8 are defined in a different way (see the commentary to articles 7 and 8).

The term “public concerned” refers to a subset of the public at large who have a special relationship to a particular environmental decision-making procedure. To be a member of the “public concerned” in a particular case, the member of the public must be likely to be affected by the environmental decision-making, or the member of the public must have an interest in the environmental decision-making. The term can be found in article 6 on public participation in decisions on specific activities, and the related access to justice provision, article 9, paragraph 2.

As mentioned previously, article 3, paragraph 9, requires that no person should be excluded from the definition on the grounds of nationality, domicile, citizenship, or seat. Persons who are non-citizens, therefore, have rights and interests under the Convention. For example, in cases where the area potentially affected by a proposed activity crosses an international border, members of the public in the neighbouring country will be members of the “public concerned” for the purposes of article 6. Moreover, in its findings on communication ACCC/C/2004/03 (Ukraine), the Committee observed that “foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.”¹²⁶

The term “public concerned” may originate from the original version of the EIA Directive. The definition itself is, in part, based on the concept of “being affected” which is well known in some jurisdictions and has been used since 1991 by the Espoo Convention for the purpose of defining the public which should be allowed to participate in transboundary EIA. The definition supplements this concept with the concept of “interest” which again is well known in many jurisdictions. In this way, the definition combines two major approaches used to define standing in administrative procedures in various legal systems in the ECE region. Finally, the definition is suffixed with a phrase aiming to ensure proper recognition of environmental organizations, which in some countries have not traditionally been accepted as being among the “public concerned”.

While narrower than the “public,” the “public concerned” is nevertheless still very broad. With respect to the criterion of “being affected”, this is very much related to the nature of the activity in question. Some of the activities subject to article 6 of the Convention may potentially affect a large number of people. For example, in the case of pipelines, the public concerned is usually in practice counted in the thousands, while in the case of nuclear power stations the competent authorities may consider the public concerned to count as many as several hundred thousand people across several countries.

With respect to the criterion of “having an interest”, the definition appears to go well beyond the kind of language that is usually found in legal tests of “sufficient interest” (see next paragraph). In particular it should be read to include not only members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity. Potentially affected interests may also include social rights such as the right to be free from injury or the right to a healthy environment. It also applies, however, to a category of the public that has an unspecified interest in the decision-making procedure.

It is significant that article 2, paragraph 5, does not require that a person must show a legal interest to be a member of the public concerned. Thus, the term may encompass both “legal interest” and “factual interest” as defined under continental legal systems, such as those of Austria, Germany and Poland. Under national law, persons with a mere factual interest do not normally enjoy the full panoply of rights in proceedings accorded to those with a legal interest. In contrast, the Convention accords the same status (at least in relation to article 6) regardless of whether the interest is a legal or factual one.

Article 2, paragraph 5, explicitly includes within the category of the interested public NGOs whose statutory goals include promoting environmental protection, so long as they meet “any requirements under national law”. Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, such as through its charter, by-laws or

activities. “Environmental protection” can include any purpose consistent with the implied definition of environment found in article 2, paragraph 3. The requirement for “promoting environmental protection” would thus be satisfied in the case of NGOs focusing on any aspect of the implied definition of environment in article 2, paragraph 3. For example, if an NGO works to promote the interests of those with health concerns due to water-borne diseases, this NGO would be considered to fulfil the definition of article 2, paragraph 5.

The reference to “meeting any requirements under national law” should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation and the clear requirement of article 3, paragraph 4, to provide “appropriate recognition” for NGOs. In its findings on communication ACCC/C/2004/05 (Turkmenistan), the Compliance Committee found that “Non-governmental organizations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public”.¹²⁷

Meeting any requirements under national law

In Case C-263/08 (Sweden), the European Court of Justice (ECJ) considered whether the requirement then found in Sweden’s Environmental Act that NGOs must have at least 2,000 members to appeal a development consent was too restrictive in relation to EU Directive 85/337 and the Aarhus Convention.

The ECJ held that Directive 85/337 leaves it to national law to determine the conditions for access to justice for NGOs. However, national law must ensure wide access to justice. It held that it was conceivable that a requirement that an environmental NGO have a minimum number of members may be relevant in order to ensure that the association does in fact exist and that it is active. However, the number of members required cannot be fixed at such a level that it runs counter to the objective of facilitating judicial review of projects which fall within the scope of the Directive. Furthermore, the Directive covers projects more limited in size which locally based associations are better placed to deal with.

In fact, the Swedish legislation effectively deprived local associations of any judicial remedy, as only two Swedish associations had at least 2,000 members. The ECJ held that while local associations might contact one of those two associations and ask them to bring an appeal, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 because the two large associations entitled to bring an appeal might not have the same interest in projects of limited size and moreover they would be likely to receive numerous requests of that kind.¹²⁸

Parties may set requirements for NGOs under national law, but in the light of the integral role that NGOs play in the implementation of the Convention, Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party’s legal framework encourages the formation of NGOs and their constructive participation in public affairs. Moreover, any requirements should be consistent with the Convention’s principles, such as non-discrimination and the avoidance of technical and financial barriers. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary.

For example, a possible requirement for environmental NGOs to have been active in that country for a certain number of years might not be consistent with the Aarhus Convention, because it may violate the non-discrimination clause of article 3, paragraph 9. Furthermore, the requirement “to have been active” in itself might be overly exclusive in countries that have permitted the formation of NGOs for only a relatively short period of time, and where they are therefore relatively undeveloped.

There are also sometimes requirements for NGOs to have a certain number of active members. This was one of the issues considered by the ECJ in Case C-263/08 (Sweden), discussed in the box above. Such a membership requirement would also be considered overly strict under the Convention, if the threshold is set at such a high level that only a handful of NGOs can meet it in a given country. In 2009, Slovenia amended its Environmental Protection Act to remove the requirement that NGOs promoting environmental protection undergo a financial audit of operations in order to qualify as the “public concerned” under article 2, paragraph 5.

If an NGO meets the requirements set out in article 2, paragraph 5, it is deemed to be a member of the “public concerned” under article 6 and article 9, paragraph 2. But for NGOs that do not meet such requirements ab initio, and for individuals, the Convention is not entirely clear whether the mere participation in a public participation procedure under article 6, paragraph 7, would qualify a person as a member of the “public concerned”. Because article 9, paragraph 2, is the mechanism for enforcing rights under article 6, however, it is arguable that any person who participates as a member of the public in a hearing or other public participation procedure under article 6, paragraph 7, should have an opportunity to make use of the access to justice provisions in article 9, paragraph 2. In this case, he or she would fall under the definition of “public concerned”. This issue is discussed further in the [commentary on article 9, paragraph 2](#).

ARTICLE 3

GENERAL PROVISIONS

While the Aarhus Convention stands on three distinct pillars —access to information, public participation in decision-making and access to justice— there are a number of provisions that apply to the Convention as a whole. Such provisions — ranging from overarching principles to be applied in the implementation of its obligations to practical commitments that apply to all three pillars — can be found in article 3.

| Provision | Obligation | Implementation guidance |
|-------------------------------|---|---|
| Article 3, paragraph 1 | Take necessary legislative, regulatory and other measures to establish framework for implementation of the Convention | <ul style="list-style-type: none"> Measures to achieve compatibility between provisions Proper enforcement measures Measures to establish and maintain a clear, transparent and consistent framework |
| Article 3, paragraph 2 | Endeavour to ensure that public authorities assist and guide the public | <ul style="list-style-type: none"> Officials to use best efforts Assistance regarding all three pillars |
| Article 3, paragraph 3 | Promote environmental education and awareness | <ul style="list-style-type: none"> Both generally and especially with respect to the three pillars |
| Article 3, paragraph 4 | Recognize and support associations, organizations or groups promoting environmental protection | <ul style="list-style-type: none"> Adjust legal system if necessary Associations, organizations and groups “promoting environmental protection” “Appropriate” recognition and support |
| Article 3, paragraph 5 | Convention is a “floor” not a “ceiling” | <ul style="list-style-type: none"> Right to maintain existing more positive measures Right to introduce more positive measures |
| Article 3, paragraph 6 | No derogation from existing rights required | <ul style="list-style-type: none"> Right to maintain existing more positive measures |
| Article 3, paragraph 7 | Promote Convention’s principles in international forums | <ul style="list-style-type: none"> International environmental decision-making processes International organizations in matters relating to the environment |
| Article 3, paragraph 8 | No penalization of persons exercising Convention rights | <ul style="list-style-type: none"> Persons “shall not be penalized, persecuted or harassed” Court’s power to award reasonable costs in judicial proceedings not affected |
| Article 3, paragraph 9 | Rights may be exercised without discrimination as to nationality | <ul style="list-style-type: none"> No discrimination as to citizenship, nationality, domicile or, regarding a legal person, registered seat All three pillars |

- Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.**

Building directly on article 1, this provision emphasizes that the Aarhus Convention is about taking concrete practical steps to achieve its goals. Seemingly simple, this provision is arguably the most important provision in the Convention as its obligations go to the heart of administrative and judicial institutions and practice. Through its various elements discussed below, paragraph 1 provides a concise overview of what is required to effectively implement the Convention.

A clear, transparent and consistent framework to implement the Convention

Article 3, paragraph 1, requires each Party to establish and maintain a “clear, transparent and consistent framework” to implement the Convention. The main beneficiaries of the Convention are the public. In keeping with basic principles of public administration, the public has to be aware of their opportunities for information, participation and access-to-justice and the applicable rules and procedures must be clear and consistent.

The findings of the Compliance Committee reveal that a Party’s failure to implement individual provisions of the Convention frequently also involves a violation of article 3, paragraph 1. For example, in its findings on communication ACCC/C/2005/12 (Albania), the Compliance Committee held that in addition to breaching article 6, the Party concerned’s failure to establish through legislation a clear procedure for early notification of the public, identification of the public concerned, quality of participation, and taking the outcome of public meetings into account, was a violation of article 3, paragraph 1.¹²⁹

Similarly, in its findings on submission ACCC/S/2004/1 and communication ACCC/C/2004/3 (Ukraine), the Compliance Committee held that the lack of clarity with regard to the public participation requirements in the Party concerned’s EIA and environmental decision-making procedures gave rise to a breach of article 3, paragraph 1, as well as articles 6 and 4.¹³⁰

Courts and other review bodies must also apply the law in a clear and consistent manner. In its findings on communication ACCC/C/2005/11 (Belgium), the Compliance Committee recalled the obligation in article 3, paragraph 1, and noted that the independence of the judiciary, which is presumed and supported by the Convention, cannot be taken as an excuse by a Party for not taking the necessary measures. It also noted that, although the direct applicability of international agreements in some jurisdictions may imply the alteration of established court practice, this does not relieve a Party from the duty to take the necessary legislative and other measures, as provided for in article 3, paragraph 1.¹³¹

Any time relevant new legislation is adopted, care must be taken to ensure that it is consistent with the Convention’s requirements and the framework already in place at the national level to implement the Convention. Adoption of a general law on public associations, for example, might create confusion and lack of clarity if it fails to take clear account of the Convention’s requirements. Such a situation was at issue in communication ACCC/C/2004/5 (Turkmenistan), which concerned the Party concerned’s then newly adopted Act on Public Associations.¹³² Though the Act stated that it was subject to international agreements to which Turkmenistan was a Party (implicitly including the Aarhus Convention), it set up a regime that in practice had the effect of limiting the participation rights of environmental NGOs. Such a legal development at a minimum causes confusion and additional expense for those seeking to understand the legal hierarchy and the applicability of various rules, but it also carries with it a high risk of misapplication of the law, leading to uncertainty and the possible infringement of basic rights. For example, though the wording of Turkmenistan’s Act on Public Associations gave precedence to international agreements, it is very likely that in practice an administrator or review body will be more comfortable applying the language of the statute rather than that of an international agreement.¹³³

Necessary legislative, regulatory and other measures

The language of paragraph 1 makes it clear that a mere declaration by the Party that the Convention is directly applicable is not enough to meet the obligation to ensure a clear, transparent and consistent framework to implement the Convention. Likewise, as held by the Compliance Committee in its findings on communication ACCC/C/2005/11 (Belgium), the fact that a Party’s Constitution declares international agreements to have direct applicability and to be superior to national law does not relieve that Party from taking the necessary legislative and other measures to ensure the effective implementation of the Convention.¹³⁴

Rather, it is incumbent upon Parties to develop implementing legislation, executive regulations and “other measures” to establish and maintain a clear, transparent and consistent framework. Possible “other measures” might include strategies, codes of conduct and good practice recommendations. Austria, for example, has promoted the implementation of the Convention through “political guiding principles” for the promotion of sustainable development. These principles establish inclusive good governance standards constituting a “code of conduct” for authorities to comply with while developing plans, programmes, policies and legal instruments.

Parties must not only ensure that all relevant legislation is on its face clear and consistent with the Convention, but must also guard against the inconsistent application of that legislation by public authorities, or inconsistent decisions by judicial or administrative bodies, by taking measures to ensure that such bodies interpret and apply the relevant legislation in a clear, transparent and consistent manner. In this regard, as held by the Compliance Committee in its findings on communication

ACCC/C/2005/11 (Belgium), the independence of the judiciary “cannot be taken as an excuse by a Party for not taking the necessary measures” to meet its obligations under the Convention.¹³⁵

In the same findings, the Compliance Committee rejected Belgium’s submissions that its Federal structure acted as an impediment to meeting its obligations under the Convention. The Committee referred to the general international law of treaties, codified by article 27 of the 1969 Vienna Convention, which holds that a State may not invoke its internal law as justification for failure to perform a treaty. As the Committee stated: “This includes internal divisions of powers between the federal government and the regions as well as between the legislative, executive and judicial branches of government. Accordingly, the internal division of powers is no excuse for not complying with international law.”¹³⁶

National Implementation Plans

Several Aarhus Convention Parties have addressed the need to ensure transparency and coherency of the legislative framework for implementation by developing National Implementation Plans (NIPs).¹³⁷

NIPs are a useful mechanism for individual Parties to a multilateral environmental agreement (MEA) to promote compliance at the national level in a deliberate and proactive manner. Components of NIPs often include evaluations of obstacles to compliance (e.g., laws, institutions, capacities, social norms, public and private sector considerations), action points for overcoming these obstacles, identification of necessary financial and other resources and methodologies for monitoring implementation and compliance. NIPs can also include plans for the establishment of new implementation agencies or other institutions, and can address both internal, domestic issues of compliance as well as measures for strengthening international cooperation and assistance.

Some MEAs have by now amassed substantial practice in the development of NIPs, such as the CBD and its Cartagena Protocol on Biosafety, the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Convention to Combat Desertification), the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on Prior Informed Consent. International organizations and funding mechanisms such as the Global Environment Facility (GEF) also promote the development of NIPs.

For further information, see the UNEP *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (2006), pp. 187–193.¹³⁸

Compatibility between provisions to implement the Convention

A key aspect of a clear, transparent and consistent framework is ensuring compability between the provisions taken at the national level to implement the Convention. Those involved in negotiating the Convention were aware that its commitments reached out in many directions, drawing new connections among aspects of public administration, law and practice that might not have been apparent before. Because these new links are made by the Convention, and because the pillars of the Convention involve a wide range of institutions and authorities, great attention must be paid to ensuring compatibility across the legislative and other measures intended to implement the Convention and in the conduct of the institutions and authorities involved in their implementation.

Article 6, paragraph 3, for example, requires that public participation procedures have adequate time frames for all the phases of public participation. Often in a particular public participation process, a member of the public may wish to request environmental information from a public authority under article 4. This information may be critical to the person’s participation and may also therefore be necessary to ensure effective participation of the public. So the time periods for digesting the notification and the relevant information provided in the documentation relating to the proposed activity, and for preparing comments to be made at a public hearing or other opportunity, must take into account the possibility that further information may need to be requested from public authorities. The time periods for public participation should at a minimum be long enough for a response to a request for information to be made in the ordinary course. Yet, if the request for information requires an extension, or if some requested matter is refused under the exemptions of article 4, delays may result. The public participation procedures under article 6 might need to be flexible enough to respond to such eventualities, for example, by providing that a member of the public who believes that his or her request for information relating to a particular public participation proceeding has been wrongfully refused or delayed may demand an extension of the public participation proceedings pending resolution of an appeal.

Inter-agency coordination mechanisms

Parties may wish to consider the establishment of inter-agency coordination mechanisms, such as inter-agency commissions or working groups, in order to increase understanding of public authorities' obligations under the Convention. In keeping with the philosophy of the Convention, such bodies should include multi-stakeholder participation. For example, in October 2006, Armenia established an inter-agency commission comprised of representatives of a number of ministries and departments, and also of voluntary associations. The main objective of the commission was to prepare the ground for compliance with the provisions of the Aarhus Convention.

Proper enforcement measures

Finally, article 3, paragraph 1, requires Parties to take proper enforcement measures to maintain a clear, transparent and consistent framework to implement the Convention. Enforcement is of course linked to access to justice, and the access to justice pillar indeed contributes to the enforcement of the other two pillars in certain respects. However, any provisions of the Convention not directly enforceable through article 9, as well as the access-to-justice provisions themselves, require mechanisms for their enforcement. Paragraph 1 clearly states the connection between having a clear, transparent and consistent framework for implementing the Convention and properly enforcing it. It implies that even the most highly developed legislative or regulatory framework will deteriorate if it is not constantly renewed through enforcement mechanisms.

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

This provision follows the acknowledgement in the eighth preambular paragraph that citizens may need assistance in order to exercise their rights under the Convention. This is a formula found in some human rights instruments and it may be useful to consult materials relating to human rights, such as the Council of Europe recommendations, when determining the scope of assistance and guidance to be provided to the public.

Because officials are in the public service, it is reasonable to expect that they should help to facilitate the public's use of their rights under the Convention, by providing information, guidance and encouragement. Providing information alone is not enough, as can be seen by reading this provision together with article 3, paragraph 3. That paragraph concerns environmental education and awareness-raising, especially about the subject matters of the Convention. Paragraph 2 can only be read to go beyond the general information-oriented obligation found in paragraph 3, to require a closer form of assistance by authorities faced with the specific needs of members of the public in a particular case.

While some authorities might say that it is not their job to help the public to criticize them, this view does not take into account the benefits of public participation, and presupposes an antagonism between authorities and the public that often does not exist. If one accepts the basic premise that freer information and a more active public can assist authorities in doing their jobs, then it is also in the authorities' interests to assist the public in exercising their rights because positive results can be expected.

Rather than softening the obligation, the word "endeavour" in the opening words of paragraph 2 is simply an acknowledgement that it is conceptually impossible for Parties to ensure that officials and authorities assist and provide guidance, because whether individual officers actually give assistance and guidance in a particular case is subjective. Under these circumstances, the word "endeavour to ensure" should be interpreted to require Parties to take firm steps towards ensuring that officials and authorities provide the assistance mentioned. Parties must provide means for assistance, opportunities for officials and authorities to provide such assistance, and must encourage officials and authorities to do so through official policies and capacity-building training. Austria, for example, in 2008 laid down in its government programme the objective of an innovative, cooperative, efficient and high-quality public administration with the guiding theme of enhanced citizen orientation.¹³⁹ The Czech Republic includes training on public rights of access to environmental information in the introductory training of new civil servants.¹⁴⁰



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With regard to ensuring officials assist the public in seeking access to justice, in 2008, the European Commission launched its “Cooperation with Judges Programme” in Paris. The main objectives of the programme include creating training materials for member States’ judges on the application of EU legislation — including rules regarding access to justice in environmental matters. The material produced through the programme is available free to national judicial training centres.

Article 3, paragraph 2, does not directly require Parties to appoint special officials to help the public to seek information, to participate in decision-making or to seek access to justice, although this would be a good way to implement it. Practically, there are two ways of fulfilling this requirement: one is with special contact persons, the other is through obliging the officials who are in charge of the case in question to offer help to those who seek information, to participate or to have access to justice. With respect to access to information, article 5, paragraph 2 (b) (ii) and (iii), contains these two options for practical arrangements for making environmental information available to the public.

Both solutions have advantages and shortcomings, both for the authorities and for the public. The special contact person can develop special skills, knowledge and experience which make him or her more effective in dealing with members of the public.

Electronic information tools, such as user-friendly websites, are efficient means to assist the public to gain information on how to exercise their rights under the Convention. However, not all members of the public may be able to access such tools, in particular the elderly, illiterate, poor, etc. More traditional information tools, such as brochures or written guidance on invoices or other correspondence from public authorities, e.g., on how to request information or initiate a review procedure, should also be used. Both kinds of tools should, however, be in addition to, not in place of, measures to ensure that officials provide guidance and assistance in person. For example, officials may need to help members of the public to refine their requests for information to be clearer or more specific.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee found that the failure of a public authority to state lawful grounds for refusing access to the requested information, and the failure of the same public authority to give in its letters of refusal information on access to the review procedure provided for in accordance with article 9, constituted a failure by the Party concerned to comply with both article 3, paragraph 2, and article 4, paragraph 7, of the Convention.¹⁴¹

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

Paragraph 3 recognizes that environmental education and awareness are important foundations for the implementation of the Convention's three pillars. Basic environmental knowledge is an indispensable element of capacity-building for public participation in environmental decision-making.

The first line of paragraph 3 imposes a binding obligation to promote environmental education and environmental awareness among the public generally. This is consistent with obligations and statements found in a number of international instruments, including principle 19 of the Stockholm Declaration; article 6, paragraph (a) (i), of UNFCCC; article 13 of the CBD; article 19 of the Convention to Combat Desertification; and various paragraphs of Agenda 21. Initiatives to promote environmental education have also been taken in several international forums. For example, the United Nations declared 2005–2014 the United Nations Decade of Education for Sustainable Development, with UNESCO as the lead agency for its implementation. At a high-level meeting in Vilnius in March 2005, ECE ministers, vice-ministers and other representatives of environment and education ministries adopted the ECE Strategy for ESD. The Strategy was intended as a practical instrument to promote sustainable development through education. At the same meeting, ECE ministers adopted the Vilnius Framework for Implementation of the Strategy, which, *inter alia*, established a Steering Committee and an expert group on indicators to facilitate coordination and review of the Strategy's implementation.

Environmental education and awareness-raising may be distinguished from one another. While environmental education involves general education at all levels, environmental awareness-raising is more topic-oriented and can often be applied to the modification of behaviour in relation to the environment.

The second half of paragraph 3 lays special emphasis on building the public's capacity on the matters that are the subject of the Convention. It requires each Party to take measures to promote the public's awareness of how to invoke the principal rights bestowed on them by the Convention's three pillars, *i.e.*, how to obtain access to information, how to participate in decision-making and how to obtain access to justice in environmental matters. This obligation would seem to be a more general obligation than that contained in paragraph 2, which requires officials and authorities to assist and provide guidance to individual members of the public seeking to exercise their rights. The obligation is also built upon in a more specific way subsequently in each of the Convention's three pillars. For example, article 5, paragraph 2 (a), requires each Party to provide sufficient information to the public about the basic terms and conditions under which environmental information held by public authorities is made available and accessible, and the process by which it can be obtained. Article 6, paragraph 2 (d) (ii), requires the public concerned to be informed early in an environmental decision-making procedure, *inter alia*, of the opportunities for the public to participate in that procedure. Likewise, article 9, paragraph 5, requires each Party to ensure that information is provided to the public on access to administrative and judicial review procedures.



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Green Packs

The Green Pack is a multimedia environmental education kit for teaching children between the ages of 11 and 14 about environmental protection and sustainable development. The Green Pack is produced by the Regional Environmental Centre for Central and Eastern Europe and is intended for teachers and pupils in schools throughout the ECE region. Since its launch in 2002, the Green Pack has been produced in 20 languages for 15 countries.

The online version, <http://www.greenpackonline.org>, includes 23 toolkit topics, with information specific to each of the 15 countries. Green Pack Online also features downloadable lesson plans in all local languages, as well as tests, dilemma games and film clips. To date, more than 22,000 teachers within the ECE region have received training on how to use the Green Pack and about 2.5 million students have been educated through its interactive multimedia materials. A "Green Pack Junior" for younger students was launched at the 2007 ECE Ministerial Conference in Belgrade.

Environmental education and awareness-raising in Poland

Poland's "Schools for Sustainable Development" Project has been in place since 2001. Since 2007, "Schools for Sustainable Development" has become part of the international Eco-Schools Programme, in which schools from many countries around the world take part. Participating schools can obtain certificates awarded for model management of the school environment. In Poland, the programme is administered by the Foundation for Environmental Education with the support of the Polish Ministry of the Environment and the Ministry of National Education.¹⁴²

Other campaigns carried out by the Polish Government to promote more environmentally friendly habits by the public include "European Mobility Week" (regarding sustainable transport), "Keep Your Conscience Clear" (a campaign on waste management), "Eco Schick" (concerning sustainable shopping), "Partnership for Climate" (about climate change), "Unusual Biological Diversity Lessons" (a competition for NGOs and educational centres about biological diversity) and "Biodiversity Zone" (also about biological diversity).¹⁴³

Aarhus Centres

Since 2002, OSCE, in close cooperation with the Aarhus Convention secretariat, has supported the creation of Aarhus Centres and Public Environmental Information Centres in a number of countries of Central Asia, South-Eastern Europe and the Caucasus region, in many cases also with the involvement of the Environment and Security Initiative (ENVSEC). As at April 2014, Aarhus Centres, or Public Environmental Information Centres, had been established in 13 countries (Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Serbia, Tajikistan and Turkmenistan).

Over time, the Centres have become important tools for promoting environmental education and venues through which government officials and NGO representatives can meet to discuss and resolve issues regarding the environment and environmental security. Working both in capital cities and in regional areas, the Centres promote the implementation of the Aarhus Convention at the national and local levels, helping Governments fulfil their obligations under the Convention and involving citizens in environmental decision-making. In 2009, OSCE supported the development of a set of guidelines on the strategic orientation, set-up and activities of Aarhus Centres, thereby ensuring a common understanding of all stakeholders on the role of the Centres. Many of those involved in the Aarhus Centre initiative meet at regular intervals to exchange experiences and lessons learned. Some examples of the variety of activities carried out by the Aarhus Centres include:¹⁴⁴

- Public hearings, for example on the environmental activities of local mining activities.¹⁴⁵
- A workshop for staff of the Ministry of Ecology and Natural Resources on the Aarhus Centre Guidelines and good practices for public participation in environmental decision-making.¹⁴⁶
- A user-friendly website containing environmental information from governmental and civil society sources, including national legislation, international treaties, court cases on environmental matters, EIA reports, analysis, pollution monitoring data, guidelines on how to obtain environmental information and how to apply to court to seek redress on environmental claims. An important achievement was an agreement with the parliament to post draft environmental legislation on the website. The Centre is also building an environmental "metabase" of environmental organizations holding specific environmental information.¹⁴⁷
- The establishment of an Environmental Law Resource Centre, which has subsequently organized the participatory review of draft environmental legislation, provided university courses on environmental law and security, developed a manual on environmental rights and undertaken an analysis of national environmental law enforcement.¹⁴⁸
- A workshop on possible responses to remedy and clean up oil spills, an important issue for oil-producing countries.¹⁴⁹
- The production of a television (TV) show entitled "Your environmental rights" to inform the viewers on the main principles of how the public can become involved in the decision-making process on environmental issues.¹⁵⁰

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

Recognition of and support to associations, organizations, or groups are issues running throughout the Convention. For example, article 2, paragraph 5, and article 9, paragraph 2, recognize a special status for environmental NGOs under the Convention. This special status acknowledges that such NGOs have a particularly important role to play in the implementation of the Convention. The Convention follows on numerous environmental and human rights instruments that recognize the importance of government support for civil society so as to ensure that different interests in society are represented in a balanced manner.

The effective use of the special status the Convention affords to environmental NGOs, however, depends not only on the provisions of the Convention, but on matters of a more general nature, such as legalities of registration, tax status, limitations on activities, etc. Another related provision is article 9, paragraph 5, which discusses the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

As a preliminary matter, Parties must ensure that their national legal system provides for the possibility of forming and registering associations and NGOs. Such associations may take several forms, including not-for-profit corporations, charitable foundations and mutual societies. NGOs formed for the express purpose of environmental protection are one category of associations. In addition, NGOs ostensibly formed for other purposes (for example, issues of health and safety) might from time to time promote environmental protection in connection with their activities. Even NGOs formed to advance the interests of a particular profession, such as environmental scientists, might incidentally promote environmental protection. While the Convention refers specifically to “associations, organizations or groups promoting environmental protection”, as a rule laws relating to the formation and registration of organizations do not distinguish on this basis.

The inclusion of the word “groups” is intended to ensure that technical requirements such as registration will not be a bar to the recognition and support of groups of people in association who promote environmental protection. In many instances, informal groups form over specific topics at the grass-roots level. In these cases registration as a formal, “permanent” organization may be unnecessary. The level of recognition by, and support from, public authorities may, however, vary between registered organizations and informal groups. Estonia is one country that specifically provides recognition in its administrative law for non-registered groups. In Estonia, an association of persons, including an association which is not a legal person, has the right of recourse to an administrative court to protect the interests of its members or other persons if its founding document, articles of association or relevant law grants it this right.¹⁵¹

In its findings on communication ACCC/C/2005/05 (Turkmenistan), the Compliance Committee examined a situation in which a blanket prohibition on activities by non-registered NGOs was combined with onerous requirements for NGO registration. While the Committee did not consider the requirement that NGOs register by itself to be an impairment to public participation by associations, it found Turkmenistan’s Act on Public Associations to present genuine obstacles to the exercise of participation rights due to its difficult registration procedures and requirements. This, in turn, the Committee held to be a violation of the obligation to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system was consistent with this obligation.¹⁵²

Beyond the recognition of the right of association, public authorities often also provide other forms of recognition of the important role that associations, organizations or groups promoting environmental protection play in decision-making and policymaking. It has become common practice in ECE countries for authorities to establish consultative councils or other mechanisms to promote cooperation with NGOs, and to include NGOs in environmental decision-making bodies, working groups or advisory bodies.¹⁵³

Appropriate government support to such associations, organizations and groups can take various forms. Support could be direct or indirect. Direct support might be offered to a particular group or organization for its activities, and could be project-based or general core support. In some ECE countries it is not unusual for substantial financial grants or awards to be given to environmental associations, organizations or groups to support their activities. Other governments suffer from a lack of financial resources or are reluctant to provide support because they fear such support might be misinterpreted as a political endorsement of some kind. While particular mechanisms for support are not prescribed, it would appear that a Party must at least have a legal system that would allow the government to provide support to associations, organizations or groups where appropriate.



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Article 3

Indirect support might involve general rules for tax relief (for example, exempting charitable organizations from payment of certain taxes), financial incentives for donations (such as tax deductibility) or fee-waiver provisions. These are usually found in a law on non-profit organizations. In this case, care should be taken to ensure that such provisions are non-discriminatory. Similarly, while it may be practical to enter into memorandums of understanding with groups of NGOs, the agreements reached should take into account the goal of providing recognition of and support to environmental associations, organizations and groups generally, in recognition of the important role such entities play in solving environmental problems, without creating the impression that particular NGOs have greater access or importance.

Another important form of support under the Convention is in the context of access to justice. Such support might include regulations entitling environmental associations, organizations and groups to apply for legal aid, or measures exempting them from court fees or litigation costs. Such issues are discussed further in the [commentary to article 9, paragraph 5](#), regarding the removal and reduction of financial and other barriers to access to justice.

- 5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.**

- 6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.**

Taken together, article 3, paragraphs 5 and 6, establish that the Convention is a “floor, not a ceiling”. Parties have at all times the right to provide for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention, and Parties are not required to derogate from any existing rights. For example, several Parties have shorter deadlines for public authorities to respond to information requests from the public than the one month set out in article 4, paragraph 2. The Convention sets forth requirements that Parties must meet *at a minimum* in order to provide the basis for effective access to information, public participation in decision-making and access to justice in environmental matters.

In addition, the Convention should not have the legal effect of automatically supplanting pre-existing law or policy on the subject, where that pre-existing law or policy is more favourable to the public. In this regard, it is important to keep in mind the interests expressed by certain States during the negotiations that led to the particular language of article 3, paragraphs 5 and 6.

It is a well-known tendency, when drafting international agreements that must take into account national differences, for the negotiations to lead towards a lowest common denominator outcome. In the negotiation of the Aarhus Convention, this common tendency presented a special challenge as it may have meant that rights and protections in some Eastern European countries would actually be diminished. This was the predicament faced by those countries whose constitutions give primacy to international obligations in such a way that ratification of the Convention would *supplant* prior national legislation on the same subject matter.

Earlier ECE conventions used the following wording to establish that Parties could provide more protection than that provided in a given convention: “The provisions of this Convention shall not affect the right of Parties individually or jointly to adopt and implement more stringent measures than those set down in this Convention.”¹⁵⁴

The use of the word “stringent” may be appropriate for traditional, command-and-control oriented international agreements where the subject matter of a convention is the obligation of the Parties to restrict or regulate behaviour, but it is obviously problematic when applied to a convention which pertains to the establishment of institutions, procedures and structures to facilitate the principles covered by the Aarhus Convention.¹⁵⁵ The language finally settled upon was intended to make clear that pre-existing rights or provisions more favourable to access to information, public participation in decision-making and access to justice in environmental matters cannot be automatically impinged by the Convention and, furthermore, that Parties are free to go beyond the protection and provision of rights contained in the Convention in their own national legislation and practice.

An interesting question is whether these two provisions taken together constitute an “anti-backsliding” or “anti-deterioration” clause. Some of those involved in the negotiations of the Convention took the position that the Convention should be understood as having this requirement. However, in its findings on communication ACCC/C/2004/4 (Hungary), the Compliance Committee considered that the wording of article 3, paragraph 6, does not completely exclude the possibility of a Party reducing existing rights, so long as they do not fall below the minimum level granted by the Convention.¹⁵⁶ This finding notwithstanding, the Committee regarded the reduction from existing rights as being at variance with the objectives of the Convention, and recommended the Meeting of the Parties, at its forthcoming second session, to urge Hungary not to take such action. However, at that session (Almaty, 25–27 May 2005), the Meeting of the Parties did not act upon that recommendation.¹⁵⁷

Certainly, at a minimum, article 3, paragraph 6, would prevent a Party from using the standards set by the Convention to justify a reduction in existing rights. Moreover, those seeking to urge Governments to avoid backsliding can point to jurisprudence in human rights cases stating that the establishment of a standard for protection of rights, once established, cannot be derogated from without a compelling countervailing right. Ironically, an excellent statement of this rule is found in a case from Hungary’s Constitutional Court, the *Protected Forests* case, where the Court held that if the State guarantees a certain level of protection, it cannot be withdrawn arbitrarily. The Court held that such protections could only be diminished in proportion to upholding other constitutional rights or values.¹⁵⁸

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

The Convention requires Parties to promote its principles in international decision-making processes and within the framework of international organizations in matters relating to the environment. In support of this, at its second session, the Meeting of the Parties adopted the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums (Almaty Guidelines).¹⁵⁹

The primary purpose of the Almaty Guidelines is to provide general guidance to Parties on promoting the application of the principles of the Convention in international forums in matters relating to the environment.¹⁶⁰ The Guidelines are intended to apply to all international stages of any relevant decision-making process in matters relating to the environment and are intended to positively influence the way in which international access is secured in international forums in which Parties to the Convention participate.¹⁶¹ The definition of international forums in the Guidelines is not exhaustive, but expressly includes:

- (a) The negotiation and implementation at the international level of MEAs, including decisions and actions taken under their auspices;
- (b) The negotiation and implementation at the international level of other relevant agreements, if decisions or actions undertaken at that level pursuant to such agreements relate to the environment or may have a significant effect on the environment;
- (c) Intergovernmental conferences focusing on the environment or having a strong environmental component, and their respective preparatory and follow-up processes at the international level;
- (d) International environmental and development policy forums; and
- (e) Decision-making processes within the framework of other international organizations in matters relating to the environment.¹⁶²

Regional economic integration organizations (e.g., the EU) or forums exclusively comprising all member States of a regional economic integration organization are expressly excluded from the scope of the Guidelines.¹⁶³

The definition of international forums implicitly includes both multilateral and bilateral decision-making processes. It also includes decision-making within the framework of international forums not necessarily viewed as “environmental”, for example the United Nations General Assembly, when the decision-making concerns matters relating to the environment. It also includes multilateral lending institutions such as the European Bank for Reconstruction and Development, specialized agencies and other organizations in the United Nations system, such as the World Bank and the World Trade Organization, and special international organizations formed for specific tasks, such as the reconstruction of infrastructure following a war or natural disaster.



The categories of international forums listed above may overlap in certain instances. For example, MEAs are frequently negotiated at intergovernmental conferences, such as conferences of States on environmental issues, for example the 1992 UNCED, also known as the “Earth Summit”, or the periodic Efe or Environment and Health ministerial meetings.

The negotiation of the Protocol on Water and Health to the ECE Water Convention was an example of a process in which many of the principles of the Aarhus Convention were applied. The Protocol’s negotiating parties expressly took the Aarhus Convention into account.¹⁶⁴

The Guidelines are intended to provide guidance to Parties with respect to both (a) the development, modification and application of relevant rules and practices applied within international forums (e.g., rules of procedure covering issues such as transparency, accreditation); and (b) the treatment of relevant substantive issues within those forums. Like the Convention, the Guidelines are based around three pillars: access to environmental information, public participation in decision-making regarding environmental matters and access to review procedures in environmental matters. A summary of the Guidelines is provided below:

An overview of the Almaty Guidelines on Promoting the Principles of the Aarhus Convention in International Forums

General considerations

- Like the Convention itself, the Almaty Guidelines are based on the belief that access to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels, essential for sustainability and generally improve the quality of decision-making and the implementation of decisions.
- In any structuring of international access, care should be taken to make or keep the processes open, in principle, to the public at large. Where members of the public have differentiated capacity, resources, socio-cultural circumstances or economic or political influence, special measures should be taken to ensure a balanced and equitable process.

Access to environmental information

- In order to make access by the public more consistent and reliable, each Party should encourage international forums to develop and make public a clear and transparent set of policies and procedures on access to the environmental information that they hold.
- Environmental information, including that in official documents, should be provided proactively, in a timely manner, in a meaningful, accessible form and, where appropriate, in the international forum’s official languages, so that access to information translates into greater knowledge and understanding. The use of appropriate technical means to make information accessible to the public free of charge, e.g., using electronic information tools, such as clearing houses and live webcasting of events, should be promoted.
- Any member of the public should have access to environmental information developed and held in any international forum upon request, without having to state an interest, as soon as possible and subject to an appropriate time limit, e.g. one month. The availability of information free of charge or, at most, at a reasonable charge should be promoted.
- Requests for environmental information should be refused only on the basis of specific grounds for refusal, taking into account the Convention’s requirement that the grounds for refusal should be interpreted in a restrictive way, taking into account the public interest in disclosure. A refusal of a request should give reasons for the refusal and provide information on access to any review procedure.

Public participation in decision-making on environmental matters

- Efforts should be made to proactively seek the participation of relevant actors, in a transparent, consultative manner, appropriate to the nature of the forum. Participation of the public concerned in the meetings of international forums, including their subsidiary bodies should be allowed at all relevant stages of the decision-making process, unless there is a reasonable basis to exclude such participation according to transparent and clearly stated standards. Where they are applied, accreditation or selection procedures should be based on clear and objective criteria, and the public should be informed accordingly.
- International processes should benefit from public participation from an early stage when options are still open and effective public influence can be exerted. This includes the negotiation and application of conventions; the preparation, formulation and implementation of decisions; and substantive preparation of events.
- Participation of the public concerned should include, at meetings in international forums, the entitlement to have access to all documents relevant to the decision-making process produced for the meetings, to circulate written statements and to speak at meetings, without prejudice to the ability of international forums to prioritize their business and apply their rules of procedure.
- Public participation procedures in international forums should include reasonable time frames for the different stages, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively during the decision-making process. The public should be informed in due time of the opportunities, procedures and criteria for public participation in the decision-making.

Public participation in decision-making on environmental matters (continued)

- In decisions, due account should be taken of the outcome of public participation. Transparency with respect to the impact of public participation on final decisions should be promoted.
- Given that traditional arrangements for financial support can be quite costly, efforts should be made to apply innovative, cost-efficient and practical approaches to maximizing participation.

Access to review procedures

- Each Party should encourage international forums to consider measures to facilitate public access to review procedures relating to the application of the forums' rules and standards regarding access to information and public participation within the scope of the Guidelines.

Through decision II/4 adopting the Almaty Guidelines, the Meeting of the Parties established a task force to enter into consultations regarding the Guidelines with relevant international forums. It also invited Parties, Signatories, other interested States, NGOs, interested international forums and other relevant actors to submit to the secretariat comments relating to their experience regarding the application of the Guidelines. It requested the Working Group of the Parties, based on its consideration of the outcome of the consultations and experiences regarding the application of the Guidelines, to review the Guidelines and make recommendations, as appropriate, for consideration by the Parties at their third ordinary meeting.

In accordance with this, the Task Force on Public Participation in International Forums conducted a consultation process with relevant international forums over a 13-month period from June 2006 to July 2007. Forty-nine international forums took part in the written phase of the consultation process. The consultation process culminated in an international workshop for representatives of international forums and their stakeholders in July 2007. At its third session, the Meeting of the Parties adopted decision III/4 in which it welcomed the work of the Task Force and expressed its belief that there was no need to revise the Almaty Guidelines at that time. The Meeting recognized that significant work remained to be done to implement article 3, paragraph 7. Renewing the mandate of the Task Force for a further three years, it agreed that the principal focus of common work on this issue in the ensuing intersessional period should be to assist Parties to do so. Through decision IV/3 adopted at its fourth session, the Meeting of the Parties reiterated that significant work still remained to be done to implement article 3, paragraph 7, and agreed to continue this work directly under the authority of the Working Group of the Parties.

8. 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. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

Paragraph 8 requires Parties to protect persons exercising their rights under the Convention. To some extent it reflects the so-called whistle-blower protection principle (based on the notion that someone “blows the whistle” to call the attention of the authorities to particular unlawful activities). As in many situations that involve openness and transparency and where economic interests are at stake, persons who take the risk of demanding that the rules be complied with and proper procedures followed may need to be protected from retribution. Paragraph 8 is a broadly worded provision which aims to prevent retribution of any kind. Early examples of this type of provision were found in United States labour law in the form of provisions to protect the jobs of workers who reported violations of worker health and safety regulations to the authorities.

Similar provisions can be found in Europe as well. In Hungary, the Law on Public Complaints provides for remedies if an employer takes retaliatory action against a worker who has made a complaint in the public interest. The employer is obliged to restore the employee's lawful status immediately and to properly compensate material and moral damages. If necessary, such restoration can be ordered by a superior body, which simultaneously should start disciplinary or criminal action. A complainant can ask to keep his or her name confidential, and that request must be granted unless the effectiveness of the examination of the data requires otherwise. In such a case the complainant must be informed of an intent to disclose his or her identity in advance.¹⁶⁵ With respect to whistle-blowing more generally and not just in the workplace, Hungarian law provides that those who retaliate against persons who have made complaints in the public interest commit a misdemeanour under the Criminal Code and are subject to punishment by an imprisonment of up to one year, mandatory public service or a fine.¹⁶⁶

In its findings on communication ACCC/C/2009/36 (Spain), the Compliance Committee found that by insulting the communicant publicly in the local press and mass media for its interest in activities with potentially negative effects on the environment and health of the local population, the public authorities, and thus the Party concerned, had failed to comply with article 3, paragraph 8, of the Convention.¹⁶⁷

In its findings on communication ACCC/C/2008/27 (United Kingdom), the Compliance Committee noted that, while article 3, paragraph 8, does not affect the powers of national courts to award reasonable costs in judicial proceedings, the Committee did not exclude that pursuing costs in certain contexts may be unreasonable and amount to penalization or harassment within the meaning of article 3, paragraph 8. The Committee took the view that, based on the evidence before it, the Party concerned's pursuit of costs did not amount to a penalization under article 3, paragraph 8, in that case.¹⁶⁸ The Committee made similar observations in its findings on communication ACCC/C/2008/23 (United Kingdom).¹⁶⁹



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With respect to its own procedures, the Aarhus Convention Compliance Committee has considered measures to protect members of the public making communications to the Committee from the possibility of harassment. The *Guidance Document on the Aarhus Convention Compliance Mechanism*¹⁷⁰ provides that, if a communicant is concerned that the disclosure of information submitted to the Committee could result in his or her being penalized, persecuted or harassed, he or she is entitled to request that such information, including any information relating to his or her identity, be kept confidential. The same applies if the communicant is concerned that the disclosure of information submitted to the Committee could result in penalization, persecution or harassment to any other person. The Committee respects any request for confidentiality. (For further details about the Committee's procedure with respect to requests for confidentiality, see the *Guidance Document on the Aarhus Convention Compliance Mechanism*.)

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 3, paragraph 9, makes it clear that distinctions based upon citizenship, nationality, residence or domicile, place of registration or seat of activities are not permitted under the Convention. This non-discrimination clause is another of the key provisions of the Convention. It establishes that all persons, regardless of origin, have the exact same rights under the Convention as citizens of the Party concerned.

Although the “public” and “public concerned” are defined in article 2, paragraphs 4 and 5, without reference to citizenship and other international instruments have also talked in terms of the “any person” principle in the context of environmental protection, it was considered necessary to expressly address non-discrimination in a forceful way in the Convention.¹⁷¹ This was in part due to the legacy of authoritarianism in some countries, where discrimination on the basis of citizenship, nationality or domicile was the norm with respect in particular to access to information. During the negotiations the reluctance of some countries to accept a principle of non-discrimination in fact led to a more forceful posture by the majority of countries, which considered this to be non-negotiable. In the end, a quite clear and simple provision emerged. It should be noted that this provision is also potentially useful to persons or entities based in a country in cases of positive discrimination by that country's authorities in favour of foreign persons or entities.

The concept of non-discrimination is also found in the Espoo Convention. Its article 2, paragraph 6, makes sure that its Parties under whose jurisdiction a proposed activity is envisaged to take place ("Party of origin") will provide "an opportunity to the public ... to participate in relevant environmental impact assessment procedures".¹⁷² Furthermore, the Party of origin has to "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". The concept is also incorporated in the 1994 United Nations draft principles on human rights and the environment, which states, "All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment".¹⁷³

Parties must be sensitive to the need to ensure that the law regarding the formation, establishment and membership of NGOs takes into account the non-discrimination obligations under this paragraph. In its findings on communication ACCC/C/2004/5 (Turkmenistan), the Compliance Committee, when considering Turkmenistan's Act on Public Associations, held that "the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them".¹⁷⁴

In practice, the non-discrimination provision may be especially significant when defining the "public concerned" under article 2, paragraph 5, article 6 and article 9, paragraph 2, and identifying the public for the purposes of article 7. Public authorities might tend to discriminate against non-citizens or non-residents in determining whether they have a recognizable interest or articulatable concern, and might also tend to omit non-citizens and non-residents when including the public in the development of plans and programmes relating to the environment. Particularly in transboundary situations, language issues may be grounds for discrimination. In 2009, a case in which a Dutch NGO complained that EIA documentation relating to a proposed construction of a thermal electric power plant 500 metres from the Dutch-Belgian border was available only in French, and public hearings were conducted only in three French-speaking municipalities, was the subject of a compliance review under the Espoo Convention.¹⁷⁵ Though the Espoo Convention's Implementation Committee decided there was insufficient evidence of non-compliance to begin a Committee initiative, it made a number of observations, including that the opportunity provided to the public of the affected Party should be equivalent to that provided to the public of the Party of origin. This includes at least partial translation of documentation, when documentation is in a language that cannot be understood by the public of the affected Party. As a minimum, the documentation to be translated should include the non-technical summary and those parts of the EIA documentation that are necessary to provide an opportunity to the public of the affected Party to participate that is equivalent to that provided to the public of the Party of origin.¹⁷⁶



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PILLAR I

ACCESS TO INFORMATION

Access to information is the first “pillar” of the Convention. The environmental rights outlined in its preamble depend on the public having access to environmental information, just as they also depend on public participation and on access to justice. This section of the Implementation Guide discusses both article 4 on access to environmental information and article 5 on the collection and dissemination of environmental information, as the two components of the access to information pillar.

Purpose of the access to information pillar

Under the Convention, access to environmental information ensures that members of the public are able to know and understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.

What is access to information under the Convention?

The Convention governs access to “environmental information”. Environmental information is defined in article 2, paragraph 3, to include, inter alia, the state of the elements of the environment, factors that affect the environment, decision-making processes and the state of human health and safety ([see the commentary to article 2, paragraph 3](#)).

The access to information provisions of the Convention are found in article 4 on access to environmental information and article 5 on the collection and dissemination of environmental information. Article 4 sets out the general right of the public to gain access to existing information upon request, also known as “passive” access to information. Article 5 sets out the duties of the Government to collect and disseminate information on its own initiative, also known as “active” access to information.

The preamble, as well as the objective of the Convention set out in article 1 and article 3 on general provisions, support the provisions of articles 4 and 5 by establishing the right to information, guaranteeing that right and requiring Parties to take all necessary measures and to provide guidance to the public. Article 3, in particular, reminds Parties that the Convention’s provisions, including those in articles 4 and 5, are minimum requirements and that Parties have the right to provide broader access to information for the public.

Access to information in international law

Laws on access to information held by public bodies have long been found at the national level. The Convention elaborates international standards in the specific area of “environmental” information. Many environmental treaties developed before the 1990s provided for access to information among Parties.

More recent treaties have taken the concept of access to information one step further and have included obligations for Parties to make government-held information accessible to members of the public. Many of these treaties have their basis in principle 10 of the Rio Declaration, which, inter alia, declares that “at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities”. In the past few years, access to information has also gained increasing recognition as a human right, implicit in the right to freedom of expression guaranteed by a number of global and regional treaties.

Treaties including elements of the Aarhus Convention’s access to information principles include both global agreements, such as the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on Prior Informed Consent, and other ECE environmental treaties, such as the Water Convention. For example, the Cartagena Protocol on Biosafety requires Parties to provide access to information on living modified organisms identified in accordance with the Protocol that may be imported (article 23). The Industrial Accidents Convention requires Parties to ensure that adequate information is given to the public in areas capable of being affected by an industrial accident arising out of a hazardous activity (article 9, para. 1). The Water Convention requires certain information, including water-quality objectives, permits and results of sampling and compliance checks, to be available to the public at all reasonable times for inspection, free of charge, and requires the Parties to provide members of the public with reasonable facilities for obtaining copies of such information from the Parties, on payment of reasonable charges (article 16). The Protocol on Water and Health to the Water Convention contains a similar provision in its article 10. In addition to the information to be made automatically available to the public, the Protocol also requires other information to be available in response to a request from a member of the public (article 10, para. 2).

In the human rights arena, there has been a substantial move towards recognition of access to information as a human right. The Inter-American Court of Human Rights issued a landmark judgement in 2006, holding that article 13 of the American Convention on Human Rights (freedom of thought and expression) guarantees the right of all individuals to request, and be granted access to, government-held information, unless there is a specific justification for refusal. The case was brought by members of a Chilean environmental NGO who had been denied access to documents related to the environmental impact of a proposed logging project.¹⁷⁷

Further recognition of the right of access to information came with the adoption, on 27 November 2008, of the Council of Europe Convention on Access to Official Documents (No. 205). The Convention — the first international treaty on access to information in general — recalls the Aarhus Convention in its preamble. As at April 2014, it had six ratifications, four short of the number needed for entry into force.¹⁷⁸

In 2009, the ECHR issued two rulings (*Társaság a Szabadságjogokért v. Hungary* and *Kenedi v. Hungary*) that recognized that a right of access to information held by public bodies is inherent in article 10 (freedom of expression) of the European Convention on Human Rights.¹⁷⁹ Article 10 of the European Convention on Human Rights is worded in terms very similar to those of article 13 of the American Convention. Previously, the ECHR had recognized a limited right of access to information where necessary to protect the right to private and family life under article 8.¹⁸⁰ The Court’s judgements in *Társaság a Szabadságjogokért v. Hungary* and *Kenedi v. Hungary* indicate that access to information is rapidly gaining recognition as a human right at the international level.

At its 102nd session in July 2011, the United Nations Human Rights Committee adopted General Comment No. 34, on article 19 of the International Covenant on Civil and Political Rights (freedom of expression). Paragraph 18 of General Comment No. 34 states that “Article 19, paragraph 2 embraces a general right of access to information held by public bodies.”¹⁸¹

Access to information and the EU

At the time the Aarhus Convention was adopted, Directive 90/313/EEC on the freedom of access to information on the environment provided the legal basis for access to environmental information in the EU member States. The Directive established basic obligations for EU member States to ensure that public authorities were required to make available information relating to the environment to any natural or legal person at his or her request. Directive 2003/4/EC subsequently repealed Directive 90/313/EEC and expanded the access granted under the earlier directive. Other EU legislation adopted since the Aarhus Convention came into force has also included provisions to meet the requirements of the Convention. Some of these provisions are discussed in other parts of this Guide.

The influence of the Aarhus Convention on EU law on access to environmental information

A number of important changes were made to EU legislation through Directive 2003/4/EC (references are to relevant provisions of the Aarhus Convention) including:

- *Definitions*: the definitions of environmental information and public authority were expanded (article 2).
- *Use of term "adversely"*: in the old definition of "environmental information", the Directive limited measures to those that *adversely* affect the environment, whereas the new definition covers measures affecting the environment in any way.
- *Response time limits*: the ambiguous time limits of the old Directive are replaced with time limits identical to those in the Convention (article 4, para. 2).
- *No stated interest*: under Directive 2003/4/EC, the applicant need not state an interest (article 4, para. 1 (a)), whereas under the old Directive the applicant did not need to *prove* an interest.
- *Form requested*: with certain exceptions, Directive 2003/4/EC requires information to be given in the form requested (article 4, para. 1 (b)).
- *Information on emissions*: in certain circumstances, information on emissions may not be withheld from disclosure (article 4, para. 2).
- *Course of completion*: under the Aarhus Convention, Parties may exempt "material in the course of completion" from disclosure (article 4, para. 3 (c)), while under the old Directive member States could exempt "unfinished" materials from disclosure. Directive 2003/4/EC includes the "materials in the course of completion" exception (though it also still contains the "unfinished documents or data" exception).¹⁸²
- *Course of justice*: Directive 2003/4/EC provides an exception for information that may adversely affect the "course of justice" (article 4, para. 4 (c)), rather than the "sub judice" exception in the old Directive.
- *Public interest test*: Directive 2003/4/EC introduces the requirement to construe exceptions narrowly, taking into account the public interest in disclosure (article 4, paras. 3 and 4).
- *Transfer of the request*: when the public authority does not hold the information it must either transfer the request or let the public know where the information is held (article 4, para. 5).
- *Information appeals*: in accordance with the Aarhus Convention, a full or partial refusal must now include information on appeals procedures (article 4, para. 7).

Implementing access to information

The following table contains the main elements of articles 4 and 5. It serves as an overview of the obligations that will be discussed in the following sections. The Convention imposes varying degrees of obligations on Parties and public authorities. In most cases, the Convention structures its obligations through a clear general principle combined with more flexible requirements, as well as providing implementation guidance with an even higher level of flexibility for the Party or public authority. These varying degrees of obligation will be explained in more detail below. The table covers the general obligations and provides some insight, beyond the requirements in the Convention, of how Parties may wish to implement these obligations.

| | General requirements | Implementation guidance for Parties |
|------------------|--|---|
| Article 4 | Requires a system that enables the public to request and receive environmental information from public authorities | <ul style="list-style-type: none"> • Create an access to environmental information law or regulation • Let the public know which public authority holds which type of information • Have a system to help the public formulate properly directed requests • Set clear standards for time limits • Create a schedule for charges • Clearly define any exemptions |
| Article 5 | Requires a system through which public authorities collect environmental information and actively disseminate it to the public without request | <ul style="list-style-type: none"> • Require record-keeping and reporting by public authorities and from operators to public authorities • Make lists, registers and files publicly accessible free of charge • Develop environmental information offices and identify individual points of contact • Use electronic databases and the Internet • Create incentives for operators to give information directly to the public |

ARTICLE 4

ACCESS TO ENVIRONMENTAL INFORMATION

Article 4 sets out a framework through which members of the public can gain access to environmental information from public authorities and, in some cases, from private parties. Once a member of the public has requested environmental information, article 4 establishes criteria and procedures for providing or refusing to provide it. Under the Convention, all persons have the right of access to such information.

The Convention starts out with a general rule of freedom of access to information. Parties are required to establish a system whereby a member of the public can request environmental information from a public authority and receive that information within a reasonable amount of time. This general rule is protected by safeguards concerning the timing of responses, the conditions for refusals and the documentation of the process in writing. In addition, article 9, paragraph 1, provides for the review of information requests made under article 4.

| Provision | Obligation | Implementation elements |
|-------------------------------|--|---|
| Article 4, paragraph 1 | Public authorities to make information available upon request | <ul style="list-style-type: none"> No interest to be stated In form requested (with two exceptions) |
| Article 4, paragraph 2 | Time limits for public authorities to respond and supply the requested information | <ul style="list-style-type: none"> As soon as possible General time limit, at the latest one month If voluminous and complex, possible extension, giving reasons, to two months |
| Article 4, paragraph 3 | Optional grounds for refusing disclosure | <ul style="list-style-type: none"> Requested information not held by public authority Request "manifestly unreasonable" or "too general" Requested material in the course of completion or concerns internal communications |
| Article 4, paragraph 4 | Optional grounds for refusing disclosure if disclosure would adversely affect the listed interests. Such grounds to be interpreted in a restrictive way, taking into account public interest in disclosure and whether information relates to emissions into the environment | <ul style="list-style-type: none"> Proceedings of public authorities, where confidential under national law International relations, national defence or public security The course of justice Commercial and industrial confidentiality, where protected under national law Intellectual property rights Personal data, where confidential under national law The interests of a third party which provided the information requested voluntarily Protection of the environment to which the information relates |
| Article 4, paragraph 5 | Public authority that cannot respond to a request for information because it does not hold the information requested to inform the applicant which public authority does hold the information, or to transfer the request to that authority and inform the applicant | <ul style="list-style-type: none"> Inform applicant which public authority holds information requested, or Transfer information request to that public authority and inform applicant |
| Article 4, paragraph 6 | Information, other than exempted information, to be disclosed wherever possible | <ul style="list-style-type: none"> Exempted information to be separated out; remainder of information disclosed |
| Article 4, paragraph 7 | Procedure for refusing an information request | <ul style="list-style-type: none"> Refusal in writing if information request was in writing or if applicant so requests Reasons for refusal to be stated Information on the review procedure to be provided Refusal as soon as possible and at the latest one month unless complexity of information justifies extension to two months, in which case notice, including reasons, must be given |
| Article 4, paragraph 8 | Optional charges for information | <ul style="list-style-type: none"> Not to exceed a reasonable cost Schedule of charges available beforehand |

Most of the provisions in article 4 are requirements that Parties and public authorities must meet. However, paragraphs 3 and 4 outline the circumstances when a Party *may* allow public authorities to refuse a request for information. Indeed, paragraphs 3 and 4 outline the *only* circumstances under which exceptions to the general rule apply. The Convention does not require Parties to adopt these optional provisions and, even if the exceptions are adopted, Parties may nevertheless allow the public authority to exercise discretion to provide the information requested. Moreover, if the information exempted from disclosure can be separated out, Parties are required to make available the remainder of the requested environmental information.



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Task Force on Access to Information

At its fourth session, the Meeting of the Parties decided to extend the scope of the work undertaken by the Task Force on Electronic Information Tools¹⁸³ and to rename it the Task Force on Access to Information. Through decision IV/1,¹⁸⁴ the Meeting of the Parties requested the Task Force on Access to Information to undertake, inter alia, the following tasks, subject to the availability of resources:

- (a) To promote the exchange of challenges and good practices concerning public access to environmental information, including with regard to products and the promotion of the accessibility of environmental information held by the private sector;
- (b) To identify barriers and solutions with respect to public access to environmental information;
- (c) To identify regional and subregional priorities for further work;
- (d) To continue to monitor and support the implementation of the Convention's recommendations on the more effective use of electronic information tools to provide public access to environmental information¹⁸⁵ and to promote standards for providing public access to environmental information tailored to meet requirements of users from diverse geographical areas;
- (e) To continue monitoring technical developments, and, where appropriate, contribute to other initiatives regarding electronic information access, electronic public participation in decision-making and electronic access to justice in environmental matters;
- (f) To continue contributing to the further development of the Aarhus Clearinghouse for Environmental Democracy and PRTR.net.

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

Article 4, paragraph 1, contains the general obligation for public authorities to provide environmental information in response to a request. Parties must ensure that this obligation is met "within the framework of national legislation". This means both that (a) national legislation should set out a framework for the process of answering information requests in accordance with the Convention; and (b) national legislation may limit access to information in accordance with the optional exceptions outlined in article 4, paragraphs 3 and 4 (see also the commentary to article 2).

Environmental information, the public and public authorities are defined in article 2. A "request" can be any communication by a member of the public to a public authority asking for environmental information. The Convention does not specify the form of the request, thus implying that any request meeting the requirements of article 4, whether oral or written, will be considered to be such under the Convention.

However, while the Convention does not require a person making an information request to explicitly refer to (a) the Convention itself, (b) the implementing national legislation or (c) even the fact that the request is for environmental information, such references are considered good practice. Any or all such indications in the request facilitate the work of the responsible public authorities and help in avoiding delays. This is particularly so where only part of the requested information constitutes environmental information as defined in article 2, paragraph 3, of the Convention, or where the relevance of the requested information to the environment might not be obvious at first glance. Such a situation arose in communication ACCC/C/2007/21 (European Community) involving a request for information about the financing of a project by the European Investment Bank. The Compliance Committee noted that, where a public authority does not recognize a request as an environmental information request, it may not be aware of the potential legal obligations, thus causing problems with compliance.¹⁸⁶

Further, under the Convention, public authorities must upon request provide copies of the actual documents containing the information, rather than summaries or excerpts prepared by the public authorities. This requirement goes together with subparagraph (b), requiring that information should be given in the form requested, subject to certain exceptions. The requirement that copies of actual documents should be provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context.

(a) Without an interest having to be stated;

Under the Convention, public authorities must not impose any condition for supplying information that requires the applicant to state the reason he or she wants the information or how he or she intends to use it. Requests cannot be rejected because the applicant does not have an interest in the information. This follows the “any person” principle.

For example, Georgia’s General Administrative code contains a provision expressly stipulating that a requester is not obliged to state the reason he/she is requesting the information.

Another example is Kazakhstan’s 2004 Memo on Processing Public Requests for Environmental Information, prepared by the Ministry of the Environment and OSCE, which states that a request for information does not need to be justified. For such a memo to be effective, it should be legally binding and properly disseminated among the public authorities. Training and capacity-building are also needed. Kazakhstan’s efforts appear to have been partially in response to a finding of non-compliance on this exact issue by the Compliance Committee in its findings on communication ACCC/C/2004/1 (Kazakhstan).¹⁸⁷

(b) In the form requested unless:

Under article 4, members of the public may request information in a specific form, such as paper, electronic media, videotape, recording, etc. In general, the public authority must honour the request for a specific form except under the conditions outlined below.

Why is the form important?

Allowing the applicant to choose the form can have benefits for the public authority and the applicant, for instance:

- Faster provision of information.
- Less costly provision of information.
- Accommodation of members of the public with special needs, such as disabilities, different languages, or lack of certain equipment.
- Efficient use of complex information systems, such as geographic information systems, which can produce information in a variety of forms.

This provision also means that public authorities must provide copies of documents when requested, rather than simply providing the opportunity to examine documents. In addition, some applicants may prefer to examine the original documentation rather than receive copies. If they so request, public authorities must allow them to do so, subject to paragraphs 1 (b) (i) and (ii) discussed below. This has parallels with article 6, paragraph 6, which requires public authorities to give the public access for examination of documents regarding decisions on specific activities.

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee found the Party concerned to be not in compliance with the Convention when authorities responding to an information request failed to provide the information in electronic form on a CD-ROM as requested, and instead provided paper copies of the information.¹⁸⁸ The provision of information in paper form proved to be 100 times more expensive to the communicant than provision of the information in the form requested would have been. The requester determined that it could not afford to pay 1,200 euros for the complete 600-page document. The requester decided to take only 34 pages, and also gave up its request for copies of certain relevant plans for which an additional charge would have been levied. Thus, the failure to provide information in the manner requested significantly limited the public's access to environmental information in that case.

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

The Convention provides certain exceptions to the requirement that information should be provided in the form requested. Under article 4, paragraph 1 (b) (i), the public authority may decide on another form than the one requested if it is "reasonable". In any case, the public authority must state its reasons.

A second exception is that the public authority is not required to give the information in the form requested if it is already publicly available in another form, such as in a government-published book that may be found in a public library. Instead, the public authority may refer to or give the already publicly available form. Clearly, accessibility of the publicly available version of the information should be taken into account. Informing an applicant about the existence of a single copy of a book in a library 200 kilometres from his or her residence would probably not be a satisfactory response. In addition, "publicly" available assumes that the same reasonable cost standards are in place for that information as required under the Convention.

However, the implementation standards set in article 3, paragraph 1, make it clear that access to information should be effective in practice. To be effective, "publicly available" means that the information is easily accessible to the member of the public requesting the information. In addition, "another form" means that the available information is the functional equivalent of the form requested, not a summary; and that the information should be available in its entirety.

Estonia's Public Information Act

The general obligation of public authorities as the holders of information to assist persons making requests for information has been established in paragraph 9 of Estonia's Public Information Act. A more detailed description of the obligations is provided in paragraph 15 of the same Act, according to which the holders of information are required to clearly explain to requesters the procedure for and the conditions and manners of access to information; to assist them in every way during the application process; to identify the relevant information and most suitable manner of access thereto; and, if necessary, to promptly refer requesters to the competent official or employee, or promptly forward the request in writing to the competent official or employee. If a request for information does not indicate the manner in which the requested information is to be provided, the holder of information must promptly contact the requester in order to clarify the request.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

The Convention requires public authorities to make information available within a specific time limit. As a general rule, it requires public authorities to provide the information “as soon as possible”. It then sets a maximum time limit of one month, with certain circumstances allowing an extension of up to two months. The limits set in the Convention are maximum limits and the Convention requires Parties to respond to requests in a shorter time frame whenever possible. The Convention also does not define when the period for the time limit begins, but says only after the request has been “submitted”. The time when a request will be deemed submitted will generally be regulated by the administrative law of a Party.

Timing for providing information

- “As soon as possible” the base standard.
- “At the latest within one month” the maximum time allowed.
- “Extension of up to one additional month” only when justified by the volume and complexity of the request.

In cases where viewing files in a public office is requested, “as soon as possible” can mean a few days or longer depending on how quickly the office can organize the release of the information. Countries have defined the time limit differently depending on whether the request is to view the document or to copy it. The Brussels Region of Belgium, for example, encourages that access should take place immediately if viewing of a document is requested.¹⁸⁹ In the case of a request for copies of a document, “as soon as possible” can mean within a few days. For example, in Norway, public authorities must provide information “without undue delay”, which typically means within two to three days of receiving a request.¹⁹⁰ The “as soon as possible” standard is echoed in article 4, paragraph 5, requiring the public authority to inform the applicant or transfer the request “as promptly as possible” if it does not hold the information.

In normal cases, the Aarhus Convention gives authorities up to one month after the request was submitted to answer, including if the answer will be a refusal under article 4, paragraph 7 (see also the [commentary to article 4, paragraph 7](#)). This time limit was chosen because the vast majority of countries in the ECE region already have such limits, many of them even shorter. For example, Portugal requires the request to be answered in 10 days, Hungary in 15 days and Slovenia sets a limit of 20 days for providing the requested information and 8 days for a refusal. Latvia also generally requires answers within 15 days, though other time limits may apply. For example, the time limit is 7 days in the case of a refusal or 30 days if additional processing of the requested information is necessary. In Georgia, the public authority is obliged to provide the requester with the requested information promptly or within 10 days. If justified on the basis of the volume of the request, the authority may extend the deadline within limits, and must notify the requester. Attention should be paid to whether the country also has a general information law, since deadlines may differ. In Poland, for example, the deadline for responding to an environmental information request is actually longer than the deadline for a general information request.

In some cases, the Convention allows public authorities to find that the “volume and complexity” of the information justify an extension of the one-month time limit to two months. Countries can establish clear criteria to judge whether the volume and complexity of information justify an extension. If the volume and complexity of the request justify the longer two-month period, public authorities must inform the applicant of this extension as soon as possible and at the latest by the end of the first month. The Convention also requires public authorities to give the reasons for the extension. This requirement is reiterated with respect to the refusal of an information request in article 4, paragraph 7, which also requires a reason for an



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extension beyond the one-month period to be given to the applicant.

The possibility of an extension or of an eventual refusal of an information request means that early notification of the status of the request is important for achieving effective access to information. Some countries, therefore, require special early notification of the status of the request. For example, Ukraine requires one time limit for notification of the status of the information request and a second time limit for the actual response to the request. The authorities must reply to a request within 10 days and inform the applicant whether his request will be granted (and if not, why), while the term for providing a response to the request is 30 days. This type of requirement for an interim reply speeds up the process significantly, especially if the request is refused.

Proper administration of the time limits in the Convention is critical to the proper functioning of the regime. Time frames are often linked with the time frames of other processes. For example, a delay in receiving information in response to an information request may affect the ability of members of the public concerned to participate in decision-making processes under article 6. Such a situation was brought before the Compliance Committee in ACCC/C/2008/24 (Spain). In that case, information was provided four months after a request for information related to pending land use decisions. In the intervening time, authorities decided to approve a modification of the land use plan. Thus, the delay in providing information impinged on the ability of the public to participate in the planning decision. The Compliance Committee did not find a violation of the Convention with respect to this information request because the Convention was not in force with respect to the Party concerned at the time of the request, but a later information request in the same case was found to have been improperly handled when it was not fulfilled until seven months after the request was made. The Compliance Committee clarified that at the end of the two-month maximum period for complying with information requests, the only option for the public authority is to provide the information or refuse the request in whole or in part on the basis of article 4, paragraphs 3 and 4.

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

A public authority is required to give access only to the information that it “holds”. This means that if a Party decides to provide for this exception, it will need to have defined what is meant by “holding” information. However, information that is held is certainly not limited to information that was generated by or falls within the competency of the public authority. The Convention provides some guidance in article 5, paragraph 1 (a), which requires Parties to ensure that public authorities possess and maintain environmental information relevant to their functions. In practice, for their own convenience, public authorities do not always keep physical possession of information that they are entitled to have under their national law. For example, records that the authority has the right to hold may be left on the premises of a regulated facility. This information can be said to be “effectively” held by the public authority. Domestic law may already define conditions for physical and/or effective possession of information by public authorities. Nothing in the Convention precludes public authorities from considering that they hold such information, as well as the information actually within their physical possession.

If the public authority does not hold the information requested, it is under no obligation to secure it under this provision, although that would be a good practice in conformity with the preamble and articles 1 and 3. However, failure to possess environmental information relevant to a public authority’s responsibilities might be a violation of article 5, paragraph 1 (a). Moreover, where another public authority may hold the information, the public authority does have a duty under article 4, paragraph 5, to inform the applicant which public authority may have the information. Alternatively, it can transfer the request directly to the correct public authority and notify the applicant that it has done so. In either case, the public authority must take these measures as promptly as possible.

(b) The request is manifestly unreasonable or formulated in too general a manner; or

Public authorities may refuse a request for information that is “manifestly unreasonable”. Parties to the Convention are not required to apply this exception. If a Party decides to provide for this exception it will need to define “manifestly unreasonable” so as to assist public authorities in determining when a request is so unreasonable that it may be refused under this exception, and to protect the public’s interest that the test will not be applied arbitrarily. Although the Convention does not give direct guidance on how to define “manifestly unreasonable”, it is clear that it must be more than just the volume and complexity of the information requested. Under article 4, paragraph 2, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request “manifestly unreasonable” as envisioned in paragraph 3 (b).

The above interpretation was confirmed by the Compliance Committee in its combined findings on submission ACCC/S/2004/1 (Ukraine) and communication ACCC/C/2004/3 (Ukraine), where the Committee noted that the volume of information requested does not justify a refusal to provide the requested information. The Committee stated:

In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information, in accordance with article 4, paragraph 8, of the Convention.¹⁹¹

Under the Convention, public authorities may also refuse an information request on the grounds that it is “formulated in too general a manner”. The Convention does not define “too general” and if a Party decides to provide for this exception, it may wish to provide further guidance for its public authorities. The concept of “too general” is already defined in some national legislation or practice.

Defining “too general”

Parties have flexibility in how they define “too general”, but practice from other countries may provide some guidance.

For example, the French Commission for Access to Administrative Documents has ruled in the past that a request for “any document” relating to a specific wild bear species and a request for “all opinions” issued for EIAs by the Government were too general. However, it must be kept in mind that in France many EIAs are conducted each year, so that the request would cover hundreds and perhaps thousands of EIAs. The French Commission did not consider too general a request for the data from water analyses of all the local authorities in a department for five specified months and a request for all the documents relating to the development of the local road system.

Article 3, paragraph 2, requires Parties to try to ensure that guidance is provided to the public in seeking information. Any assistance or guidance provided by public authorities to members of the public seeking information will help to avoid situations where the request is manifestly unreasonable or formulated in too general a manner.

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

The public authority may refuse to disclose materials “in the course of completion” or materials “concerning internal communications”, but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by “customary practice” and this may differ according to the administrative law of an implementing Party. For example, for some Parties, establishing that such an exemption exists under “customary practice” may require evidence of established norms of administrative practice to that effect.

Even when the requirement exists in national law or customary practice, authorities are required to take into account the

public interest that would be served by disclosure of the information before making a final decision to refuse the request. The requirement in paragraph 7 to put the reasons for refusal in writing means that authorities must document precisely how they considered the public interest as a part of their determination.

The Convention does not clearly define “materials in the course of completion”. However it is clear that the expression “in the course of completion” relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared.

A request for access to raw environmental data cannot be refused on the grounds that it is “material in the course of completion” to be made publicly available only after processing or correction factors have been applied. In its findings on ACCC/C/2010/53 (United Kingdom), the Committee considered whether raw air pollution data collected from a monitoring station and not yet subject to data correction could be exempted from disclosure as “material in the course of completion”. The Committee considered that the raw data was itself environmental information within the meaning of article 2, paragraph 3 (a), of the Convention.¹⁹² The Committee held that should the authority have any concerns about disclosing the data, they should provide the raw data and advise that they were not processed according to the agreed and regulated system of processing raw environmental data. The Committee held that the same would apply for the processed data, in which case the authorities should also advise on how those data were processed and what they represented.¹⁹³

Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words “in the course of completion” suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the “course of completion” they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. “In the course of completion” suggests that the document will have more work done on it within some reasonable time frame. Other articles of the Convention also give some guidance as to how Parties might interpret “in the course of completion”. Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, EIAs, policies, programmes, plans and executive regulations that are open for comment under the Convention would not be “materials in the course of completion” under this exception.

A similar conclusion was reached by the Conseil d’Etat of France, in case N° 266668 (7 August 2007) with respect to the use of the term “unfinished documents” in Directive 90/313/EEC. The Conseil d’Etat held that a provision excluding preliminary documents produced in the course of drawing up an administrative decision from the right of access to environmental information is not compatible with article 3, paragraph 3, of Directive 90/313/EEC which limits the possibility for a request for environmental information to be refused to when the request concerns “unfinished documents”.

The second part of this exception concerns “internal communications”. Again, Parties may wish to clearly define “internal communications” in their national law. In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form. Opinions or statements expressed by public authorities acting as statutory consultees during a decision-making process cannot be considered as “internal communications”. Neither can studies commissioned by public authorities from related, but independent, entities. Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an “internal communication”.

Finally, even if one of these two exceptions applies, paragraph 3 (c) further requires Parties or public authorities to take into account the public interest in disclosure of the information. The public interest test is discussed again in paragraph 4.

Taking the public interest into account

The Convention does not provide specific guidance on how to balance the “public interest”. One issue is whether Parties may choose to consider the public interest (a) categorically across an entire issue; (b) case by case in each decision on whether to release information; or (c) may provide some latitude for case-by-case determinations within the framework of policies or guidelines. In Case C-266/09 (*Commission v. the Netherlands*) the ECJ held that article 4 of Directive 2003/4/EC should be interpreted to require that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved.¹⁹⁴

4. A request for environmental information may be refused if the disclosure would adversely affect:

The interests set out in article 4, paragraph 4, are further exceptions to the general rule that information must be provided upon request to members of the public. Parties are not required to incorporate all or any of these exceptions into their implementation of the Convention. In practice there is substantial variation among Parties to the Convention as to whether the exceptions contained in this paragraph are included in their national law. For example, in its 2008 National Implementation Report, Armenia reported that its national law does not allow for the exceptions to disclosure found under subparagraphs (a), (b), (g) or (h). This is a good example of the spirit of article 3, paragraph 5, which expressly allows Parties to establish regimes that provide for broader access to information than required under the Convention.

In any case, before one of the exceptions can be applied in a particular case, the relevant public authority must make a determination that disclosure will adversely affect the stated interest. Adversely affect means that the disclosure would have a negative impact on the relevant interest. The use of the word “would” instead of “may” requires a greater degree of certainty that the request will have an adverse effect than applies in other provisions of the Convention (e.g., article 6, para. 1 (b)). Parties may wish to provide criteria for the public authorities to apply when deciding whether information requested in a particular case would indeed adversely affect the stated interests.

In addition, as will be discussed later, either the Party or the public authority must take the public interest in disclosing the information into account, must consider whether the information relates to emissions and must generally interpret the grounds for refusal laid out in article 4, paragraph 4, in a restrictive way. These last provisions come after the exceptions are listed and apply to all of them. They are discussed in more detail below.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee referred to article 4, paragraph 4, in its finding, *inter alia*, that the adoption of a Government regulation “On Rent of Forestry Fund for Hunting and Recreational Activities”, which set out a broad rule with regard to the confidentiality of information received from rent-holders, constituted a failure by the Party concerned to comply with article 3, paragraph 1, and article 4, paragraph 4, of the Convention.¹⁹⁵

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

Article 4, paragraph 4 (a), provides for an exception to the release of information relating to the proceedings of public authorities, if such release would adversely affect the confidentiality of such proceedings. The Convention does not define “proceedings of public authorities” but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence. The confidentiality must be provided for under national law. This means that public authorities may not unilaterally declare a particular proceeding confidential and stamp documents “confidential” in order to withhold them from the public. National law must provide the basis for the confidentiality.

(b) International relations, national defence or public security;

If release of the requested information would adversely affect international relations, national defence or public security, the public authority may consider whether to deny the request.

The Convention does not define the terms “international relations”, “national defence” or “public security”, but it is implicit that the definition of such terms should be determined by the Parties in accordance with their generally accepted meaning in international law. Many national Governments already have similar exceptions in place and have interpreted them narrowly. Some countries have chosen to require information concerning the environment to be made publicly accessible, regardless of how it affects international relations, national defence or public security. For example, the Ukrainian Constitution, article 50, provides that no one may restrict information on the environmental situation, the quality of food and housing. The Russian Federation Law on State Secrets declares that information, *inter alia*, on the state of the environment, health and sanitary data is excluded from being designated a State secret.¹⁹⁶ Public authorities tend to analyse whether public access to the information would actively harm national security.

How to determine when information is a “State secret”?

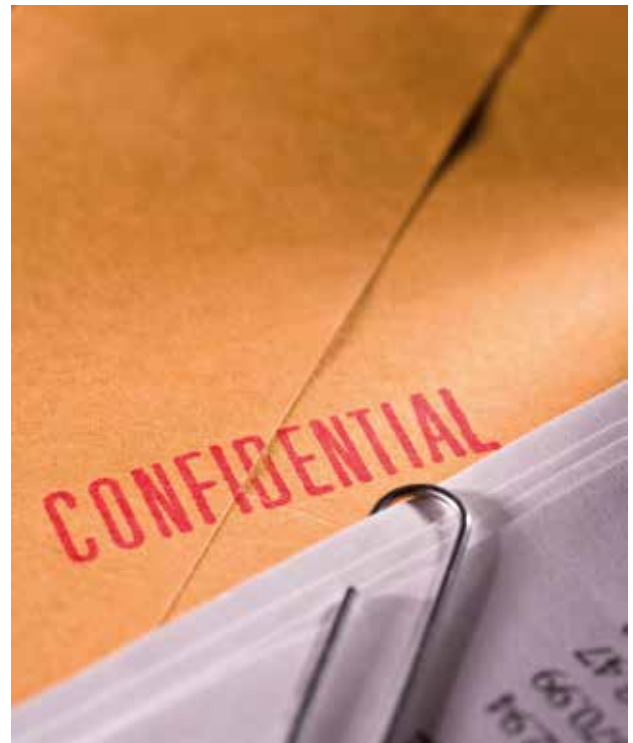
Some countries, such as Hungary, have established several steps for determining whether information should be kept secret under this or other exceptions. Hungary, like most other countries, exempts information defined as State secrets from public disclosure. It takes two steps to declare a piece of information a State secret:¹⁹⁷

- The class of information must be defined as a State secret in the annex to the Act on State Secrets and Official Secrets.
- The specific piece of information must be declared a State secret by a qualified senior executive (as defined in Hungarian law).

Information that must actively be provided to the public cannot, under Hungarian law, be declared a State or official secret. The list of classified documents must also be published in the official State gazette and the Ombudsman must give a final opinion on the secrecy of the information.

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

If the release of information would adversely affect the “course of justice”, public authorities may have a legal basis to refuse to release it. The course of justice refers to active proceedings within the courts. The term “the course of” implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused.



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Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases. The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

Under the Convention, public authorities are allowed to withhold certain, limited types of commercial and industrial information from the public. This exemption from the obligation to disclose information is predominantly focused on protecting legitimate economic interests of private entities; however, it may also be used to protect legitimate economic interests of public bodies or the State itself, provided that the requested information is of a commercial or industrial nature. For public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that

information must pass several tests.

First, national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets.

Second, the confidentiality must protect a “legitimate economic interest”. In this regard, it would be difficult for an enterprise operating in a monopolistic manner, such as certain State-run enterprises, to assert a claim of commercial confidentiality, since there are no competitors that could gain an advantage by access to the information.

Options for implementing “legitimate economic interest”

The Convention does not define “legitimate economic interest”. Parties may wish to consider taking the follow steps to assist in the determination of whether disclosure would adversely affect a legitimate economic interest in a particular case:

- **Establish a process.** Parties may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential.
- **Determine confidentiality.** Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case.
- **Determine harm.** Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist competitors.

Thirdly, as an exception to the exception, the Convention holds that information concerning pollutant emissions which is relevant for the protection of the environment may not be claimed as confidential commercial information. This provision is broadly consistent with the principle that information about emissions would lose its proprietary character once the emissions enter the public domain. In principle, the exception seems to allow that information on emissions that is not relevant for the protection of the environment could still be exempted from disclosure. In practice, it is not completely clear in what circumstances information on emissions might be deemed not relevant to the protection of the environment. In view of the Convention’s principles and objectives, it would seem that any information on emissions that may affect the quality of the environment should be considered relevant for environmental protection, irrespective of the quantities of the emissions involved. Indeed, a case can be made that all information on emissions is relevant to the protection of the environment. This notion is reflected in the legal systems of a number of ECE member States.

Defining “emissions”

The term “emission” has been defined in the Industrial Emissions Directive¹⁹⁸ as a “direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land”.

(e) Intellectual property rights;

Under the Convention, public authorities may choose not to disclose information that would adversely affect an intellectual property right. Intellectual property and intellectual property rights are protected under national and international law.

The primary forms of intellectual property rights are copyright, patent, trademark (including geographical indications) and trade secret. Sui generis forms include, inter alia, plant breeders’ rights, database protection and industrial designs. Generally, patents protect novel ideas or inventions, copyrights protect original expressions (art, literature, music, etc.), trademarks and geographical indications protect symbols and names used in commerce and trade secrets protect proprietary business information of all kinds from improper acquisition and use.

Intellectual property laws do not, as a general matter, protect “generic” ideas and concepts, principles of nature or scientific fact, or (except for geographical indications) ideas, names or expressions which are already in widespread public use. For patents, copyright and trademarks, protection is afforded to a specific individual person or corporate entity, is limited in duration and has the primary goal of creating economic rewards for creators and inventors through market transactions involving the intellectual property right or its subject matter.

Misusing copyright to deny access to information

In its findings on communication ACCC/C/2005/15 (Romania), the Compliance Committee considered the question of the legality of designating the contents of an EIA study to be the property of the author of the study, which the relevant public authority could only disclose with the author's permission. The Committee stated: "EIA studies are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law."¹⁹⁹ Furthermore, where copyright laws may be applied to such studies, it does not justify a general exclusion of such studies from public disclosure.²⁰⁰

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

Under the Convention, public authorities may withhold information that will adversely affect the privacy of individuals. However, the confidentiality must be protected in national law. The individual whose personal data is in question can waive his or her right to confidentiality.

The exception does not apply to legal persons, such as companies or organizations. It is meant to protect documents such as employee records, salary history and health records.

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

Under the Convention, public authorities may withhold information that would adversely affect the interests of a "third party" who voluntarily gives the information to the government and who does not consent to its release. A "third party" is a person not a party to a particular agreement or transaction, but a person who may have rights or interests therein (see the [commentary to article 2, paragraph 1](#)). In the case of access to information, the "transaction" will generally be the information request. If the request relates to information supplied by another person or entity (for example, a company applying for a permit) that entity will be a "third party" for the purposes of the information request. The exemption only applies, however, to cases where the requested information was supplied voluntarily.

This exception is meant to encourage the voluntary flow of information from private persons to the government. Information provided to public authorities that the public authority has not specifically requested is not necessarily "voluntary". It would not be voluntary, for example, if the person providing the information could be legally obliged to provide it.

For example, in some countries the national Government may delegate competence to a public authority to require an enterprise to report certain information. The public authority may decide not to impose a formal obligation to report this information if it is already being reported in practice. Most countries have found this type of information not to be "voluntary". This protects the public interest by ensuring that any information that the public authority is entitled under national law to require to be submitted is accessible to the public.

Not only must the information in question qualify as voluntarily supplied information, the person that provided it must have denied consent to have it released to the public. Some countries require such a refusal to release to be made by the party providing the information in writing and at the time the information is provided. In those countries, the public authority is usually not under an obligation to go back to the third party at the time of the request to gain its consent for the disclosure.

Where a particular Party uses voluntary agreements for reporting certain information in practice, it would be a good idea to specify at the outset in the terms of the agreement itself how any information disclosed by the private party to public authorities may be used by those authorities.

(h) The environment to which the information relates, such as the breeding sites of rare species.

Public authorities may refuse to release information to the public that would adversely affect the environment. This exception allows the government to protect certain sites, such as the breeding sites of rare species, from exploitation — even to the extent of keeping their location a secret. It exists primarily as a safeguard, allowing public authorities to take harm to the environment into consideration when making a decision whether or not to release information.

Some grounds for refusal that are not permitted under the Convention

Among the possible grounds that might be put forward for refusal to comply with an information request under the Convention, those that are not permissible include:

- The information is already in the public domain.²⁰¹
- Disclosure of the information requires consent of a third party.²⁰²

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

The final clause of article 4, paragraph 4, instructs Parties and public authorities on how to interpret all of the exceptions to access to information under that paragraph. The fact that the requested information falls, in a literal sense, under one or other of the exempt categories is not in and of itself sufficient justification for invoking the exception.

Parties and public authorities must interpret the exceptions in a “restrictive way”. For example, if an official refuses to release information by claiming one of the exceptions, he or she could be required to go through a process to ensure that the decision to use the exception is not arbitrary and that in each case the release of information would lead to actual harm to the relevant interest. The Convention contains two safeguards that help Parties understand what is meant by restrictive.

Under article 4, paragraph 4, Parties must take the public interest served by disclosure into account. As discussed in article 4, paragraph 3 (c), “the public interest served by disclosure” is not clearly defined in the Convention. It is left for Parties to decide how the public interest will be taken into account, in conformity with the principles and objective of the Convention. The Sofia Guidelines on Public Participation in Environmental Decision-making (see “The Road to Aarhus” in the Introduction to the Implementation Guide) provide Parties with some guidance as to how this might be done. Paragraph 6 of the Sofia Guidelines proposes a balancing exercise, stipulating that the “aforementioned grounds for refusal are to be interpreted in a restrictive way with the public interest served by disclosure weighed against the interests of non-disclosure in each case”. Most of the Parties to the Aarhus Convention have endorsed the Sofia Guidelines, and the Sofia Guidelines are specifically mentioned in the preamble to the Convention.

Taking interests into account thus requires an active balancing of interests. Nevertheless, Parties can and should give guidance to their public authorities on how to carry out such balancing so as to limit arbitrary distinctions and promote uniformity.

The balancing test that authorities must go through to weigh the public interest served by disclosure against an interest protected under one of the exceptions in subparagraphs (a) to (h) was noted by the Compliance Committee in its findings on communication ACCC/C/2007/21 (European Community). In that case the Committee rejected the position of the Party concerned that the identification of *any* harm to one of the protected interests would be sufficient to keep the information from being disclosed. As the Committee stated, “in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.”²⁰³

In a second safeguard, the Convention requires public authorities to take into account whether the information requested relates to emissions into the environment. As is evident in the exception concerning commercial confidentiality (article 4, para. 4 (d)), the Convention places a high priority on releasing information on emissions.

Public interest under the EU's Transparency Regulation 1049/2001 and Aarhus Regulation 1367/2006

The EU's Transparency Regulation²⁰⁴ includes provisions related to public access, upon request, to documents drawn up or received by EU institutions. This Regulation has been qualified with respect to environmental information by the Aarhus Regulation,²⁰⁵ which was adopted to apply the Aarhus Convention to EU institutions. The two regulations approach the concept of "the public interest" differently, as is illustrated by Case T-264/04, *WWF-EPO v. Council of the European Union*.²⁰⁶ The case involved a complaint by an NGO against the Council for failure to fulfil a request under the Transparency Regulation to provide information related to a committee meeting at which the EU position in relation to a World Trade Organization (WTO) meeting was discussed. In determining that the refusal was justified, the Court confirmed the rule is:

The public is to have access to the documents of the institutions and refusal of access is the exception to that rule. Consequently, the provisions sanctioning a refusal must be construed and applied strictly so as not to defeat the application of the rule. Moreover, an institution is obliged to consider in respect of each document to which access is sought whether, in the light of the information available to that institution, disclosure of the document is in fact likely to undermine one of the public interests protected by the exceptions which permit refusal of access. In order for those exceptions to be applicable, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical.

The Court went on to find that the documents related to sensitive ongoing international negotiations, and thus the contention that it was in the public interest to refuse to disclose the documents was justified.

In contrast to the Transparency Regulation, the Aarhus Regulation establishes clearly that there is an overriding public interest in disclosure when information requested relates to emissions into the environment. The Aarhus Regulation also specifically refers to the Transparency Regulation's grounds for refusal, stating that these "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment."²⁰⁷

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

Article 4, paragraph 5, reflects the principle that public authorities have a collective responsibility for dealing with information requests from the public, irrespective of the particular agency or department to which a request is submitted. Article 4, paragraph 3 (a), allows a public authority to refuse a request for information if it does not hold that information. However, under paragraph 5, the public authority's responsibility does not end with the written refusal notice. The public authority has two choices. It can tell the applicant where he or she may find the information or it can transfer the request to the proper authority and inform the applicant of the transfer. In general, the most timely and effective method, as encouraged in the Convention's preamble and article 3 on general provisions, is to require public authorities to transfer the request directly, whenever possible.

Whether the public authority tells the applicant where he or she may find the information or whether it transfers the request to the proper authority directly, in its findings on ACCC/C/2009/37 (Belarus), the Compliance Committee held that two conditions must be met. The first condition for "onward referral" under article 4, paragraph 5, is that the request for information is referred to another "public authority."²⁰⁸ As discussed in the commentary to article 2, paragraph 2 (b) and (c), private entities may be considered as public authorities under the Convention for some purposes (see commentary to article 2, paragraph 2 (b) and (c)).²⁰⁹ The second condition is that onward referral should not compromise the Party's compliance with article 5. In particular, the obligation to ensure that public authorities possess environmental information which is relevant to their functions and the obligation to establish practical arrangements to ensure that environmental information is effectively accessible to the public, as required in article 5, paragraph 2 (a) and (b).²¹⁰

The Convention also emphasizes the importance of timeliness. Article 4, paragraph 5, requires public authorities to notify the applicant or transfer the request "as promptly as possible". Indeed, some countries give a specific, much shorter time limit for referrals than for the provision of information.

Timing of referrals

Parties may choose to make the time limits for referrals shorter than those for refusals. In Armenia, if an agency does not possess the requested information, it is obliged to forward the request to an agency that does possess the information within five days.²¹¹ Hungarian law adopts another way to ensure that referral does not become an excuse for delay. In Hungary, the transfer of a request within the administrative system does not affect the starting point of the administrative time limit.²¹²

In many countries public authorities do not necessarily know what type of information other public authorities have. This can make referrals difficult or incorrect, adding to delay for the public in securing access to information. Article 5, paragraph 2 (a), stipulates that Parties should provide sufficient information to the public about the type and scope of environmental information held by relevant public authorities — a practice that has improved access to information in some countries already.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

Once a public authority determines that certain information is confidential in accordance with one of the exceptions, this does not mean that the entire requested document may be refused. Under the Convention, public authorities must make the non-confidential portion of the information available.

In practice, this usually means that a public authority marks out or deletes the information to be withheld. Some countries require the public authority to indicate the general nature of the deleted information. For example, in the Netherlands, if confidential commercial information has been removed from a document before its release, a so-called second text must be supplied. It indicates where information has been removed and, in a general way, the substance of the information withheld.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

The Convention sets out very clear procedures for refusals of access to information. It stipulates that if the request for information is in writing, the refusal must also be in writing. If the request was made verbally and the applicant asked for an answer in writing, the refusal must be in writing. Many countries have found it easier and cheaper to uniformly require refusals to be in writing. For example, in Belgium, the reason for every partial or complete refusal must be given and the applicant notified in writing. As an alternative, some countries have tried to ensure that everyone is aware of the right to have a refusal in writing. In the Netherlands, a person receiving an oral refusal of a request for information must be informed as to how they can obtain a refusal in writing.

Under the Convention, the refusal must include reasons and information on the review procedure (see discussion under article 9, para. 1). This applies to both written and oral refusals. Written documentation of the reasons for refusal provides

the applicant with the opportunity to rephrase and resubmit the request. These reasons can include a determination that the information requested meets the criteria of one of the exceptions, that the request was too general, or that the public authority in question does not hold the information and is not aware of any other public authority which might hold the information.

If the applicant disagrees with the rationale for refusal, a written reasoning also provides the basis for an appeal of the decision under article 9. In fact, in Belgium, not only must the reason for every partial or complete refusal be given in writing, but the authority must also specify the options open for appeal. In France, the authority must specify the provisions of law on which the refusal is based.²¹³

The Convention also regulates the timing of a refusal along similar lines as the time limits set out in article 4, paragraph 2, for responding to requests for information. The Convention sets out a general rule of “as soon as possible”, “a maximum of one month”, and an extension under certain circumstances of one additional month (see further the commentary to article 4, paragraph 2). Some countries require shorter deadlines than one month for refusals. For example, in Norway, when a request for information is received by an agency, the agency has five working days to respond. If no response is given within this time period, the request is to be considered rejected and a right to appeal arises, independent of whether the request has actually been rejected.²¹⁴ Any rejection must be given in writing and accompanied by the relevant legal provision justifying the refusal.²¹⁵ Within three weeks of receiving a rejection, the requester may request a further written justification for the refusal. The agency is required to provide the further justification in writing at the earliest opportunity and not later than 10 working days after receiving the request.²¹⁶ In all cases of refusals, Norwegian authorities must consider whether the information can be released despite the fact that it has been classified as exempt from public access.²¹⁷

A public authority may find itself in a situation where a third party with a possible protectable legal interest in the information under consideration has mounted a legal challenge against the release of the information. There is no provision in the Aarhus Convention, however, that would extend a relevant authority’s deadline for providing the information due to the fact that there is a legal challenge pending.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee found that the failure of a public authority to state lawful grounds for refusal of access to information, and the failure of the same public authority to give in its letters of refusal information on access to the review procedure provided for in accordance with article 9, constituted a failure by the Party concerned to comply with article 3, paragraph 2, and article 4, paragraph 7, of the Convention.²¹⁸ Furthermore, the failure of the authority to respond in writing and in a timely manner to one of the information requests was found to be a violation of article 4, paragraph 7, of the Convention.²¹⁹

Time limits for refusals

General rule: *as soon as possible*. In this way, the member of the public requesting information has the ability to rephrase the request or appeal against the refusal and still receive relevant information in a timely fashion;

Maximum time limit: *one month*. Under the Convention, public authorities may not take longer than one month to issue a refusal notice;

Extensions: *up to one additional month*. If the complexity of the information justifies an extension, the public authority may take one more month. To receive the extension, the public authority must inform the applicant of the extension and the reasons justifying it, by the end of the first month at the latest. Note that some countries require a shorter time frame for refusals of information requests.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

The Convention embraces the concept that if information is to be truly accessible it must also be affordable. Article 4, paragraph 8, stipulates that any charges for information must be reasonable. Many countries with access to information regulations try to keep information affordable — and free whenever possible.

The Convention safeguards this requirement by obliging public authorities to provide guidance for information charges. These guidelines must include (a) a schedule of charges; (b) criteria for when charges may be levied; (c) criteria for when charges may be waived; and (d) criteria for when the supply of information is conditional on the advance payment of a charge.

A schedule of charges can help protect against abuse and inconsistency of charges. In addition, it strengthens the ability of members of the public to access information if they know in advance what it will cost. For example, a country may decide not to levy charges for copies of a limited number of pages, for electronic transmissions, for non-commercial use or for limited postage. To ensure that financial barriers are not an impediment to access to information, and every person can afford information, public authorities often waive fee requirements for individuals and NGOs.

“A reasonable amount”

The Compliance Committee considered the issue of reasonable costs in its findings on communication ACCC/C/2008/24 (Spain). Municipal authorities had set a charge of €2.15 per page for copying documents held by the municipality. The Committee analysed the practice of States and jurisprudence of European and national courts, as well as the local commercial rate for copies, which was €0.03 per page, and determined that the municipality's charge scheme was unreasonable.²²⁰

The Court of Justice of the European Communities ruled in Case C-217/97, *Commission v. Germany* that:

Any interpretation of what constitutes “a reasonable cost” for the purposes of Article 5 of the [EC] directive [on information, 1990] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected. Consequently, the term “reasonable” for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.²²¹

National practice supports the idea that costs should be limited to the material costs of producing information. By way of illustration, the Information Tribunal of the United Kingdom in a 2006 case ruled that:

The Council should adopt as a guide price the sum of 10p per A4 sheet [about €0.11], as identified in the “Good practice guidance on access to and charging for planning information” published by the Office of the Deputy Prime Minister and as recommended by the DCA [Department of Constitutional Affairs] ... The Council should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so.²²²

ARTICLE 5 COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION



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Article 5 sets out the obligations of the Parties and public authorities to collect and disseminate environmental information. The requirements for active collection and dissemination of information imply a sense of urgency and importance that certain types of information should reach the public. Whereas article 4 applies to “environmental information” generally, article 5 contains obligations with respect to specific categories of information. This includes, inter alia, information relevant to public authorities’ functions, information about proposed and existing activities that may significantly affect the environment, information in times of emergencies, information on the state of the environment, product information, pollutant release and transfer information, information about laws, programmes, policies, agreements and other documents relating to the environment and information about how to get information.

Some of the provisions of article 5 require the Parties or public authorities to take certain specific steps for collection and dissemination. Other provisions give the Parties and public authorities some guidance as to the desired end result, but they leave the choice of process and implementation methods open.

The implementation of article 5, paragraph 9, on pollution inventories or registers, has been greatly enhanced by the adoption and entry into force of the 2003 Protocol on PRTRs. The Protocol entered into force on 8 October 2009.

The following table sets out the main obligation contained in each provision of article 5 and the types of information covered by that obligation. It also indicates implementation elements that are found in the Convention itself. These elements are meant to guide the Parties and public authorities as they integrate the Convention’s obligations into their national legal framework and determine how best to make the Convention work in practice.

| Provision | Obligation | Types of information | Implementation elements |
|-------------------------------|---|---|---|
| Article 5, paragraph 1 | Public authorities to collect, possess and disseminate various types of environmental information | <ul style="list-style-type: none"> • Environmental information relevant to public authorities’ functions • Information about proposed and existing activities which may significantly affect the environment • Information which could enable the public to prevent or mitigate harm arising from a threat to human health or the environment and that is held by a public authority | <ul style="list-style-type: none"> • Public authorities to possess and update information relevant to their functions • Mandatory systems that ensure adequate information flow to public authorities about proposed and existing activities which may significantly affect environment • In event of imminent threat to human health or environment, immediate dissemination of all information which could enable the public to prevent or mitigate harm from the threat |

| | | | |
|--------------------------------|--|--|--|
| Article 5, paragraph 2 | Environmental information to be made available in a transparent way and to be effectively accessible | <ul style="list-style-type: none"> Information about the type and scope of environmental information held by public authorities, and the conditions and process for obtaining it | <ul style="list-style-type: none"> Establish and maintain practical arrangements such as publicly accessible lists, registers or files at no charge Officials to support public in seeking information Points of contact |
| Article 5, paragraph 3 | Environmental information to progressively become available electronically | <ul style="list-style-type: none"> State-of-the-environment reports Legislation relating to the environment Policies, plans, programmes, and agreements relating to the environment Other information that would facilitate the application of national law implementing the Convention | <ul style="list-style-type: none"> Provided such information is already available in electronic form Easily accessible in electronic databases Available through public telecommunications networks |
| Article 5, paragraph 4 | National state-of-the-environment reports | <ul style="list-style-type: none"> Information on the quality of the environment Information on the pressures on the environment | <ul style="list-style-type: none"> Publish and disseminate at regular intervals, not exceeding three or four years |
| Article 5, paragraph 5 | Disseminate national legislation, policy documents and significant international documents on environmental issues | <ul style="list-style-type: none"> Legislation, strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation International agreements and other significant international documents on environmental issues | <ul style="list-style-type: none"> Measures in national legislation for this purpose |
| Article 5, paragraph 6 | Encourage operators to regularly inform the public of the environmental impact of their activities | <ul style="list-style-type: none"> Environmental impact of operators' activities and products | <ul style="list-style-type: none"> Operators whose activities have significant impact on the environment Public to be regularly informed Where appropriate, within the framework of voluntary eco-labelling or eco-auditing schemes or by other means |
| Article 5, paragraph 7 | Publish information concerning environmental policymaking, dealings with the public under the Convention and the performance of public functions relating to the environment | <ul style="list-style-type: none"> Facts and analyses of facts for major environmental policy proposals Explanatory material on dealings with the public under the Convention Information on the performance of public functions and the provision of public services relating to the environment | |
| Article 5, paragraph 8 | Develop mechanisms for disseminating environment-related product information to consumers | <ul style="list-style-type: none"> Environment-related product information | <ul style="list-style-type: none"> Sufficient information to enable consumers to make informed environmental choices |
| Article 5, paragraph 9 | Progressively establish a publicly accessible nationwide system of pollution inventories or registers | <ul style="list-style-type: none"> Inputs, releases and transfers of a specified range of substances and products | <ul style="list-style-type: none"> Taking into account international processes where appropriate Coherent, nationwide system Structured, computerized, publicly accessible database Compiled through standardized reporting |
| Article 5, paragraph 10 | Optional exceptions from disclosure listed in article 4, paragraphs 3 and 4, preserved | | |

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

Article 5, paragraph 1 (a), requires public authorities to possess and update environmental information relevant to their functions. “Environmental information” is defined in article 2, paragraph 3, of the Convention. The current provision further defines the type of environmental information that a public authority must possess and update as relevant to its functions. For example, a water authority would be expected to possess and update information concerning water resources and not necessarily air emissions data.

The Convention does not give much guidance on how to implement this requirement. However, Parties can consider establishing systems that ensure a regular flow of information from operators, monitoring systems, researchers and others to the responsible public authorities. Such an information flow will help Parties to meet the requirement that the public authority should possess and update the relevant information. So this requirement implies reliable systems for collecting information, such as envisioned in article 5, paragraph 1 (b). It also implies reliable systems for storing information, such as the practical arrangements required in article 5, paragraph 2 (b) (i). Once a flow of information is established and the information is held in well-organized files or registers, public authorities will find that the information can be updated immediately upon receiving new reports from operators and others. Air emissions and ambient air quality, which are usually monitored daily, provide good examples.

This provision requires public authorities to possess and update information that is relevant to the decisions and actions that they take. The requirement for the public authority to “possess” the information upon which it has based its decision implicitly means that the authority also “holds” it for the purposes of article 4. The ownership of the information is not relevant to the question of whether the public authority holds the information, as it is the obligation of any applicant for a decision by a public authority to provide the necessary information supporting the application. The possible disclosure of this information is then covered by article 4, paragraphs 3 and 4, of the Convention.

Implementation guidance on “possess and update”

- Establish a record-keeping and reporting system for operators.
- Establish monitoring systems with regular reporting
- Establish research systems with regular reporting.

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

Article 5, paragraph 1 (b), requires mandatory systems to ensure an adequate flow of information to public authorities. The information is about proposed or existing activities that have the potential to “significantly affect” the environment. Article 6 also covers activities that may significantly affect the environment, which can mean either a positive or negative effect (see discussion of “significant effect” in the commentary to article 6, paragraph 1).

To implement this provision, Parties can impose various requirements on public or private actors. One way to implement the provision is through mandatory monitoring and research programmes. Another is through mandatory systems of self-monitoring and record-keeping by facilities on data such as air and water emissions and waste disposal.

Governments often delegate monitoring responsibilities to specialized agencies, laboratories, universities or quasi-governmental institutions. These would be public authorities under article 2, paragraph 2 (b) or (c), insofar as they meet the requirements of that article.

Many States also require enterprises to monitor their own emissions and other activities that have an impact on the environment. Placing the burden on the polluter is consistent with the polluter pays principle, as set forth, for example, in Principle 16 of the Rio Declaration adopted by 172 States, including 108 Heads of State, at the 1992 Earth Summit. Principle 16 of the Rio Declaration states:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.²²³

Enterprises can be required to keep records of the monitoring and periodically report this information to the appropriate public authority. For example, in Belarus, the Ministry of Statistics collects information on emissions, discharges, waste disposal and environmental protection measures from enterprises. The law requires all enterprises and institutions, regardless of ownership, to provide such information.

An additional source is the information that private entities must submit to public authorities as part of licensing and permitting procedures and procedures for their renewal. In its findings on communication ACCC/C/2005/15 (Romania), the Compliance Committee found that article 5, paragraph 1 (a) and (b), taken together, require, at a minimum, that the relevant public authorities possess and update EIA studies in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation.²²⁴

Possible elements of systems for information flow to public authorities

- Public authorities monitor emissions and environmental quality.
- Public authorities conduct environmental research.
- Operators monitor emissions regularly.
- Operators keep records of their emissions monitoring.
- Operators report the emission monitoring data to the public authorities.
- Public authorities keep and update records of information submitted in permitting and other licensing procedures, including EIA studies in their entirety.

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

Article 5, paragraph 1 (c), requires public authorities to inform the public in the event of environmental emergencies. Its requirement to disseminate information is triggered by any “imminent threat” to human health or the environment. This means that actual harm does not have to occur for the immediate dissemination of information to be required. The Convention does not draw a distinction between threats caused by human activities or by natural causes: both are treated with equal weight. The Convention also gives equal weight to whether the object of the threat is human health or the environment.

Under the Convention, the information that public authorities must release includes all information that could enable the public to take measures to prevent or lessen harm arising from the threat. Information to enable the public to take preventive or mitigation measures can, inter alia, include safety recommendations, predictions about how the threat could develop, results of investigations and reporting on remedial and preventive actions taken.



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International and EU law concerning industrial accidents

Environmental emergencies generated by industrial and hazardous substances accidents such as those at the Chernobyl nuclear facility in Ukraine and at chemical facilities in Bhopal, India, and Seveso, Italy, have brought attention to the public's need to know and to be heard about major accidents that may affect them.

At the international level, the ECE Industrial Accidents Convention includes provisions on access to information, public participation and access to justice. Article 9, paragraph 1, of that Convention requires its Parties to ensure that adequate information, including certain minimum information, is given to the public in the areas capable of being affected by an industrial accident arising out of a hazardous activity. Article 9, paragraph 2, requires the Party of origin to give the public in the areas capable of being affected an opportunity to participate in relevant procedures on prevention and preparedness measures; the public of the affected Party must be given equivalent opportunity to that of the public of the Party of origin. Article 9, paragraph 3, requires Parties to provide natural or legal persons who are being or are capable of being adversely affected by the transboundary effects of an industrial accident, with access to justice equivalent to that available to persons within their own jurisdiction.

At the EU level, following the Seveso accident in 1976, a series of directives on the major accident hazards of certain industrial activities and those involving dangerous substances were adopted, starting with Directive 82/501/EEC (Seveso Directive), which was replaced by Council Directive 96/82/EC (Seveso II Directive), itself later extended by Directive 2003/105/EC.²²⁵ Following a review of the Seveso II Directive, Directive 2012/18/EU (Seveso III Directive) was adopted on 4 July 2012 and entered into force on 13 August 2012.²²⁶

Article 14, paragraph 1, of the Seveso III Directive requires certain specified information to be permanently available to the public. Annex V to the Directive specifies the information to be provided. This includes "general information about how the public concerned will be warned, if necessary" and "adequate information about the appropriate behaviour in the event of a major accident or indication of where that information can be accessed electronically". In addition, article 14, paragraph 2, requires that all persons likely to be affected by a major accident originating in so-called upper-tier establishments regularly receive clear and intelligible information on safety measures and requisite behaviour in the event of a major accident. The information must include the information in Annex V as a minimum. Article 15, paragraph 1, requires that the public concerned be given an early opportunity to give its opinion on the planning of new upper-tier establishments, on significant modifications to existing establishments, and new developments around existing establishments that may increase the risk or consequences of a major accident. Article 12, paragraph 5, requires that the public be given early opportunity to give its opinion on external emergency plans.

The Convention sets a high priority on the rapid dissemination of information that could save human lives or prevent environmental damage. The public authority must disseminate the information immediately. Dissemination without delay can help save lives and prevent damage in situations involving an imminent threat to human health or the environment. In 1998, a case before the ECHR dealt with this issue. The Government concerned had neglected to release essential information that would have enabled citizens to assess the risks they and their families might run if they continued to live in a town particularly exposed to danger from accidents at a local fertilizer production factory.²²⁷ The Court held that, by failing to provide timely information, the State did not fulfil its obligation to secure the applicant's right to respect for their private and family life.²²⁸

Implementation guidance for immediate dissemination in the event of an imminent threat

- Obligation triggered by any *imminent threat* to human health or environment — harm need not have occurred for the immediate dissemination of information to be required.
- Dissemination without delay.
- Release of all information that could enable public to take measures to prevent or lessen harm.
- As a minimum, dissemination to all members of public who may be affected by the imminent threat.
- To facilitate implementation:
 - Designate which public authority is responsible for the dissemination of which type of information in which circumstances.
 - Require public authorities, especially localities, to develop emergency preparedness plans.
 - Establish a system for the notification of local governments, hospitals and fire and emergency medical services that can be immediately implemented.
 - Establish a system for the immediate notification of the public, including through the use of local radio, newspapers, television, and public announcement systems.
 - Conduct training for emergency personnel, especially in the handling of hazardous substances.

The Convention sets a minimum obligation to disseminate the information to members of the public who may be affected by the imminent threat, though, beyond this, public authorities may distribute the information as widely as they wish. In some cases, members of the public who may be affected may include the entire country, in others it may include members of the public in neighbouring countries, in yet others it may be more localized to a specific region. The use of the word “may” indicates that there need only be a reasonable possibility that members of the public could be affected for the public authority to be obliged to inform them.

To facilitate implementation of this provision, Parties can designate which public authority is responsible for disseminating which type of information and in what circumstances. Countries can establish a system for emergency communications that can be used in these conditions. For example, in Belarus, the Ministry of Emergencies is responsible for spreading environmental information in the event of emergencies. The Centre for Radiation Control and Monitoring has a system of early emergency warning and control and is responsible for providing this information to the government and the public. Local authorities are the best placed to distribute some types of information.

Implementation guidance for article 5, paragraph 1

- *Public authorities need to have a reliable system for collecting and updating environmental information.* Information can be collected and updated through clear requirements and procedures for monitoring, record-keeping and reporting, by both private enterprises and government agencies.
- *Public authorities must hold environmental information.* They can do so through structured systems of registers, files and lists.
- *Public authorities need a system for immediate dissemination of information in emergencies.* This step can be taken through established processes to give information out over the radio, newspapers, and television, as well as directly to emergency health personnel and local government officials.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

Experience has shown that simply having a law or regulation giving the public access to information does not guarantee access in practice. Article 5, paragraph 2, requires Parties to make sure that when public authorities make environmental information available, they do so openly and ensure that the information is genuinely accessible.

Parties are required to implement this provision “within the framework of national legislation”. First, this means that Parties must have transposed the obligations and mechanisms set out in article 5, paragraph 2, into their national legal framework. It also means that Parties have some flexibility as to how to implement this provision within their own national legal frameworks. Article 5, paragraph 2, sets out several concrete mechanisms for ensuring transparency and effectively accessible information — all of which can be structured slightly differently depending on the system of national law.

The requirement for transparency in the way that public authorities make information available means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained. Article 5, paragraph 2, thus builds on article 3, paragraph 1, which requires Parties to establish and maintain a clear and transparent framework to implement the Convention, and article 3, paragraph 2, which requires officials to assist the public in seeking access to information.

The common law duty to disclose

Some Parties to the Aarhus Convention have legal systems that impose a duty on public authorities to affirmatively disclose information to the public that may be relevant to a particular decision-making procedure. This duty is independent of any procedural obligations that may fall under a law related to a particular proceeding, such as an EIA procedure. In the United Kingdom, the Court of Appeal has held that the non-disclosure of reports held by a public authority containing information about the projected emissions from a cement factory that intended to change its processes to include the burning of waste tyres, left the public in a state of ignorance, until the agency's grant of the permit, regarding the full extent of the low-level emissions of dust and their possible impact on the environment. The Court was of the view that such information was potentially material to the agency's decision and to the members of the public who were seeking to influence it. The Court held that the failure by the agency to disclose it at the time was a breach of its common law duty of fairness to disclose it.²²⁹

"Effectively accessible" means that the established information systems should go beyond simply making the information available to the public. Records, databases and documents may be considered effectively accessible when, for example, the public can easily search within them for specific pieces of information, or when the public has easy access through convenient office hours, locations, equipment such as copy machines, etc. For instance, the environmental authority in Cork, Ireland, lends out copies of large documents to make them more effectively accessible to members of the public. As well as being physically accessible, "effectively accessible" requires that information should be available in a format, language and level of technical detail that the public can effectively access.

Effectively accessible – the issue of language

In the light of concerns that environmental and social impact assessments were sometimes made available in English only, with just the non-technical summary being translated, the European Bank for Reconstruction and Development has since the mid-1990s required the full environmental and social impact assessment to be made available in the local language. This enables more meaningful public participation because local people potentially affected by the project are able to read the full document and not just the technical summary.

Electronic information tools and the Aarhus Convention

The Convention gives special attention to new forms of information, including electronic information. This is referred to in the preamble, in article 3 on the general provisions and in articles 4 and 5 on access to information. The Convention takes into account developments in information technology, in particular the shift towards electronic forms of information and the ability to transfer information over the Internet and other systems. Through decision I/6, the Meeting of the Parties established a Task Force on Electronic Information Tools, the mandate of which was extended through decisions II/3 and III/4. Annexed to decision II/3 are recommendations prepared by the Task Force on the more effective use of electronic information tools to provide public access to environmental information. At its fourth session, the Meeting of the Parties decided to extend the scope of the work undertaken by the Task Force on Electronic Information Tools and to rename it the Task Force on Access to Information²³⁰ (for more on the mandate of the Task Force, see the textbox in the commentary to article 4).

The following provisions of article 5, paragraph 2, set out certain requirements for how Parties should ensure that environmental information is made available in a transparent and effectively accessible way. The Convention establishes these as minimum requirements; the phrase "inter alia" means that Parties may add whatever mechanisms they find necessary or desirable to achieve transparency and effective accessibility.

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

Article 5, paragraph 2 (a), provides one example of the type of information covered under the article. Article 5, paragraph 2, covers not only environmental information, but also information about how best to access environmental information. This type of information — namely information about information — is sometimes called “meta-information”. The public will have much better access to environmental information if it knows what type of information is held, where it is held, the criteria for obtaining it, if any, and the procedures for obtaining it. Under the Convention, the information must be “sufficient”, or complete enough to ensure that it helps the public to effectively gain access to information.

Public authorities must provide sufficient information about the basic terms and conditions under which environmental information is available and the process by which it can be obtained. This can be done through information publications, announcements in government publications, announcements on government websites, television or radio public service announcements, or as part of environmental information catalogues, as described in the box below.

Information about information (“meta-information”)

The EEA’s website provides a large amount of downloadable data about Europe’s environment.²³¹ Under each dataset, the relevant metadata is posted. For example, for the dataset on monitoring of carbon dioxide emissions from passenger cars (<http://www.eea.europa.eu/data-and-maps/data/co2-cars-emission-6>), the following metadata is provided (<http://www.eea.europa.eu/data-and-maps/data/co2-cars-emission-6#tab-metadata>).

In Austria, section 10 of the Federal Law on Environmental Information obliges the federal Ministry of the Environment to establish an environmental data catalogue for public information. The national Environmental Data Catalogue has been drawn up to assist in locating environmental information. The national Catalogue is a computer-supported database that has been available to the public since 1995. It provides information as to who has what available environmental data, as well as other useful information relevant to environmental matters, and is accessible via the Internet.

(b) Establishing and maintaining practical arrangements, such as:

Subparagraph 2 (b) further defines transparency and effectiveness in terms of practical arrangements for access to information. The Convention requires Parties to establish and maintain practical arrangements. These can include a variety of options, such as publicly accessible lists, registers or files; support to the public; and identification of contact points. They are meant to facilitate access to both the information itself and the information about how to get information referred to in paragraph 2 (a) above. Paragraph 2 (b) includes examples of practical arrangements that Parties are likely to find useful in implementing this provision.

(i) Publicly accessible lists, registers or files;

The Convention includes publicly accessible lists, registers or files as examples of how a Party can meet the requirement to establish and maintain practical arrangements for accessing environmental information and information about where to find that information.

One way in which countries can establish practical arrangements for access to information is through lists, registers or file systems. The words “lists”, “registers” and “files” are often used interchangeably among different countries’ systems. The form of the list, register or file can vary. In some cases it may be in traditional, hard copy format, kept, for example, in a library; in others it may be a computer database in electronic form.

Lists, registers and files can be used to compile information submitted from private sources or gathered from the government. They can also provide advantages to both the public and the authorities. When a member of the public has

the ability to inspect a list, register or file, he or she is able to target the information request more precisely. This can save time, make information requests easier to process and reduce costs. Countries have many different types of registers, lists and files with environmental information. Public registers, lists and files need not be centralized nationally, but may be held locally in libraries or local government offices around the country.

Registers, lists and files can contain the actual environmental information itself or references to which documents containing environmental information exist and where they are to be found. By way of example regarding the former, the United Kingdom has a fairly extensive system of “public registers” covering a wide range of information, such as planning applications, lists of stray dogs and pesticide evaluation documents. The registers are files of information maintained under particular pieces of legislation that specify the exact nature of the information which is to be available to the public and usually where it is to be located. The information is often kept in hard copy and typically the register is kept in an office that can be visited by the public during normal business hours. Copies can usually be obtained for a fee. Certain registers consist of computerized files, in which case an operator may be needed to access the files and prior arrangement may need to be made, but an increasing amount of public register information is available via the Internet, providing worldwide public access. By way of example regarding the latter, Poland keeps a register of all documents containing environmental information and where they can be found.

Selected public registers in the United Kingdom

- Register of applications to release or market genetically modified organisms
- Pesticide Evaluation Documents
- Register of Pesticide Enforcement Notices
- The Planning Register
- Integrated Pollution Control Register
- Local Authority Air Pollution Register
- Register of Hazardous Substances Consents
- Register of Sites Holding 25 tonnes of Dangerous Substances
- Register of Radioactive Substances
- Register of Notifications of Intended Works on Trees in Conservation Areas
- Register of Drinking-water Quality
- Register of Licences for Deposits at Sea
- Maps of Nitrate-sensitive Areas
- Trade Effluent Register
- Water-quality Register
- Maps showing freshwater limits of rivers
- Register of Waste Management Licences

Lists, registers and files can also contain all of the documents pertaining to a specific case. They can contain collections of documents relating to a decision-making process, including drafts, background analyses, public comments, alternative proposals, interim decisions and the proceedings of any meetings. For example, the environment ministry might maintain a publicly accessible register or file with all the documentation from an EIA or licensing case. This would help to meet the requirement in article 6, paragraph 6, that public authorities should allow the public to examine all information relevant to the decision-making process. It also would establish a record of decisions in review cases under article 9 on access to justice.

Lists, registers and files may be made accessible to the public in various ways. For example, in the city of Shkodra, Albania, a system of special information billboards operated by municipalities and the regional environment agencies allows for the public display of environment permits, permit applications and EIA and SEA documentation on



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a regular basis.

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

A second type of practical arrangement to ensure effective access to information is having government officials support the public in requesting information. This provision is an example of a way to fulfil the obligation under article 3, paragraphs 2 and 3, to provide guidance to the public in seeking access to information. Parties can require public authorities to assist members of the public in formulating or refining their requests, if need be.

More and more information is available on the Internet and through information points where environmental information can be found in structured databases. However, public authorities need to be sensitive to the needs of members of the public who may need additional assistance, such as the elderly, illiterate, poor and others.

In many cases, Parties may need to go beyond simply requiring public authorities to assist the public. Parties also can provide training for government officials in access to information laws and regulations, including guidelines to how to apply any exceptions to disclosure and how to ensure that the public has timely, transparent and effective access to information.

(iii) The identification of points of contact; and

The final practical arrangement required by the Convention is that public authorities should identify points of contact for each authority to facilitate public access. Points of contact are especially useful when many people will be interested in accessing information. A publicly identified office or individual point of contact will facilitate and hasten the process of accessing the information for members of the public. For example, Georgia's General Administrative Code obliges governmental bodies to designate particular public officials as contact points for applicants making information requests.

In thinking about how to implement this provision, Parties can consider identifying individual points of contact in specific cases, such as an EIA procedure, a permitting process, or rule-making. Some countries require that every time a public authority gives notice of a process that provides an opportunity for public participation, such as licensing or EIA, it must include a point of contact in the notice so as to facilitate access to information. Article 6, paragraph 2, on public participation requires the notice to include an indication of the public authority from which information can be obtained.

In general, an effective way to establish such points of contact is through a specific environmental information service or office. For example, in Ireland, the Government's Environmental Information Service (ENFO) has been transformed from a single walk-in information centre to a national environmental information service with dedicated public library spaces called "ENFOpoints" where people can access a wide range of information. It also has a dedicated website (www.askaboutireland.ie).

Estonia's Environmental Information Centre was established within the Ministry of Environment in 2004. Other Parties have worked in cooperation with international organizations to establish Aarhus Centres throughout the countries ([see box in the commentary to article 3, paragraph 3](#)).

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

Article 5, paragraph 2 (c), adds to Parties' understanding of transparency and effective access to information by addressing the issue of cost. The Convention requires public authorities to provide access to environmental information contained in lists, registers or files free of charge. Under article 4, paragraph 8, public authorities are allowed to make a reasonable charge for supplying information. However, article 5, paragraph 2 (c), makes it clear that public authorities are not allowed

to charge for examination of information held in publicly accessible lists, registers or files.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

Article 5, paragraph 3, requires Parties to expand their information-gathering and disseminating efforts by making use of electronic information systems. Changes in information technology are revolutionizing the way public authorities and the public create, store, transfer and access information. The Convention reflects these changes by requiring Parties to work towards making environmental information available electronically. In implementing this provision, Parties have a clear obligation to ensure that environmental information progressively becomes available in electronic databases, though they have flexibility in determining who will manage this process, the time frame for meeting the obligation and the shape of the electronic databases. The Convention requires that once Parties have established electronic databases, these must be easily accessible to the public.

Implementation options for electronic databases

The Convention stipulates only that the electronic databases should be easily accessible to the public. Parties can consider various ways of meeting this requirement, including the following:

- Using telecommunications networks, as discussed in article 5, paragraph 3, to facilitate direct access by the public to the databases, avoiding the need for a public authority operator.
- Setting up databases that enable the public to search for specific information electronically.
- Setting up databases that can provide information in a variety of categories, such as type of pollutant, type of species, region of the country, via structured, customized queries.
- Setting up interconnected databases: currently, although environmental information is very interrelated, it is often collected through separate means. Databases could establish links between themselves to allow a larger pool of information to be searched at once.

A number of Aarhus Convention Parties, including Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Serbia, Tajikistan and Turkmenistan have contributed to their implementation of article 5, paragraph 3, through their involvement in the establishment of either Public Environmental Information Centres or Aarhus Centres. These centres use electronic tools such as websites, databases and electronic list servers to make environmental information easily accessible to the public. Environmental information made available online by some of the centres includes national and regional state-of-the-environment reports, various international, national and local legislative and policy documents and other publications related to the environment. ([For more information about Aarhus Centres, see the commentary on article 3, paragraph 3, above.](#))

Polish law requires that a computer be made available in a public place, e.g., a public library, so that members of the public can access environmental information. However, the availability of such a resource should not be used to dismiss members of the public who ask for personal assistance from the authorities, particularly if the member of the public may have difficulty using a computer to access the information.

The German Environmental Information Portal: PortalU®

As environmental information comes from many sources and is held by different public authorities, it can vary widely in content and format. The German Environmental Information Portal, PortalU® (www.portalu.de), launched in 2006, is an instrument that aims to coordinate the diverse range of environmental information that is available on the Internet. The main objective of PortalU® is to improve access to environmental information held by or for public authorities in Germany. It aims to be the one-stop portal for public environmental information in Germany. To date, over 3 million web pages and over 500,000 database entries from public authorities are available from about 350 public institutions and organizations at the national, Länder (federated state) and municipal level. Both environmental experts and the general public can access the portal free of charge.

It is important that the electronic versions do not replace other forms of the same information, as computers and public telecommunications networks are not readily accessible to all members of the public in every country. The wholesale replacement of traditional forms of information storage might not satisfy the requirement that information should be truly accessible to the public, at least in the short term. However, for those members of the public who do have access to the Internet, through their personal computers, or through publicly accessible computers in libraries or information centres, electronic databases provide a fast, and effective way of searching and finding relevant environmental information — anytime and from anywhere. And although electronic databases can be expensive initially for a public authority, they can later pay for themselves in time and resources saved, not only in answering information requests, but also in providing information for the public authority's own implementation and enforcement initiatives.

The Convention lists specific types of information that should eventually become accessible electronically. The use of the word “should” instead of “shall” in this provision means that the Convention urges Parties to take this course of action, rather than requiring them to do so. The use of the word “include” means that Parties can add other relevant environmental information to this list if they deem it useful.

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

Under paragraph 3 (a), Parties should ensure that the state-of-the-environment reports required under paragraph 4 also progressively become available in electronic databases. As state-of-the-environment reports already exist electronically in most countries, this will primarily mean putting these reports in the types of databases that are publicly accessible. The electronic database form will help both the public and public authorities to search the state-of-the-environment reports for specific information which they can use to compile comparative information about the state of the environment over time.

(b) Texts of legislation on or relating to the environment;

Under paragraph 3 (b), Parties should ensure that texts of legislation on or relating to the environment progressively become available in electronic databases. Legislation is often one of the first items to be made publicly accessible through the websites of ministries. For example, the Danish Ministry for Environment and Energy has a publicly accessible website with a wide range of documents, including legislation. In the Czech Republic, Hungary and Poland, ministries and parliaments make texts of legislative drafts, international treaties and laws electronically accessible. Parties may wish to take advantage of ECOLEX, an Internet-based information service (www.ecolex.org) on environmental law that UNEP operates in cooperation with IUCN and the Food and Agriculture Organization of the United Nations (FAO). Its stated purpose is to build capacity worldwide by providing the most comprehensive possible global source of information on environmental law. The ECOLEX database includes information on treaties, international soft law and other non-binding policy and technical guidance documents, national legislation, judicial decisions and law and policy literature. Users have direct access to the abstracts and indexing information about each document, as well as to the full text of most of the information provided.²³²

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

Under paragraph 3 (c), Parties should ensure that, as appropriate, policies, plans and programmes on or relating to the environment progressively become available in electronic databases. In this case “as appropriate” means that Parties have additional flexibility in determining which policies, plans, and programmes would be most usefully accessible through electronic databases because of a public interest in accessing them. For example, this can be a useful tool for implementing article 7 on public participation in decisions concerning plans, programmes and policies. It is very important for the public and for public authorities to have easy access to existing plans, programmes and policies when commenting on proposals.

Policies, plans and programmes can be at the international, regional, national or local level. Like legislation, these documents are typically among the first to be published electronically by Government ministries with websites.

Paragraph 3 (c) also requires, as appropriate, that “environmental agreements” should become progressively available in electronic databases. Environmental agreements include both agreements between countries and covenants or contracts between the government and one or more private enterprises or industry groups (see the commentary to article 2, paragraph 3 (b)). For example, the Netherlands uses public-private environmental agreements. This type of environmental agreement often represents voluntary agreements to cooperate in meeting certain emission limits on the part of industry in exchange for fewer reporting or other requirements imposed by government.

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

Under paragraph 3 (d), Parties should identify other information that can readily be made accessible in electronic form if it would facilitate the application of national law implementing the Convention. For example, a Party can determine that providing proposals and other drafts open to public participation under articles 6, 7 and 8 would facilitate the application of national law implementing the Convention. It could therefore require that proposals for specific activities, plans, programmes and policies, and for executive regulations and legally binding instruments, should become progressively available in electronic databases. This provision also serves as a reminder that the Convention’s information provisions are not limited to written text only, but also apply to graphics, photographic materials, sound recordings, etc.

provided that such information is already available in electronic form.

Article 5, paragraph 3, does not require Parties to put the information in electronic form. It only stipulates that, if the information is already in electronic form, it should be placed in publicly accessible databases on public telecommunication networks. In practice, the aforementioned categories of information will tend to exist in electronic form. The purpose of this final provision would appear to be to avoid imposing on public authorities an obligation to scan or type in handwritten or oral submissions from the public, as well as older documents that might not exist in electronic form.

Using electronic information technology in Kazakhstan

Kazakhstan’s 2007 Environmental Code provides a detailed list of environmental information that must be made available to the public through telecommunication networks as required by article 5, paragraph 3, of the Convention. Article 160 of the Environmental Code requires competent public authorities to make publicly available through the Internet and other public telecommunications networks the following types of environmental information:

- Reports on the state of the environment.
- Drafts and text of national legislation and international treaties on environmental issues.
- Drafts and texts of governmental policy documents, programmes and action plans relating to the environment.
- Reports on environmental enforcement.
- Information on electronic government services related to the environment.

The Code also requires that the competent public authorities establish and maintain publicly accessible electronic registers of environmental information.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

Article 5, paragraph 4, requires that a national state-of-the-environment report be published at regular intervals. The regular intervals may not exceed three to four years. Throughout the ECE region, countries have found it useful for reasons of comparison and to monitor progress to publish their state-of-the-environment reports on a yearly basis.

The state-of-the-environment reports must be publicly disseminated. Dissemination can take many forms. For example, Georgian legislation requires that a report on the state of the environment be published every three years. The report is also made available in electronic format through the website of the Aarhus Centre Georgia.

The Convention requires the reports to include information on both the quality of the environment and the pressures on the environment. "Pressures on the environment" can mean many things in the context of the report. For example, the Czech state-of-the-environment report includes information on the causes of change in the environment, the state and development of environmental elements, the consequences of environmental changes for the human population and developments in environmental law and policy.

As discussed above in article 5, paragraph 3 (a), state-of-the-environment reports must progressively become available in electronic databases that are easily accessible to the public, provided that the information is already available in electronic form.



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5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, *inter alia*:

In requiring Parties to take measures to disseminate certain information specified below, article 5, paragraph 5, goes beyond the passive access to information requirements of article 4. Dissemination means actively giving the information to the public through means such as publications, mailings or electronic posting. It can also mean letting the public know that certain kinds of information are available, telling it where and how to access the full text of the environmental information and making that information accessible to the public at little or no cost. Article 5, paragraph 5, is to be implemented "within the framework of [a Party's] legislation", giving Parties some flexibility in implementing measures that both meet the Convention's obligations and can be placed within the national legal framework.

Paragraph 5 has some similarities with the Convention's requirement that information relating to imminent threats to human health or the environment should be disseminated immediately to members of the public who may be affected (article 5, para. 1 (c)). However, paragraph 5 is a more general requirement for the dissemination of documents that the public has the right to know on a regular basis. It concerns dissemination to all members of the public and through the use of the phrase "inter alia" contains only a preliminary list of what kinds of information should be disseminated. Parties may add to this list any other relevant types of information that will help to implement the Convention.

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

Paragraph 5 (a) requires Parties to develop a legal system to disseminate legislation and policy documents that concern the environment. This provision should be considered also in the context of articles 7 and 8, which concern public participation in plans, programmes, policies, law-making and rule-making. Parties are required to actively disseminate the texts of strategies, policies, programmes and action plans relating to the environment. In addition to the texts of these law and policy documents, the Convention requires Parties to disseminate progress reports on their implementation. The term “relating to the environment” is used here instead of “environmental information”. “Relating to the environment” arguably includes a broader range of information such as policies on transport, energy, agriculture or mining as these relate to the environment through their impacts or otherwise.

Most countries already publish legislation and policy documents in official Government journals that are publicly accessible. For example, in the Republic of Moldova, legislation, presidential decrees, international acts, resolutions and instructions of the Government and acts of ministries, departments and the national bank must be published in *Monitorul Oficial al Republicii Moldova* — the official register — in order to become effective. The journal is printed in Romanian and Russian. Once an act has been published in the journal, it may be further publicized on radio and television. In addition, the decisions of mayoral offices and executive regional councils that involve a public interest must be disseminated to the public by means of the mass media. In Georgia, the texts of legal acts must be published electronically on the web page of Georgia’s official journal — *Legislative Bulletin* — which also maintains an electronic database of legal acts.

(b) International treaties, conventions and agreements on environmental issues; and

Paragraph 5 (b) requires Parties to disseminate international treaties, conventions and agreements on environmental issues. International treaties, conventions and agreements are legally binding instruments that establish obligations between two or more countries. Depending on a country’s constitutional order, in some countries,²³³ once a legally binding international instrument to which the country is a party has come into force, that instrument has immediate and direct effect as domestic law. For other countries,²³⁴ the international instrument will need to be implemented through legislation at the national level before its obligations will become part of domestic law. However, as the international instrument will still bind the country at the international level, it is similarly important for the public to have access to its text.

It is standard to disseminate international treaties, conventions and agreements through publication in legal gazettes. For example, article 88 of the Polish Constitution requires publication as a precondition for any law or international treaty to enter into force.

Another way to disseminate these documents is through electronic databases on the Internet, as is required when the information is already available in electronic form under article 5, paragraph 3 (b). Finland, for instance, does this.

(c) Other significant international documents on environmental issues, as appropriate.

Paragraph 5 (c) requires Parties to take measures within the framework of their national legislation to disseminate other significant international documents on environmental issues, as appropriate. The subparagraph covers international documents other than treaties, conventions and agreements which must be made public under paragraph 5 (b) above.

In this case, “as appropriate” means that the Parties can exercise their judgement as to which international documents on environmental issues are most likely to serve the obligations of the Aarhus Convention by being relevant and of interest to the public. For example, a Party might determine that regional agreements from other regions might not be appropriate for active dissemination to members of the public.

International documents on environmental issues do not only come from international processes or institutions typically considered as “environmental”. Countries can sign or develop many other types of international documents on environmental issues. For example, countries that participate in the deliberations of WTO should disseminate important WTO documents on environmental issues, including relevant decisions of the WTO Dispute Settlement Body. Countries that are part of or in negotiations with the World Bank, the European Bank for Reconstruction and Development or one of the other multilateral lending institutions should disseminate information on bank policies and loans relating to environmental issues. Wide publication of such documents can help mobilize public support for States to influence international decision-making as discussed under article 3, paragraph 7.

6. 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-labelling or eco-auditing schemes or by other means.

Paragraph 6 concerns the flow of information from an “operator” directly to the public. An “operator” can be a private enterprise or a governmental body that conducts activities with a significant impact on the environment. Paragraph 6 requires Parties to encourage these operators voluntarily to disseminate information about the environmental impact of their activities and products. This provision differs from paragraph 1, which requires the establishment of mandatory systems for operators to provide information to public authorities. Here, in the case of information flowing from an operator directly to the public, the Party need only provide incentives and other encouragement.

The Convention recognizes that some countries already have voluntary systems that give this type of information directly to the public, such as “eco-labelling” or “eco-auditing”. The Convention foresees that Parties may wish to encourage operators to disseminate information on the environmental impacts of their activities and products through these voluntary systems. Eco-labelling is a system that includes information about the environmental impacts of the process for manufacturing a product and the contents of the product directly on the label. For example, some cosmetic companies state on their labels that they do not test their product on animals; some food product labels state that they were produced through farming methods that did not use chemical pesticides or fertilizers; and some detergent labels state they do not contain phosphates.

Eco-auditing is a system that reports on environmentally relevant information about the inputs, processes and outputs of a manufacturing activity. For example, a computer chip manufacturing facility could carry out an eco-audit to show the amount and type of chemicals taken in and the amount and type that remain as waste or as products. Eco-auditing systems often help enterprises realize how they can prevent pollution and use their resources more effectively.



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The EU Eco-Management and Audit Scheme

The Eco-Management and Audit Scheme (EMAS) is the voluntary EU scheme for companies and other organizations seeking to evaluate, manage and improve their environmental performance. The scheme is governed by Regulation (EC) No. 1221/2009 on the voluntary participation by organizations in a Community eco-management and audit scheme. The Regulation (known as EMAS III, as it is the third regulation on this issue) entered into force on 11 January 2010.²³⁵

An EMAS registration (granted to an organization by a public authority after verification by an accredited/licensed environmental verifier) allows organizations to demonstrate to stakeholders such as customers, regulators, and citizens, that they evaluate, manage and reduce the environmental impact of their activities. The EMAS logo can be used as a marketing or sales tool to promote the organization's environmental performance.

EMAS is open to all types of organizations in all public and private sectors. Its methodology is designed so that small and medium-sized enterprises can also be part of the scheme. It also allows member States to enable EMAS registration for organizations from outside the EU.

In order to be able to benefit from EMAS registration, an organization must carry out the following steps:

1. Conduct an environmental review, considering all environmental aspects of the organization's activities, its legal and regulatory framework and existing environmental management practices and procedures.
2. Adopt an environmental policy, including a commitment to compliance with all relevant environmental legislation and to achieve continuous improvement in its environmental performance.
3. Establish an environmental management system (EMS) aimed at achieving the organization's environmental policy objectives as defined by top management.
4. Carry out an internal environmental audit to assess the implementation of the EMS and to check compliance with relevant environmental regulatory requirements.
5. Prepare an environmental statement of the organization's environmental performance.
6. Obtain verification by an independent EMAS verifier of the environmental review, the EMS, the audit procedure and the environmental statement.
7. Register the validated environment statement with the appropriate EMAS Competent Body and make it publicly available.
8. Use the verified environmental statement in the organization's operations, e.g., to market its activities, to assess suppliers against EMAS requirements and to give preference to suppliers registered under EMAS.²³⁶

There are many other ways in which Parties can encourage operators to use existing voluntary systems or to develop new ones. They can develop reliable regulatory frameworks that encourage public dissemination of information. They can offer operators special incentives if they provide information directly to the public, such as relaxation of certain regulatory requirements or tax incentives. Parties can give special publicity to operators that participate in programmes to inform the public, creating an opportunity for the enterprise to advertise itself as a responsible environmental citizen. They can also explicitly include the provision of information to the public as a criterion for selection in government contracting or assistance programmes. One established means for operators to give information about the environmental consequences of their activities is through environmental reporting in their annual financial reports. Moreover, in recent years, in countries such as Denmark, there has been a movement towards an obligatory "report or explain" framework for sustainability reporting by publicly traded and large companies.

Another important way in which Parties can further their implementation of this provision is by encouraging enterprises posing a significant risk of a serious industrial accident to regularly inform the public of the risk and measures to be taken in the event of such an accident. This complements the obligation in article 5, paragraph (1) (c), which requires information to be disseminated in the event of an imminent threat to human health or the environment. By encouraging enterprises to provide information to the public when there is no imminent threat of harm, the public may be better prepared should such an accident occur in the future. For example, Austria requires enterprises posing a risk of a serious industrial accident to inform all affected members of the public of the risk. This obligation applies to certain facilities, on the basis of characteristics such as size, location or the use of hazardous methods. The owner must inform the members of the affected public in advance about: the possible risks of the occurrence of an abnormal incident; the existence of safety measures; and the correct behaviour in the event of an abnormal occurrence. This information must be issued in a suitable manner, in a form understandable to the general public.

7. Each Party shall:

Paragraph 7 requires each Party to publish information that will help members of the public, as well as public authorities, understand what goes into government decisions, to monitor how those decisions are implemented and to make more effective contributions to decision-making.

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

Paragraph 7 (a) requires Parties to publish background information underlying major environmental policy proposals. If a Party considers that certain facts and analyses of facts are relevant and important in framing such proposals, it must publish them. “Facts” may be interpreted to cover factual information like water and air quality data, natural resource use statistics, etc. “Analyses of facts” includes cost-benefit analyses, EIAs and other analytical information used in framing proposals and decisions. Since article 7 provides for public participation during the preparation of policies relating to the environment, the publication of facts and analyses of facts under article 5, paragraph 7 (a), will help to ensure that the public has the relevant information it needs to make its participation in policymaking as effective as possible.

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

Paragraph 7 (b) requires Parties to make accessible any available explanatory material on the Convention’s implementation. The Convention does not require Parties to generate this explanatory material, only to make it publicly accessible once it has been generated.

The Parties must either publish this information or use another means that will make it accessible, such as electronic publication, teletext publication, or radio announcements. The scope of the information includes any explanatory material on the government’s dealings with the public in access to information, public participation and access to justice as covered by the Aarhus Convention. This may include, for example, data on access to information requests, such as how many were received, how many satisfied, how many refused, which exemptions were used, etc. It could also include any reports provided by a Party to either the Meeting of the Parties, a subsidiary body of the Convention, the Convention’s secretariat or the Compliance Committee on the Party’s implementation of the Convention ([see also the commentary to article 10, paragraph 2, and article 15](#)).

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

Paragraph 7 (c) requires Parties to provide information on how their public authorities carry out public functions and provide services relating to the environment. This provision is not just limited to central public authorities, but applies to regional and local public authorities as well. In contrast to paragraph 7 (b), paragraph 7 (c) is not limited to materials already in existence and may require information materials to be specially prepared for this purpose.

Many countries have some form of self-assessment or reporting that allows them to monitor the progress of public authorities. For example, in Denmark two reports — one that describes the state of the environment and the impacts on it and another that describes follow-up policy initiatives — are very useful tools for the public authorities themselves, as well as for the public, in monitoring performance and identifying areas for improvement in the future. In Poland, the *Statistical Yearbook* gives implementation and enforcement information, such as the number of environmental permits issued, the number of inspections carried out and the number of enforcement actions undertaken.

The report required under article 5, paragraph 4, includes information on the state of the environment and the pressures on the environment. Paragraph 7 (c) obliges public authorities to also provide information on how they implement environmental and other laws and how they perform specific environmental services, such as waste management.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

Paragraph 8 requires Parties to develop mechanisms to ensure that sufficient product information is available to the public. The information must be made available —whether by Parties, producers, or sellers— in a manner that enables consumers to make informed environmental choices. This is a potentially far-reaching provision that could be further developed by Governments when implementing it.

Consumer protection has been a core EU policy since 1993. To this end, the EU has developed a body of consumer law, including provisions on access to information, public participation and access to justice.²³⁷

One common tool for providing consumer information is eco-labelling (see article 5, para. 6). Eco-labels can contain information concerning the origins of the product and its contents, the effects of the product's contents, the impact of the product on health or the environment during and after use and consumer guidelines for using the product in as environmentally friendly a manner as possible.

Mechanisms for product information may be established through codes of conduct that ensure consistency and reliability. In addition, public authorities that embrace the ISO 14021 standard on self-declared environmental claims can also translate this standard into practical guidelines that can be used by both manufacturers in avoiding misleading advertising and by their own review bodies in the adjudication of complaints. Other implementation options are discussed below.

Implementation options for product information

Countries have developed a variety of mechanisms to ensure that sufficient product information is available to the public. These include both voluntary and regulatory mechanisms, including:

- Health warning labels.
- Use directions.
- Content labels.
- Categorization of products, e.g., as “organic”, “green” or “recyclable”.
- More detailed product information available on request from producers.
- Register of consumer information.

At its fourth session, the Meeting of the Parties requested the Convention's Task Force on Access to Information, subject to the availability of resources, to promote the exchange of information, experiences, challenges and good practices regarding public access to environmental information, including with regard to products and the promotion of the accessibility of environmental information held by the private sector. It also requested the Task Force to identify capacity-building needs, barriers and solutions with respect to these issues.²³⁸

- 9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.**

Article 5, paragraph 9, requires Parties to take steps to establish pollution inventories or registers. The provision sets out general parameters to guide Parties in their development. Since the adoption of the Convention, the phrase “pollutant release and transfer register” (or PRTR) has become the standard term to describe pollution inventories and registers covered by this paragraph.

What is a PRTR?

A pollution inventory or register, also known as a “pollutant release and transfer register” (PRTR), is a database of potentially harmful releases (emissions) to air, water and soil, as well as of wastes transferred off-site for treatment or disposal. Typically, facilities releasing one or more of a list of specified substances must report periodically as to what was released, how much and to which environmental media. This information is then made available to the public both as raw data and in the form of analyses and reports. The development and implementation of such a system adapted to national needs represents one component towards developing a means for the government, enterprises and the public to track the generation, release, further use and disposal of various hazardous substances from “cradle to grave”.

Why develop a PRTR?

The most dynamic aspect of PRTRs is their ability to stimulate pollution prevention and reduction. A company that reveals the quantities of pollutants that it is releasing into a neighbourhood becomes the focus of public scrutiny and this can cause a reassessment of accepted levels of releases. Mere publication of the quantities of chemicals released into the environment begins to involve the public in the decision-making underlying continued pollution of the environment, and by reducing releases, a company and/or regulator can demonstrate publicly their commitment to environmental improvement.

The reporting of releases can often yield a double dividend. Many companies have found that the quantitative analysis of waste streams and associated costs (in lost materials or disposal costs for example) can actually result in changes to operations that produce considerable financial savings.

The information gathered through PRTRs can be used for a variety of purposes. The initiation of pollution reduction programmes (by individual companies or by sectors) has been one result, but data can also be analysed to set priority targets (particular substances or geographic areas) at local or national level. A consistent, regional PRTR system can achieve the same goals at an international level. PRTR data can be used to judge compliance with permit conditions, or to analyse the effectiveness of pollution control laws. Educational programmes can also use PRTR data to illustrate pollution problems.

The United States Emergency Planning and Community Right-to-Know Act of 1988 was the first law of this kind. Still in force, it requires the collection and public dissemination of toxic substance release and transfer data to all environmental media for the particular purposes of assessing environmental quality, implementing pollution prevention strategies, developing adequate emergency response policies and providing a means for the guarantee of information rights. The law makes the pollution inventory the main vehicle for the attainment of its goals, and sets out exact definitions and procedures that create a framework for the reporting systems necessary to accomplish the goals. The voluntary Netherlands National Emissions Inventory, in operation since 1990, although much less comprehensive than the United States regime, was the first such instrument in Europe and contained similar kinds of information, while also plotting maps of diffuse pollution sources in addition to industrial sources.²³⁹

In addition to article 5, paragraph 9, PRTRs are also addressed in article 10, paragraph 2 (i), of the Convention. In article 10, paragraph 2 (i), the Parties undertook to review their experience in implementing article 5, paragraph 9, at their first meeting and to consider what steps were necessary to further the system referred to in that paragraph. That review ultimately resulted in the 2003 Protocol on PRTRs (see box below).



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The Protocol on Pollutant Release and Transfer Registers

On the occasion of the Fifth EUE Ministerial Conference (Kyiv, May 2003), the Meeting of the Parties to the Aarhus Convention held an extraordinary session to adopt and sign the Protocol on PRTRs. Thirty-six states and the EU signed the Protocol in Kyiv. The Protocol came into force on 8 October 2009. As at April 2014, it had 33 Parties. Further guidance on the Protocol can be found in the separate *Guidance to Implementation of the Protocol on Pollutant Release and Transfer Registers*.²⁴⁰

For Parties that have ratified the Protocol on PRTRs, the implementation of their obligations under the Protocol should also meet their obligations under article 5, paragraph 9. For those Parties not party to the Protocol, the Protocol nevertheless serves as an important guide to the implementation of this paragraph. Several other international texts provide guiding principles that may help define the potential scope and composition of pollution inventories or registers under the Convention. In addition to Agenda 21, which in its Chapter 19 refers to the use of emission inventories, the Organization for Economic Cooperation and Development (OECD) in 1996 developed a guidance manual on PRTRs with reference to systems already then in use by several countries, including some European countries now Party to the Convention.²⁴¹

Under article 5, paragraph 9, Parties' pollutant inventories or registers are required to be coherent and nationwide, structured, computerized, and publicly accessible. The Convention requires Parties to compile pollution inventories through standardized reporting. The information collected may include "inputs, releases and transfers" of a specified range of substances and products from a specified range of activities.

What type of information can a PRTR include?

Inputs: Inputs can include chemicals and substances used in production processes or brought on-site for storage. They can also include water, energy and resources (raw materials) that go into production processes.

Releases: Releases can include emissions from industrial facilities or production processes (or other point sources) of specific substances. Releases of things other than pollutants could include releases of water and energy. Releases can also include emissions from diffuse sources such as agriculture, forestry, construction, roads and urban areas, in which case decisions have to be taken on the unit area to be used for reporting. Reports on releases can be usefully organized according to environmental medium, such as releases to surface water, groundwater, marine waters, air and soil. Releases into a public wastewater treatment system may also be considered releases for reporting requirements.

Transfers: Transfers refer to substances moved to another place, either for further use, recycling, storage, or disposal. The transfers can be to on-site and off-site storage, treatment or disposal sites. Some facilities treat their waste, or store substances, on the premises where it was generated (on-site). Some transfer it to a separate holding, storage or disposal facility (off-site). The definition of "transfers" may also include the amount of a substance that ends up in a finished product that is shipped off-site.

Article 5, paragraph 9, must be carried out through the development of a coherent national system. However, this system does not need to supplant existing information mechanisms. Countries can follow a series of different paths to reach a national system and integrate their existing procedures accordingly. Some countries, such as the Czech Republic, developed all of the elements of a PRTR at once, prior to EU membership. Others may choose to implement the different elements of a pollutant release and transfer system step by step.

Suggested steps for establishing a PRTR

Step 1—Gather information:

Parties can require private entities to monitor, keep records and report inputs, releases and transfers of substances and products into environmental media or disposal sites. For example, Poland has a fairly well-established system of requiring reporting from most enterprises to public authorities. Poland has long had mandatory self-reporting requirements, linked to its system of pollution charges. These requirements include annual (and, for large polluters, quarterly) reporting to the appropriate regional authority about emissions of regulated pollutants into the air and water and disposed of as waste. Since 1997 the regional authorities' registers have been publicly accessible.

Thresholds are often used in early stages of a PRTR, both with respect to the size of facilities required to report, and to the quantity above which substances released and/or transferred are required to be reported. These thresholds may be gradually reduced over time.

Step 2—Organize the information:

Parties can adopt national laws requiring public authorities to compile the reported information and place the raw data in some type of inventory or register that organizes the information by different criteria. Mechanisms ensuring the adequate flow of information from the private sector to the public authorities usually require different reporting schemes for the different environmental media. In practice, these have tended not to be integrated and proved difficult to use for the coherent prevention, control and minimization of pollution. Good PRTR systems take an integrated approach to reporting and to their own internal organization of the reported information. Croatian law requires the information collected under its reporting system to be organized in a register consisting of data on sources, types, quantities, manner and place of introduction and release or disposal of harmful substances into the environment. The registers are maintained by the county or town department responsible for environmental matters. In order to establish a uniform manner of registering data, the State Directorate prepares and provides to county and town register subscribers common programme equipment for the development and maintenance of the register. Seminars have been held for officials using the equipment and in charge of collecting data.

Step 3—Make the information publicly accessible:

Countries developing a PRTR system should make the information publicly available. In PRTR systems, data may be available on paper, CD-ROM, microfiche and via the Internet. Public outreach programmes and training also increase public awareness and use of the data.

10. **Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.**

As discussed in detail in the commentary on those provisions, article 4, paragraphs 3 and 4, lists the exceptions that public authorities can invoke to withhold information requested under article 4.

Article 5, paragraph 10, states that the obligations in article 5 to collect and disseminate certain kinds of information will not prejudice the right of Parties to refuse a request for information on the basis of one of the grounds for refusal set out in article 4, paragraphs 3 or 4. But there are limits within article 4 itself as to the conditions under which those grounds for refusal can be asserted.

So, if there is an imminent threat to public health or to the environment, the public authority has a duty to disseminate this information in accordance with article 5, and it is unlikely that it would be able to claim an exception under article 4. Where threats are imminent, or in an emergency, none of the exemptions that are theoretically applicable under article 4 could be applied, because each of them includes a “public interest test”. Thus, in a hypothetical situation where there is a leak, or an imminent threat of a leak, in a nuclear power station, the environmental and human health implications would take precedence over any public security interest, and require information to be disclosed. However, if a person requests information about the safety arrangements in place to prevent the possibility of a leak at a nuclear facility in the future and the government refuses to give the information claiming a public security exception under article 4, paragraph 4 (b), the applicant’s claim might not automatically prevail.

In short, notwithstanding the wording of article 5, paragraph 10, the duty to disseminate certain information under article 5 might in certain circumstances prevail over the grounds for refusing disclosure in article 4, taking into account the public interests served by disclosure.





PILLAR II

PUBLIC PARTICIPATION IN DECISION-MAKING

Public participation in decision-making is the second “pillar” of the Convention. Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar.

In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policymaking. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures and appropriately taking account of the outcome of the public participation. The level of involvement of the public in a particular process depends on a number of factors, including the expected outcome, its scope, who and how many will be affected, whether the result settles matters on a national, region or local level, and so on. In addition, different persons may have different status in connection with participation on a particular matter. Those who are most affected by the outcome of the decision-making or policymaking should have a greater chance to influence the outcome. This is behind the distinction between “public” and “public concerned”.

Purpose of the public participation pillar

All responsible public authorities take advantage of the interest and the energy of the public. The importance of fully integrating environmental considerations into governmental decision-making requires public authorities to be in possession of accurate, comprehensive and up-to-date information (see the sixteenth preambular paragraph). The public can be a major source of this information. Fortunately, the public often has the desire to take part in the process of gathering information and discussing options for decision-making, both out of self-interest and because of their wish to protect the environment. But this requires an open, regular and transparent process in which the public can have confidence. By providing such a framework in which the public can exercise its rights to information, association and participation, Parties can achieve two goals simultaneously — improving the ability of authorities to carry out their responsibilities and providing the necessary conditions for the public to enjoy their rights and meet their own obligations.

The articles in the second pillar serve as a reminder to public authorities that it is vitally important to allow public participation to do its job fully. While it may be tempting to cut corners to reach a result that might appear on the surface to be the best, there are countless cases where unexpected or hidden factors became apparent only through a public participation process, with the result that potentially costly mistakes were avoided. Furthermore, even where the original proposal is not substantially changed as a result of public participation, the successful implementation of the final decision can be promoted through the active and real participation of the public during the decision-making. Conversely, public participation that is merely pro forma — i.e., that takes place when options are already closed — can injure the chances for successful implementation of a decision because of the questionable legitimacy of the process.

It must be emphasized that public participation requires more than simply following a set of procedures; it involves public authorities genuinely listening to public input and being open to the possibility of being

influenced by it. Ultimately, public participation should result in some increase in the correlation between the views of the participating public and the content of the decision. In other words, the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input.

What is public participation under the Convention?

“Public participation” is not expressly defined in the Convention. The preamble, however, recites some of the values and considerations at the heart of public participation. The most fundamental of these is the role of public participation in ensuring a mechanism for the public to assert the right to live in an environment adequate to health and well-being, and to fulfil its duty to protect the environment (seventh preambular paragraph). The preamble also reminds us that public participation enhances the quality and implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns and enables public authorities to take due account of such concerns. Public participation also furthers accountability of and transparency in decision-making and strengthens public support for decisions on the environment.

In the main text, the Convention shows how public participation should work in the case of certain decision-making processes. The public participation provisions of the Convention are divided into three parts, according to the kinds of governmental processes covered. Article 6 covers public participation in decisions on specific activities with a potential significant effect on the environment, for example, decisions on the proposed siting, construction and operation of certain types of facilities, often over a certain size, as well as other activities for which an EIA procedure including public participation is required under national law. Article 6 also covers, to the extent feasible and appropriate, decisions on the deliberate release of GMOs. At its second session, the Meeting of the Parties adopted an amendment to the Convention whose provisions, when in force, will supersede those of article 6 with respect to decisions on the deliberate release and placing on the market of GMOs. Article 7 covers public participation in the development of plans, programmes and policies relating to the environment, which include sectoral or land-use plans, environmental action plans, and environmental policies at all levels. Article 8 covers public participation in the preparation by public authorities of laws and regulations.

The Convention establishes firm obligations that Parties must meet in providing for timely, adequate and effective public participation. Among these are requirements concerning notification, timing, information, commenting, taking into account and communication. The Convention also urges Parties to promote public participation through other mechanisms, such as encouraging project proponents to interact with the public at a preliminary stage. Of the three articles on public participation, more precise obligations are established under article 6, in recognition that a high level of



involvement of the public, adequately guaranteed by law, is appropriate in specific types of decision-making, reflecting the principle that those who are affected should have the right to influence the decision-making process. Greater flexibility is offered to Parties in meeting the obligations of articles 7 and 8, especially with respect to policies and draft laws.

Article 3, furthermore, reminds Parties that the Convention's provisions, including the provisions in articles 6, 7 and 8, are minimum requirements and that Parties have the right to provide more extensive public participation in decision-making.

Public participation under international law

Aspects of public participation can be found in a growing number of international instruments. As early as 1982, the World Charter for Nature, adopted by the United Nations General Assembly in its resolution 37/7 of 28 October 1982, provided persons with the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment (para. 23). In Europe, the Council of Europe Resolution No. 171 (1986) of the Standing Conference of Local and Regional Authorities of Europe on regions, environment and participation included very specific provisions on public participation in environmental decision-making.

Prior to the adoption of the Aarhus Convention, the 1991 Espoo Convention contained the most developed public participation provisions of any ECE convention. Its article 2, paragraphs 2 and 6, and article 4, paragraph 2, require that the assessment of proposed activities with a potential significant transboundary environmental impact should take place with the participation of the public in the areas likely to be affected. The 1992 UNFCCC, through its article 6, subparagraph (a) (iii), requires Parties to promote and facilitate public participation in addressing climate change and its effects and developing adequate responses. The 1992 ECE Industrial Accidents Convention, through its article 9, paragraph 2, requires a Party under whose jurisdiction an industrial accident may occur to give opportunities for participation to the public in affected areas, without regard to borders.

The general principles developed through these and other international instruments were set forth in the Rio Declaration, adopted by UNCED on 14 June 1992. Its principle 10 states that environmental issues are best handled with the participation of all concerned citizens, and declares that each individual should have the opportunity to participate in decision-making processes, facilitated by the widespread availability of information. Agenda 21, also adopted at the Rio Conference, provides details on the methods and best practices for achieving sustainable development, and gives a great deal of attention to public participation.

More recent international instruments have followed the direction taken by the Rio Declaration. The Convention to Combat Desertification, in its articles 3 (a) and 10 (2) (e) and (f), repeats earlier formulations calling for public participation in relevant decision-making and the need for Parties to facilitate action. It also specifically mentions public participation in several types of processes, including policy planning, decision-making, and implementation and review of national action programmes.

Several instruments have followed the direction of the Aarhus Convention itself. Such instruments include the 1999 Protocol on Water and Health to the ECE Water Convention. The Protocol's preamble takes note of the Aarhus Convention and, in article 5, paragraph 1, includes the three Aarhus Convention pillars among the principles and approaches by which its Parties are to be guided in implementing the Protocol. Its article 6, paragraphs 2 and 5, expressly provides for public participation in the establishment of targets for the standards to be maintained for protection against water-related disease and in the development of water management plans.

The 2003 Protocol on SEA to the Espoo Convention also acknowledges the Aarhus Convention and the importance of providing for public participation in SEA in its preamble. The Protocol, which entered into force on 11 July 2010, includes public participation in its definition of SEA in article 2, paragraph 6. Its article 5, paragraph 3, and article 6, paragraph 3, provide for public participation in the screening and scoping of plans and programmes. Article 8 sets out more detailed requirements for public participation in the SEA of plans and programmes.

The relationship between the Aarhus Convention, EIA and SEA

Public participation is often identified with environmental assessment. Environmental assessment has been described as one of the more successful policy innovations of the twentieth century.²⁴² It is a formal process, which by the time of the Convention's negotiation was already used in more than 100 countries and international organizations to help decision makers consider the environmental consequences of proposed actions. When it is applied to specific activities, e.g., development projects, environmental assessment usually takes the form of EIA. When it is applied to strategic activities like planning or programming, it is known as SEA (see box below).

The scope of application of the second pillar of the Aarhus Convention is, however, different and rather broader than the scope of environmental assessment. For example article 6 covers the reconsideration or updating of the operating conditions of specific activities, which in many countries, unless related to a major change in the activity, is not subject to an EIA procedure but rather to environmental permitting, e.g., the permit required in EU member States under the Industrial Emissions Directive²⁴³ (see the commentary to article 6). Similarly, article 7 applies to plans and programmes "relating to the environment", which is a much broader concept than plans and programmes "likely to have significant environmental effects" and which are usually subject to SEA (see the commentary to article 7).

Moreover, the Aarhus Convention does not require an environmental assessment to be carried out. The Aarhus Convention does not stipulate that an environmental assessment must be a mandatory part of public participation procedures nor does it regulate the situations where environmental assessment is required. However, if an environmental assessment is carried out (either EIA or SEA) then the public participation provisions of the Convention will apply (see the commentary to articles 6 and 7).

Thus, one can conclude that while public participation is in fact a mandatory part of environmental assessment, an environmental assessment is not a mandatory part of a public participation procedure under the Aarhus Convention, as the Convention covers a broader scope.

Concepts of EIA and SEA

In 2002, the Parties to the CBD adopted guidelines on incorporating biodiversity-related issues into EIA and SEA. The guidelines provide the following explanation of EIA and SEA and the differences between them:

Environmental impact assessment is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.

Strategic environmental assessment is the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations.

Strategic environmental assessment, by its nature, covers a wider range of activities or a wider area and often over a longer time span than the environmental impact assessment of projects. Strategic environmental assessment might be applied to an entire sector (such as a national policy on energy for example) or to a geographical area, (for example, in the context of a regional development scheme).

(See the CBD Guidelines For Incorporating Biodiversity-Related Issues Into Environmental Impact Assessment Legislation Or Processes And In Strategic Impact Assessment).²⁴⁴

Despite the differences between EIA and SEA processes, the applicable legal frameworks, at both the national and international level, have many similar features that distinguish them from other procedures used in environmental decision-making. They both relate to proposed or planned — as opposed to existing — activities, and they both involve preparation of documentation meeting certain requirements; for example, both require the documentation to include a discussion of the environment likely to be affected, alternatives to the activity and the potential impact of the proposed activity and its alternatives. They also involve similar procedural steps, such as "screening" to determine which activities require assessment and "scoping" to determine the scope of the assessment. Another important feature that distinguishes EIA and SEA from some other procedures used in environmental decision-making is that they do not necessarily need to be applied to decision-making which is strictly or exclusively "environmental". In practice, both EIA and SEA are often applied in relation to decisions where environmental considerations constitute only some of the factors — and not necessarily the most important ones — to be taken into account by the authority competent to make the decision. As the decision-making authority will not

necessarily be an environmental authority, both EIA and SEA procedures usually require environmental authorities to be consulted before taking the decision. Finally, all the international instruments related to environmental assessment, whether they are concerned with EIA or SEA, and whether binding or non-binding, make public participation a core element of the assessment procedure (see, for example, the definitions of EIA and SEA in the Espoo Convention and its SEA Protocol below).

Elements of EIA and SEA procedures

The Espoo Convention, in its article 1, subparagraph (vi), defines EIA as follows:

“Environmental impact assessment” means a national procedure for evaluating the likely impact of a proposed activity on the environment;

Its article 2, paragraph 2, stipulates that this requires:

the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

The SEA Protocol, in article 2, paragraph 6, defines SEA as follows:

“Strategic environmental assessment” means the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying-out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.

While environmental assessment in the form of EIA or SEA plays an important role in facilitating the effectiveness of public participation under articles 6 and 7 of the Convention, EIA and SEA procedures, as currently regulated at the national and international level, cannot be considered to fully implement the Convention’s public participation requirements ([see the commentary to articles 6 and 7](#)). However, environmental assessment is a very useful tool in ensuring effective public participation in decision-making: without environmental assessment documentation, the public usually have no easy access to reports or studies evaluating the environmental and health risks of an activity. Thus, such documentation helps the public to develop and express their own science-based opinions on the proposed activity, plan or policy.

Identifying whether a decision is an article 6 or article 7 decision

Because different national regulatory frameworks may provide for decisions of various names and legal characters, it is not always obvious whether a particular type of decision amounts to a permit decision under article 6 or a decision to adopt a plan or programme under article 7 of the Convention. As observed by the Compliance Committee, the “Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions”.²⁴⁵ The Committee has held that the issue must be determined on a contextual basis, taking into account the legal effects of the particular decision.²⁴⁶ It has also held that in determining whether a particular decision is an article 6 or 7 decision, its label under the domestic law of the Party is not decisive; rather, it will depend on the legal functions and effects of the decision.²⁴⁷

For example, in communication ACCC/C/2006/16 (Lithuania), the Compliance Committee had to determine the legal nature of decisions called “detailed plans” in Lithuanian law. The Committee held that, under Lithuanian law, such decisions:

have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention.²⁴⁸

Conversely, in its findings on communication ACCC/C/2005/12 (Albania), the Committee held that a challenged decision on an industrial and energy park had:

more the character of a zoning activity, i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not). This would link it more closely with article 7.²⁴⁹

However, the Committee found that another of the decisions challenged by the communicants in that case:

simply designates the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, it is more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant.²⁵⁰

In the light of such findings by the Compliance Committee, one commentator has suggested that certain elements may assist with classifying a decision as falling under article 6 or article 7.²⁵¹ For example, an article 6 decision is typically (a) an individual decision issued by a public authority, (b) usually upon an individual application by an applicant for a permitting decision (most often a developer or operator of an existing installation), (c) permitting a particular activity (development project) to be undertaken by the applicant, (d) in a specific place and under specific conditions, and (e) usually following the general requirements set by the plans or programmes setting the framework for such activities.

In comparison, a typical article 7 decision (plan or programme) has the legal nature of (a) a general act (often adopted finally by a legislative branch), (b) initiated by a public authority, (c) which sets, often in a binding way, the framework for certain categories of specific activities (development projects), and (d) which usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.

Implementing public participation

Under the Convention, Parties have certain core obligations to put into practice. However, each Party has some flexibility in how it adapts the Convention’s obligations to its own national legal and institutional system. The following table provides an overview of the core obligations imposed on Parties through articles 6, 7 and 8 and practical guidance for their implementation.

| | General requirements | Implementation guidance |
|------------------|--|---|
| Article 6 | <ul style="list-style-type: none"> • Conduct public participation early in decisions on activities with a possible significant environmental impact • Give notice to the public concerned • Establish reasonable time frames for phases of public participation • Provide all relevant information to the public concerned • Provide opportunities for the public to make comments • Take due account of the outcome • Inform the public of the final decision with reasons | <ul style="list-style-type: none"> • Develop criteria for evaluating significance of non-listed activities • Identify which decisions “permit” activities and of these decisions, which should be subject to public participation requirements • Ensure that decision makers have a legal basis to take environmental considerations into account • Develop incentives for applicants to engage in early dialogue • Set guidelines and standards for the quality of relevant information • Establish clear procedures for submitting comments in writing or at hearings • Supervise how public authorities take comments into account • Clearly define any exemptions • Flexibility in setting time frames • May facilitate public participation through early dialogue with the applicant • May apply information exemptions • Establish clear procedures for promptly informing the public of the final decision <p><i>For Parties that have not ratified the GMO amendment:</i></p> <ul style="list-style-type: none"> • May limit application to decisions on GMOs if not “feasible and appropriate” <p><i>For Parties that have ratified the GMO amendment:</i></p> <ul style="list-style-type: none"> • Ensure early and effective information and participation on decisions on GMOs, in accordance with the modalities in annex I bis |

| | | |
|------------------|---|--|
| Article 7 | <ul style="list-style-type: none"> • Establish a transparent and fair framework for public participation in plans and programmes relating to the environment • Identify participating public • Conduct public participation early in development of plans and programmes relating to the environment • Give necessary information to the public • Establish reasonable time frames for public participation • Take due account of the outcome | <ul style="list-style-type: none"> • Develop a list or clear criteria for identifying plans, programmes and policies relating to the environment • Develop clear rules for participation • Develop mechanisms for notification • Set guidelines and standards for the quality of necessary information • Develop tools for the identification of the participating public • Supervise how public authorities take comments into account • Establish policies for public participation in policymaking • Flexibility in means (practical and/or other provisions) • Flexibility in setting time frames • Broad latitude in how to provide public participation in preparation of policies |
| Article 8 | <ul style="list-style-type: none"> • Strive to promote effective public participation in the preparation of laws and rules which may have a significant effect on the environment • Establish sufficient time frames for effective participation • Publish or publicize drafts • Provide opportunities for the public to comment • Take account of the result as far as possible | <ul style="list-style-type: none"> • Develop clear rules for participation • Develop criteria for evaluating environmental significance • Establish a reliable and regular vehicle for publishing drafts • Establish clear procedures for submitting comments in writing or at hearings • Supervise how public authorities take comments into account • Broad latitude in how to provide public participation in preparation of laws and rules |

ARTICLE 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

The Convention recognizes that people have the right to take part in basic decisions affecting their lives. It also recognizes that the quality of these decisions can be improved through the active involvement of the public concerned.

Article 6 sets certain requirements for public participation during decision-making on specific activities. A list of some of the specific activities covered by article 6 is set out in annex I to the Convention. Article 6 applies in the first place to decisions on whether to permit such proposed activities — in other words, decisions which permit a particular proposed project, activity or action to go forward. The form of such decisions may vary from one administrative system to another. Article 6 can apply, for example, to spatial-planning decisions, development consents and construction and operating permits, including secondary decisions such as those relating to safety and emissions. Other examples include permits for water or other natural resource use, as well as permits for discharges of pollutants into the water, air or soil. Many countries also require permits for particular types of activities, such as construction or soil excavation.

In addition to the types of specific administrative decisions listed above, the requirements of article 6 apply to all decisions to permit activities within the scope of article 6, whether or not a formal licensing or permitting procedure has been established. Article 6 does not require a formal licensing or permitting procedure to be established, but if such a procedure is established, the public participation requirements of article 6 must be implemented as part of it. Article 6 is to be enforced by article 9, paragraphs 2 and 3.

The table below provides an overview of the core obligations imposed on Parties through article 6 and practical guidance for their implementation.

| Provision | Obligation | Implementation guidance |
|-------------------------------|--|---|
| Article 6, paragraph 1 | Requires Parties to guarantee public participation in decision-making with a potentially significant environmental impact | <ul style="list-style-type: none"> • Applies to activities listed in annex I • Applies also to non-listed activities which may have a significant effect on the environment • National defence exemption |
| Article 6, paragraph 2 | Sets requirements for notifying the public concerned about the decision-making | <ul style="list-style-type: none"> • Public concerned must first be identified, then notified • Early in the process • In an adequate, timely and effective manner • Notice to include the information in article 6, paragraph 2 (a)-(f) as a minimum |
| Article 6, paragraph 3 | Sets time frames for public participation procedures within a decision-making process | <ul style="list-style-type: none"> • Specific time frames must be established for the different phases • Must provide enough time for informing the public and for the public to prepare and participate effectively |
| Article 6, paragraph 4 | Requires that public participation take place early in decision-making | <ul style="list-style-type: none"> • When all options are still open • Public participation may not be pro forma |
| Article 6, paragraph 5 | Encourages exchange of information between permit applicants and the public | <ul style="list-style-type: none"> • Where appropriate • Before permit application • Provide explanations • Enter into dialogue |
| Article 6, paragraph 6 | Requires public authorities to provide the public concerned with access to all information relevant to the decision-making | <ul style="list-style-type: none"> • All relevant information • Free of charge • As soon as available • Article 4, paragraphs 3 and 4, exceptions may apply • Includes the information listed in article 6, paragraph 6 (a)-(f) as a minimum |

| | | |
|---|---|--|
| Article 6, paragraph 7 | Procedures for submitting comments | <ul style="list-style-type: none"> • Any comments, information, analyses or opinions the public considers relevant to submit • Public to judge relevance • In writing or public hearing |
| Article 6, paragraph 8 | Parties must ensure that decision takes due account of public participation | <ul style="list-style-type: none"> • Reasons and considerations on which decision is based should provide evidence of how due account taken of public participation |
| Article 6, paragraph 9 | Public must be informed of final decision | <ul style="list-style-type: none"> • Promptly after decision is taken • Practical arrangements to make publicly accessible the text of the decision along with reasons and considerations |
| Article 6, paragraph 10 | Public participation if article 6 activities are reconsidered or changed | <ul style="list-style-type: none"> • When public authority reconsiders or updates operating conditions • Article 6, paragraphs 2 to 9 apply |
| Article 6, paragraph 11 (original) | Decisions on whether to permit deliberate release of GMOs | <ul style="list-style-type: none"> • Article 6 applies to the extent “feasible and appropriate” |
| Article 6, paragraph 11 (amended) | Decisions on whether to permit deliberate release and placing on the market of GMOs | <ul style="list-style-type: none"> • Article 6 does not apply |
| Article 6 bis | Decisions on whether to permit deliberate release and placing on the market of GMOs | <ul style="list-style-type: none"> • Early and effective information and participation • In accordance with modalities in annex I bis |

Article 6 and EIA

At first glance, it may appear that article 6 refers simply to public participation in EIA procedures. However, EIA is not in itself a permitting or authorization process. It is a tool for decision-making. The term EIA has become associated with a standard form of procedure for the assessment of potential environmental impacts as part of the decision-making process relating to a proposed activity. The Convention expressly mentions EIA procedures in article 6, paragraph 2 (e) ([see the commentary on “The relationship between the Aarhus Convention, EIA and SEA”](#) above and also on [article 6, paragraph 2 \(e\)](#), below).

While the term EIA is used in the Convention, the test as to whether the Convention applies to a particular decision-making procedure is not whether that procedure is required to include EIA, or is considered as “environmental decision-making” under national law, but whether the decision-making itself may have a potentially significant impact on the environment.

The EIA procedure is normally linked closely to decisions that determine whether or not a proposed activity may proceed, and may therefore be regarded as part of the decision-making process. In theory, an EIA procedure may reveal the likelihood of negative environmental effects from a proposed project and yet the decision may be to proceed with the project. In another situation, the converse may be the case, i.e., the EIA procedure may reveal a probability of no significant environmental effects and yet the decision may be not to proceed. However, given that the EIA procedure often involves the most detailed examination of the environmental consequences of proceeding with a proposed activity, the findings of the EIA procedure often play a significant role in the decision itself ([see the commentary to article 6, paragraph 8](#)).

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee noted that:

The Convention does not make the EIA a mandatory part of public participation; it only requires that when public participation is provided for under an EIA procedure in accordance with national legislation (para. 20 of annex I to the Convention), such public participation must apply the provisions of its article 6. Thus, under the Convention, public participation is a mandatory part of the EIA, but an EIA is not necessarily a part of public participation.²⁵²

In those findings, the Committee held that a decision that there is no need for environmental assessment does not amount to a breach of the Convention, even if such a decision would be in breach of national or international law regarding environmental assessment:

Accordingly, the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in particular the decisions that there is no need for environmental assessment, even if such decisions are taken in breach of applicable national or international laws related to environmental assessment, and cannot thus be considered as failing to comply with article 6, paragraph 1, of the Convention.²⁵³

International and regional instruments on EIA

Two important instruments on EIA are the ECE Espoo Convention and EU Council Directive 85/337/EEC of 27 June 1985 (as amended) on the assessment of the effects of certain public and private projects on the environment (EIA Directive).

Both oblige parties or member States to take the necessary measures to establish an EIA procedure for specified activities that allows the public to participate (Espoo Convention, article 2, para. 2, and EIA Directive, article 2, para. 1, and article 6, para. 4). The Directive, for example, requires member States to ensure that projects likely to have significant effects on the environment “are made subject to a requirement for development consent and an assessment with regard to their effects” (article 2, para. 1).

Even if the Aarhus Convention does not establish an EIA regime per se, its article 6 does establish a kind of review of the environmental impacts of particular activities, where decision-making in relation to them takes place. That is because it is implicit in the Convention that public comments in relation to environmental matters must be taken into account (article 6, para. 8). Moreover, for them to be taken into account, the decision maker must have a legal basis for doing so. Consequently, the law must allow environmental considerations to be one of the factors in decision-making. Furthermore, the specific requirements of article 6 with respect to notification and its contents, procedures for taking public comments into account, and the effect of the public participation on the resulting decision, significantly corresponds with the international norms of EIA.

Other types of decision-making processes

While EIA is the most familiar process within decision-making covered by article 6, the article also applies to other decision-making. For example, in most countries in addition to the EIA procedures which may apply while granting development consents for activities covered by article 6, such activities may require special environmental permits before starting operation. As is the case for permits issued under the Industrial Emissions Directive (see box on “Multiple permits in EU law” below), such permits will also require public participation under article 6. Furthermore, while EIA procedures do not typically apply to existing activities unless a significant change is involved, the reconsideration or updating of operating conditions for activities covered by article 6 usually takes the form of such environmental permits and requires public participation under article 6, paragraph 10. Finally, article 6 may potentially apply — in accordance with national law — to a variety of specific regulatory decisions regarding proposed activities which may have a significant effect on the environment, such as rate-setting or approvals for the introduction of new products into commerce or of alien species into the environment, or decisions to initiate a remedial action in case of environmental damage.

The obligation to provide opportunities for public participation may apply to different environmentally significant decisions in the course of a particular approval process, depending on what kind of permit system a Party uses. As a result, in implementation, Parties may be obliged to establish mechanisms to guarantee the participation of the public at several steps along the way in the conception, initiation, development, operation and even closing-down of projects, facilities and other activities which may have a significant effect on the environment. The key question is whether the particular decision-making meets the triggering requirements of article 6, paragraph 1.

As discussed earlier, the Compliance Committee has held that the names of decisions under the domestic law of a Party are not decisive in determining how they should be categorized under the Convention, rather this is to be determined by the legal functions and effects of the decisions.²⁵⁴ While decision-making on plans, programmes and policies in general is regulated by article 7 ([see the commentary to article 7](#)), article 6 may apply when such planning is concerned with a concrete activity. For example, the United Kingdom’s Town and Country Planning General Regulations (1992) regulate the issue of “planning permission”. Despite the term, such decisions are normally considered as specific decisions concerning development of a specific land plot.

Public participation in the OVOS/expertiza system

A specific form of decision-making incorporating EIA procedures may be found in many countries in the ECE region that have developed the concepts of the “OVOS procedure” and “state expertiza”. This is a two-stage system. Proposed activities that have a significant impact on the environment are first subjected to the OVOS procedure. The OVOS is a procedure during which the developer collects all the necessary information concerning the potential impact on the environment of

the proposed activity and compiles the relevant impact assessment documentation. The developer also has the responsibility to provide members of the public, or their associations, interested in participating in the OVOS procedure with the relevant information and ensuring their participation in the development of the documentation. The OVOS procedure is not itself a permitting procedure but is closely connected to the development of the overall project documentation. During the second stage, the proposed activities are subjected to a “state environmental expertiza” conducted by the competent environmental authorities or by external experts nominated by the competent environmental authorities. During this stage, there is usually no requirement for public participation. The public may, however, if certain conditions are met, initiate a so-called “public environmental expertiza” whereby independent specialists nominated and paid by the initiators (usually NGOs) examine the compliance of the submitted documentation, including the information on public participation, with the requirements of national law and submit their conclusions to the authorities responsible for the state environmental expertiza.

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the OVOS and the state environmental expertiza should be considered jointly as a decision-making process involving a form of an EIA procedure and that the conclusions of the state environmental expertiza should be considered as a decision whether to permit an activity.²⁵⁵

It held, however, that relying on the developer at the OVOS stage to carry out the public participation was not in line with the Convention. The Committee recommended appropriate changes be made in the Party concerned’s legal framework. The Committee also held that since the organization of so called public environmental expertiza was not a mandatory part of the decision-making it could not be considered as a primary tool to ensure the implementation of article 6. It may, however, have a role as an additional measure to complement the public participation procedure required as a mandatory part of the decision-making.²⁵⁶

Multiple permits

Most ECE countries require some type of assessment of the potential environmental impact of specific projects or activities before issuing a permit. This assessment is typically carried out by authorities at the level most relevant to the proposed activity or by an applicant or proponent of a project under their supervision. For example, local authorities will generally have authority to approve projects with solely local impact, while regional authorities may approve projects with an impact throughout a watershed. Some countries also require separate issuance of more than one permit, each of which may have environmental consequences.

In this regard, the Compliance Committee has had to address the question as to whether the Convention requires the public participation procedures in article 6, paragraphs 2 to 10, to be applied in all, or in all environment-related, permitting processes or just in some of them.

In its report to the third session of the Meeting of Parties, the Committee expressed the view that:

not all the decisions required within national frameworks of regulatory control in relation to activities listed in annex I to the Convention should necessarily be considered as “decisions on whether to permit proposed activities” to which the full range of public participation procedures should apply. On the other hand it does not mean that it would necessarily be sufficient to provide for public participation according to article 6 in only one such decision. In fact, many national frameworks require more than one such permitting decision, and to limit public participation opportunities to only one such decision would not always be sufficient to fulfil the requirements of the Convention. Furthermore, development of large-scale projects often has long span and certain significant elements as projected at an early stage might later require substantial modification. While public participation at an early stage remains crucial, significant modifications of the project’s elements might call for further consultations at later stages.²⁵⁷

The Committee held that it therefore:

considers that the issue will have to be decided on a contextual basis, taking the legal effects of each decision into account. Of crucial importance in this respect will be to examine to what extent such a decision indeed “permits” the activity in question. If there are more than one such permitting decision, some kind of significance test seems to be the most appropriate way to understand the requirements of the Convention. The test should be: does the permitting decision, or range of permitting decisions, to which all the elements of the public participation procedure set out in article 6, paragraphs 2 to 10, apply embrace all the basic parameters and main environmental

implications of the proposed activity in question? If, despite the existence of a public participation procedure or procedures with respect to one or more environment-related permitting decisions, there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the above basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.²⁵⁸

Multiple permits in EU law

The requirements relating to public participation in decisions whether to permit proposed activities subject to article 6 of the Convention are included in EU law through both the EIA Directive and the Industrial Emissions Directive.

The EIA Directive requires an EIA procedure to be conducted before the issuing of a decision (“development consent”) to permit a project likely to have significant effects on the environment and requires the public concerned to be given early and effective opportunities to participate in the EIA procedure. If national law provides for a consent procedure comprising more than one stage, the EIA Directive has been interpreted by the ECJ²⁵⁹ to require an environmental impact assessment to be carried out if it becomes apparent, in the course of the later stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location. In practice, this includes both those situations where (i) it was decided at the initial screening stage that the project was unlikely to have significant environmental effects and thus no EIA was done; and (ii) an EIA was carried out at the earlier stage, but it subsequently becomes apparent that the project is likely to have further significant environmental effects that have not been assessed.

The Industrial Emissions Directive requires that no installation subject to the Directive is to be operated without a permit granted in accordance with the Directive, and that early and effective public participation must be conducted before the granting or updating of a permit.²⁶⁰

In the light of the EIA and Industrial Emissions Directives, public participation is required in all EU member States at an early stage in the approval of activities that are likely to have significant effects on the environment (when the basic parameters, including type, size and location, are being decided) and then again at later stages (up until the stage where the precise technology and resulting emissions are approved in the integrated permit).

Furthermore, a new development consent (with EIA and public participation) is required in the case of any changes or extensions to projects subject to the EIA Directive that are already executed and which are likely to have significant effects on the environment. Public participation is likewise required if a permit issued under the Industrial Emissions Directive is subsequently reconsidered and updated.

Decisions on whether to permit certain kinds of activities versus other types of decisions

In many countries there may be a range of decisions, often taking the form of resolutions, which allow for contracts or agreements to be concluded between public authorities or between public authorities and private companies. Such decisions may in practice limit the range of options available to some extent. Such decisions may have various names and legal characters. One possible example could be an agreement between a city council and a private developer for a housing development. This might include an obligation for the city council to take the steps necessary to reclassify part of the lands where the houses would be constructed from “non-residential” to “residential”. Another example might be a resolution by local authorities to launch a tender procedure for a concession for a private operator to carry out public services related to waste management. Such decisions would not necessarily require public participation under article 6 or 7 of the Convention. This was noted by the Compliance Committee in its findings on communication ACCC/C/2007/22 (France), in relation to resolutions by local authorities regarding a contract with a private company regarding a waste disposal plant. In its findings, the Committee found that “while there may be many good reasons to provide public participation also before adopting municipal resolutions of this kind”,²⁶¹ they were not subject to article 6 or 7 of the Convention in that case, despite the fact that they narrowed down the scope of options allowed under the applicable plans, so long as they “neither had any legal effect on these plans, nor conferred any right to construct or operate the waste treatment centre or to use the site, nor in any other respect did they entail legal effects amounting to that of the applicable planning instruments”.²⁶²

In its findings on communication ACCC/C/2007/21 (European Community), the Compliance Committee held that in general a decision of a financial institution to provide a loan or other financial support is legally not a decision to permit an activity, as is referred to in article 6 of the Convention.²⁶³

Challenging decisions subject to article 6

In understanding article 6, it must be kept in mind that, through article 9, paragraph 2, the public has access to justice to defend its rights and interests with respect to the procedures of article 6 ([see also the commentary to article 9, paragraph 2](#)).

Finally, it should also be made clear that rights under the Convention are independent of the rights of parties to an administrative proceeding as determined under applicable domestic law. Parties to a proceeding may have specific legal rights in addition to those granted to the public or to the public concerned under the Convention. Members of the public or of the public concerned under the Convention might also have the right to become parties to the proceeding.

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

Subparagraphs (a) and (b) together establish a test for determining whether decisions on certain proposed activities should be subject to article 6. They are linked by their consideration of the potentially significant impact of proposed activities on the environment. Subparagraph (a) makes use of an annex of listed activities that are presumed to have a potentially significant effect on the environment: annex I. Subparagraph (b) establishes an obligation for Parties to apply article 6 to other activities not contained in annex I that may have a significant effect on the environment. Paragraph 1 as a whole was drafted with reference to article 2, paragraph 1, of the EIA Directive, its annexes I and II and the original IPPC Directive²⁶⁴ and its annex I.

The Convention uses the term “proposed activities”. While not defined in the Aarhus Convention, the term “proposed activity” is used in the Espoo Convention, which defines it as “any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure” (Espoo Convention, article 1, para. (v)). The term is broad enough to cover both the terms “project” in the EIA Directive and “installation” used by the Industrial Emissions Directive.

While subparagraph (a) refers to “decisions on whether to permit”, subparagraph (b) refers to “decisions on” proposed activities. This difference reflects the fact that the activities listed in annex I, because of their recognized environmental significance, can be expected to be the subject of sophisticated permitting procedures, whereas the kinds of activities falling under subparagraph (b) might not ordinarily be subject to fully developed permitting procedures. Furthermore, the flexibility in subparagraph (b) enables article 6 to be applied to additional forms of decision-making as their environmental significance is realized.

Article 6, paragraph 1 (a)

Article 6, paragraph 1 (a), requires that the public participation provisions of article 6 be applied to decisions on whether to permit the proposed activities listed in annex I. Annex I is based, with some modifications, on the respective annexes to the Espoo Convention, the original IPPC Directive and the EIA Directive ([see the commentary to annex I](#)). In addition to the many different types of activities listed in paragraphs 1–19 of annex I, paragraph 20 of the annex extends article 6 to any activity that under domestic law requires an EIA procedure with public participation (annex I, para. 20).

Likewise, paragraph 22 of annex I extends article 6, paragraph 1 (a), to cover changes to or extension of the activities listed in paragraphs 1–20 where the change or extension itself meets the criteria or thresholds set out in annex I ([see the commentary to annex I, paragraph 22](#)). In such cases, it is assumed that they may have a significant impact. Where the change or extension does not itself meet the threshold, the Parties must apply article 6, paragraph 1 (b).

Whereas paragraph 22 of annex I deals with physical changes or extensions to activities, paragraph 10 of article 6 addresses changes to the operating conditions of activities covered by article 6, paragraph 1. It requires public authorities reconsidering or updating the operating conditions for such activities to apply that article's public participation requirements, *mutatis mutandis*, and where appropriate ([see the commentary to article 6, paragraph 10](#)).

Finally, some activities that would normally fall under subparagraph (a) may be exempt from the requirements of article 6, if they exclusively or mainly involve research and the development and testing of new methods, with certain restrictions ([see the commentary to annex I, paragraph 21](#)).

Article 6, paragraph 1 (b)

Article 6, paragraph 1 (b), applies article 6 public participation requirements to decisions on proposed activities not listed in annex I that may yet have a significant impact on the environment. The Convention provides that “Parties shall determine whether such a proposed activity is subject to these provisions”. Although the text of the Convention is not very clear on this point, the word “Parties” used in subparagraph (b) should most likely be understood in the context of the chapeau of the paragraph which is addressed to “each Party”. That is to say, it is up to each Party to make such a determination.

It is not clear from the wording of the subparagraph whether Parties must develop categories of activities within the scope of subparagraph (b) in addition to those found in annex I, or whether they must develop guidelines for the application of the Convention's principles by individual public authorities in decision-making on a case-by-case basis. However, it is worth mentioning that if a Party develops additional categories of activities subject to a mandatory EIA procedure, these activities would already fall under subparagraph (a) by virtue of paragraph 20 of annex I as long as public participation is required.

Also worth mentioning in this context is the EIA Directive, which, except for the mandatory list of activities subject to EIA procedure in annex I, establishes also a list of activities requiring screening in annex II. The screening may be done case by case or according to thresholds or criteria, or both.

Whether done case by case, or according to thresholds or criteria, or both, a determination under article 6, paragraph 1 (b), that a proposed activity is subject to the provisions of article 6 does not mean that the activity should be necessarily subject to an EIA procedure also. Thus, while screening for the purpose of EIA might serve as a useful mechanism to assure compliance with article 6, paragraph 1 (b), it should not be considered as the only means to determine whether an activity should be subject to provisions of article 6.

It is also clear that it need not be certain that a proposed activity will definitely have a significant effect on the environment before subparagraph (b) can be applied. The Convention states that Parties must determine the applicability of article 6 where the proposed activities *may have* a significant effect on the environment, i.e., a mere likelihood of significant effect triggers the obligation.

The question of “significance” is an important one. The “significance” of the effect on the environment is what takes ordinary decision-making into the realm of environmental decision-making as contemplated under the Convention. Significance is not defined in the Convention, but some guidance as to how it is interpreted in other contexts can be found in appendix III to the Espoo Convention and other sources related to EIA procedure (see box below).

As well as the question of how to determine significance, it is also important to consider who will determine it. The test of significance should be applied objectively and not in a manner to avoid public participation. In countries with developed EIA practice, authorities and applicants frequently have their determinations that potential impacts are not significant overturned by the courts. In these cases, the public has often employed independent scientists and experts to challenge official findings.

What is environmentally “significant”?

While what would constitute a “significant impact on the environment” is not defined in the Convention, some guidance as to how it is interpreted in other contexts can be found in appendix III to the Espoo Convention and other sources related to EIA procedure. Article 6, Paragraph 1 of appendix III to the Espoo Convention stipulates that:

In considering proposed activities ... the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria:

- (a) *Size*: proposed activities which are large for the type of the activity;
- (b) *Location*: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;
- (c) *Effects*: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.

The EIA Directive, as amended, includes an annex III on selection criteria for determining whether a particular project should be subject to EIA procedure. The criteria include:

- Characteristics of projects, such as the size, the cumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances and the risk of accidents;
- The location of projects, such as the environmental sensitivity of geographical areas likely to be affected by projects, including, for example, wetlands, coastal zones, mountains, forest areas, nature reserves and parks, landscapes of historical or cultural significance, or densely populated areas;
- Characteristics of the potential impact, including the extent of the impact in terms of geographical area and affected population, the transfrontier nature of the impact, the magnitude and complexity of the impact, the probability of the impact, and the duration, frequency and reversibility of the impact.

Following the above criteria, in 2001 a special Guidance for EIA screening was issued by the European Commission.²⁶⁵ Some countries may have developed further substantial guidelines for determining “significance” that may be of use to Parties in implementing the Convention.

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

When a Party deems that the application of article 6 to proposed activities serving national defence purposes would have an adverse effect on those purposes, the Party may decide not to apply it. The phrase “on a case-by-case basis if so provided under national law” is problematic. It is subject to at least two possible interpretations. The first is that decisions about the application or non-application of article 6 in national defence cases may be done on a case-by-case basis only if provided under national law. Otherwise, if the national law is silent, such decisions could not be made on a case-by-case basis. Where national law does not expressly provide for a case-by-case basis, such decisions would presumably have to be made according to clear criteria, which should be found in law, that is, in a transparent and clear framework for implementation of the Convention.

The second interpretation is that the two phrases between the commas are to be read as independent elements. This would have been made more apparent if the drafters had placed a comma between “on a case-by-case basis” and “if so provided under national law”. That would establish two tests before a Party could decide not to apply article 6 in a particular case. First, the national law would have to provide a legal basis for decisions not to apply article 6 to activities serving national defence purposes. Secondly, determinations could not be made categorically, but would have to be made on a case-by-case basis.

In either case, the final phrase requires that a determination be made that the application of the exemption in the particular case would have an adverse effect on national defence. Therefore, in the case of the first reading, the mere fact that a particular activity falls into a national defence category would not be enough to avoid the application of article 6. A further

determination would have to be made that in the particular case an adverse effect would result. This somehow supports the second reading of the provision, because it means that *in any case* there will need to be some specific inquiry into the facts and circumstances. If the second reading is correct, then the phrase at the end adds little to what has gone before. It only confirms what will be the inquiry during the case-by-case determination — whether the application of article 6 would have an adverse effect on national defence.

Therefore, if a Party wants to provide for a national defence exemption, it can meet both readings of this provision by establishing clear national legal criteria for use of the exemption, while requiring in a particular case an inquiry into whether the application of article 6 would have an adverse effect on national defence.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of:

Paragraph 2 establishes minimum standards for the public concerned to be informed of information necessary for it to participate effectively in environmental decision-making. The obligation is stated in the passive voice in recognition of the fact that Parties can place the obligation of notification and information on different actors. In some systems it may be appropriate to place the responsibility to provide the notice on the authority responsible for the ultimate decision, while in others it may be appropriate to place this obligation on other authorities or bodies or sometimes on the applicant. Parties must ensure that the obligation is placed upon someone, and act as the guarantors of the process.

According to article 2, paragraph 5, “the public concerned” is the public affected or likely to be affected by the environmental decision-making or having an interest in it. The term should be seen in the light of the non-discrimination provision in article 3, paragraph 9, which means that the obligation to inform the public concerned includes also, where appropriate, the public across national borders (see the commentary to article 2, paragraph 5, and article 3, paragraph 9). In its findings on communication ACCC/C/2004/03 (Ukraine), the Compliance Committee noted that “generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention.”²⁶⁶



The reference to “environmental decision-making” must be considered in the light of article 6, paragraph 1 — that is, a new term is not being introduced here. Rather, the decision-making that is at issue is any decision-making included by virtue of article 6, paragraph 1, not any decision-making which is labelled environmental under national law.

How to inform the public concerned

The article provides for two methods of informing the public — public notice and individual notice. Public notice means the dissemination of information to as many members of the public as possible, making use of the normal means for general and widespread transmission of information. Means of public notification might include publication in a newspaper or other generally available printed media, dissemination through mass media (TV, radio), through electronic means or posting of notices in areas with heavy traffic or places frequented by the local population (e.g., bus stations, churches, shops, etc). The EIA Directive mentions, for example, bill-posting within a certain radius, publication in local newspapers and the organization of exhibitions with plans, drawings, tables, graphs and models as valid means of notification.²⁶⁷

With respect to its examination of the national reports submitted by the Parties, in its report to the third session of the Meeting of the Parties, the Compliance Committee observed that “there are a significant number of good practices and several advanced practical solutions to effective notification of the public concerned with regard to decision-making. These include notification in several newspapers, using local authorities as mediators, individual notification based on mailing lists, and notification in the locality of the planned activity or at places frequently visited by the public concerned”. The Committee noted however that “unfortunately, countries usually rely on only one of the means of notification” and suggested that “simultaneous use of several methodologies would often be significantly more effective”.²⁶⁸

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that “journalists’ articles commenting on a project in the press or on television programmes ... in general, do not per se constitute a public notice for the purpose of public participation, as required under article 6, paragraph 2, of the Convention”.²⁶⁹

Moreover, in its findings on communication ACCC/C/2009/43 (Armenia), the Compliance Committee observed that “sometimes, it may be necessary to have repeated notifications so as to ensure that the public concerned has been notified”.²⁷⁰

Individual notice — that is, dissemination of information to certain classes of persons individually — is possible in appropriate situations. Individual notice is especially important where individual interests might be affected by the decision. The Seveso III Directive establishes zones in the immediate vicinity of facilities engaging in potentially dangerous activities.²⁷¹ A similar approach is followed in many ECE countries that use the concept of “sanitary zones”. These zones can help to identify potentially affected people, who may then be individually notified. Individual notification is also especially relevant for NGOs that are not located in the immediate vicinity of the proposed activity, but which meet the requirements of the “public concerned” under article 2, paragraph 5.

Means of notification in Poland

Under the Polish Act on Access to the Information on the Environment, Public Participation and the Environmental Impact Assessment of 3 October 2008, the notification of the public is the responsibility of the competent authority (i.e., the authority responsible for making the decision or adopting a strategic document) and must be provided by the following means:

- Placing the information on the Internet homepage of the authority (via a so-called “Public Information Bulletin”).
- Publishing the information in the customary way at the seat of the authority (usually by placing the information on the notice board).
- Posting notices in the vicinity of the proposed project.
- In the case of proposed plans, programmes, policies, etc., by publication in a newspaper of applicable geographical circulation.
- Where the seat of the competent authority is located in a community other than the community relevant to the subject of the notification, by publication in the local press or in a manner commonly used in the locality or localities relevant to the subject of the notification.

In addition, the Administrative Procedure Code requires those having a legal interest in the decision-making (usually immediate neighbours) to be notified by individual notice (usually by registered letter).

Criteria for notice

The inclusion of the terms “adequate, timely and effective manner” adds much to the basic obligation. These three terms are each discussed below.

Effective notice

In today’s information-saturated society, it can be extremely difficult to command the attention of those the public authorities would like to reach. Efforts must be made to ensure that the public concerned is not only reached, but that the meaning of the notification is understandable and all reasonable efforts have been made to facilitate participation (see also the [commentary to article 3, paragraph 2](#)). Thus, a small announcement in a newspaper among hundreds of advertisements would perhaps not be considered effective. Local television broadcasting at a time when most people are at work might also be ineffective. Whether a particular means of notification is considered effective will of course depend on the particular conditions. Internet websites as state-of-the-art notice boards are a powerful tool in reaching the public in some parts of the ECE region and are spreading fast. Not only can they work as systems for general notification, but through electronic manipulation they can also pinpoint those persons who may have a more direct interest in the decision-making.

Notification needs to be considered flexibly to be effective. A key concept is “penetration”. A set of tools can be used to set up a hierarchy of information, with deep penetration of general information to the public, combined with a much more focused outreach to smaller target groups. Furthermore, the general information can be much more effective if it points the direction to further information. The contents of the notification cannot be everywhere, nor would it be effective to try to spread it everywhere in every case.

In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee held that:

The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate. Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies.²⁷²

The Compliance Committee affirmed the above view in its findings on communication ACCC/C/2007/22 (France).²⁷³

Moreover, as can also be seen by reference to article 6, paragraph 6 (f), the timeliness, adequacy and effectiveness of notification might require more than a single notification at one point in time. If further information comes to light that may have relevance to the environmental decision-making procedure, an additional notification may be necessary. This is specifically acknowledged in paragraph 2 (d), where the phrase “as and when this information can be provided” clearly shows that Parties have an obligation to ensure that the notification is updated when necessary.

Adequate notice

For the purposes of this article, public notice would be considered adequate so long as it effectively targets at least the public concerned with the decision. It would be considered timely so long as it targets the public concerned early enough in the procedure for public participation to be effective (see also article 6, para. 4). The Convention requires notice to be given to the whole concerned public at an early stage of the proceeding.

In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee found that:

It has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning “development possibilities of waste management in the Vilnius region” rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as “adequate” and properly describing “the nature of possible decisions” as required by the Convention.²⁷⁴

Timely notice

Article 6, paragraph 4, sheds further light on the purpose behind giving notice early in an environmental decision-making procedure. Early public participation means that the public may participate when all options are open and participation may be effective. Article 6, paragraph 2, continues with minimum requirements as to the content of notification. The use of the term “inter alia” indicates that the notification can and should include more information than that specified in the subparagraphs. The use of the construction “informed of” allows Parties flexibility in determining whether to provide the actual documentation (such as the application itself under article 6, paragraph 2 (a)) in the notice, or to inform the recipient of the availability of the actual documentation at a convenient location.

In considering how to implement article 6, paragraph 2, it should also be remembered that paragraph 6 requires that all information relevant to the decision-making, with certain restrictions, should be made available to the public free of charge at the time of the public participation procedure ([see also the commentary to article 6, paragraph 6](#)).

With regard to communication ACCC/C/2009/37 (Belarus), the Compliance Committee, noting that under Belarusian law hearings must be organized no earlier than 30 days from the date of the public notice, made the following finding:

The Committee appreciates a flexible approach to setting the time frames aiming to allow the public to access the relevant documentation and to prepare itself, and considers that while a minimum of 30 days between the public notice and the start of public consultations is a reasonable time frame, the flexible approach allows to extend this minimum period as may be necessary taking into account, inter alia, the nature, complexity and size of the proposed activity.²⁷⁵

In its findings on communication ACCC/C/2009/43 (Armenia), the Compliance Committee held the following:

The Committee considers that one week to examine the EIA documentation relating to a mining project (first hearing) is not early notice in the meaning of article 6, paragraph 2, because it does not allow enough time to the public concerned to get acquainted with voluminous documentation of a technical nature and to participate in an effective manner.²⁷⁶

(a) The proposed activity and the application on which a decision will be taken;

This provision requires the notification to include information about the proposed activity and the application on which a decision will be taken. Public authorities must at least make the application available for inspection by the public in accordance with article 6, paragraph 6, as it is surely relevant to the decision-making. However, notification may include information on the type of activity, the proposed technology, if any, the exact location, the project applicant, and any other information that is necessary for the public to fully understand the scope and potential consequences of the proposed activity.

The term “proposed activity” is often used in connection with EIA procedure. However, under the Convention the term must be interpreted to apply to all activities where public participation may be required under article 6 ([see the commentary to article 6, paragraph 1 \(a\) and \(b\), above](#)).

(b) The nature of possible decisions or the draft decision;

The term “the nature of possible decisions” refers to the range or scope of decisions that may be taken with regard to the proposed activity. For different types of procedures, a different description may be necessary. These might, for instance, include permits (water, air, waste, etc.), permissions (planning, development and construction permissions, etc.), consents (e.g., construction consents), and the other types of decision-making described in the introduction to article 6, above. The terms used to name various decision-making procedures vary from country to country. The notification should explain what type of decision is being made and its legal force.

Where a proposed decision has already been developed, the Convention requires information about the draft decision (for example, a copy of the draft or a description of where it can be viewed) to be included in the public notification. Obviously, a draft decision cannot be a final document, but rather a proposal as to the content of the future decision that is being made, which must be open to discussion through the public participation procedure ([see also the commentary to article 6, paragraph 6](#)).

By way of example, an indication in a notice of “air emission permit” would constitute the nature of the decision, while including a copy of a draft permit for a particular facility, including conditions, would amount to notice of the draft decision.

(c) The public authority responsible for making the decision;

The notification should identify the public authority responsible for making the decision. Identification should be complete enough to enable the public concerned to contact the identified person or body. Maximum information is consistent with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth, ninth, tenth, twelfth and fourteenth paragraphs). This provision also has parallels with article 5, paragraph 2 (b) (iii), which requires the identification of points of contact to make environmental information effectively accessible to the public ([see the commentary to article 5, paragraph 2 \(b\) \(iii\)](#)).

(d) The envisaged procedure, including, as and when this information can be provided:

It is not entirely clear from the text of the Convention whether the “envisaged procedure” refers to the whole decision-making process or to the public participation procedure within it. Most of the points under subparagraph (d) pertain to public participation procedures. However, subparagraph (d) (ii), which addresses the “opportunities for the public to participate”, can be read to refer to the public participation procedures within a larger decision-making process. It would be consistent with both these views for Parties to provide information about the whole decision-making procedure, and in fact this information could also help to facilitate public participation by providing more background information to the public concerned. This provision may, therefore, be interpreted to require the notification to include a description of the decision-making process, with details provided about its consequences, as well as stages, phases and steps, including those stages at which public participation will take place.

In this context, the Convention considers the matters listed under subparagraph (d) (i) to (vi) to be essential elements to be included in the notification regarding the procedure. However, the word “including” indicates that this list is non-exhaustive. The notification may include any other information that will further inform members of the public about the procedure. For example, in respect of a proposed activity with likely transboundary impacts, the notification should indicate how and when the Party intends to distribute the EIA documentation to the public of the affected Party ([see the commentary to article 6, paragraph 2 \(e\)](#), below and also article 4, paragraph 2, of the Espoo Convention, which makes notification of how and when the Party intends to distribute the EIA documentation to the public of the affected Party mandatory).

Significantly, through the words “as and when” the Convention reinforces its own obligation for early notification by providing that a lack of information about these details should not serve to delay the notification. These words also confirm the notion that supplemental notification may have to be given “as and when” information can be provided. “As and when” is a different formulation that conveys the same meaning as “as soon as”. The term “as and when” does *not* mean “information about when” the information will be made available.

(i) The commencement of the procedure;

Presumably, the decision-making procedure will already have started and the public participation procedure will start with the notification. The notification, therefore, is informing the public concerned of an event. In such a case it is logical to interpret this provision as requiring the notification to stipulate that the decision-making procedure started on a certain date and that the public participation procedure is beginning with the sending of this notification.

(ii) The opportunities for the public to participate;

Adequate notice of a public participation procedure must obviously include information about the opportunities for the public to participate in it. A certain level of detail is required for the notification to be “adequate, timely and effective”. Therefore, the notification may include, inter alia, information about how and when the public can gain access to further information about the proposed activity or the decision-making, the manner in which the public may participate (including, where applicable, submission of comments in writing or the possibility of presenting comments, suggestions or alternatives at a public hearing (see article 6, para. 7)), and opportunities for appeal.

(iii) The time and venue of any envisaged public hearing;

If the envisaged procedure includes public hearings (see article 6, para. 7), the notification must also include sufficient information for the public concerned to understand where and when the public hearing will take place. The requirement for timely notice must allow enough time between the notice and the date of the hearing for the public to prepare effectively ([see the commentary to article 6, paragraph 3](#)).

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

The notification must identify the public authority that possesses information relevant to the proposed activity and must indicate where relevant information can be examined by the public. As with article 6, paragraph 2 (c), above, the identification of the public authority should be complete enough to enable the public concerned to contact the identified person or body, consistent with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth, ninth, tenth, twelfth and fourteenth paragraphs).

The notification required under this provision is clearly linked to the right of the public concerned in article 6, paragraph 6, to examine the information relevant to the decision-making. Interestingly, however, while paragraph 6 refers to examination by the “public concerned”, paragraph 2 (d) (iv) refers to examination by the “public” which would seem to be a slight inconsistency in the Convention.

The words “from which relevant information can be obtained” recognize that the public concerned may also take advantage of the provisions of article 4 to gain access to information additional to that deposited for public inspection in accordance with article 6, paragraph 6. This acts as a safety valve in case full information is not provided, inadvertently or otherwise, by the public authority in accordance with article 6, paragraph 6.

The place where the relevant information is to be deposited for examination does not need to be the same as the seat of the competent authority. If the seat is far away from the location of the activity it may be reasonable to make the information available for the public to inspect the relevant documentation in places closer to the local population, for example, at the premises of the local authorities or at local schools or libraries.

“Relevant information” versus “environmental information”

Paragraph 2 (d) (iv) requires notification to be given of where “relevant information” can be obtained, whether or not that information meets the definition of environmental information (article 2, para. 3).

In contrast, paragraph 2 (d) (vi) requires an indication of what “environmental information” relevant to the proposed activity is available.

The term “relevant information” must be considered to be consistent with the term used in article 6, paragraph 6, where it refers to all information relevant to the decision-making.

So subparagraph (d) (iv) does not relate only to the sources of the information covered by subparagraph (d) (vi) below. However, this provision must be read together with it, as it requires the notification to indicate what relevant environmental information is available. But environmental information under subparagraph (d) (vi) is not as broad as *all* the information relevant to the decision-making. However, it may provide the basis for requests for information under article 4.

In addition to where information can be obtained, when it is possible to do so can heavily affect the capabilities of the public to obtain real, as opposed to formal, access to information. Good practice would be to provide times for viewing information both during and outside normal business hours, so that working people also have the opportunity to participate effectively.

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

Relevant public authority or any other official body

The notification must identify the public authority or other official body to which comments or questions may be submitted. As with paragraphs 2 (c) and (d) (iv) above, the identification of the public authority should be complete enough to enable the public concerned to contact the identified person or body. In many cases, the public authority or official body identified here will be the same as that identified in subparagraph (d) (iv).

Here the Convention speaks not only of public authorities but also of “any other official body”. Parties are given flexibility to determine whether the public authority should receive comments or questions, or whether this function might be better served by another official body. It is not entirely clear what the Convention means by “other official body”, given the fact that the definition of public authority in article 2, paragraph 2, is so broad. That article specifically includes within the definition of “public authority” persons performing public administrative functions under national law, as well as any persons having public responsibilities or functions or providing public services in relation to the environment that fall under the control of government or persons performing administrative functions under national law. Thus, an official body receiving comments or questions pursuant to the requirements of the Convention would almost certainly be performing public administrative functions under national law, and therefore would already fall under the definition of “public authority”.

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the functions in article 6, paragraph 2 (d) (iv) and (v), and paragraph 6 need not always be placed on the authority competent to issue a decision whether to permit a proposed activity.²⁷⁷ In fact, in many countries the above functions are being delegated to various bodies or even private persons, for example the “planning inspector” in the United Kingdom or “*commissaire d’enquête*” in France. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a “public authority” in the meaning of article 2, paragraph 2 (b) or (c).

In the above findings, the Committee noted that:

To ensure proper conduct of the public participation procedure, the administrative functions related to its organization are usually delegated to bodies or persons who are quite often specializing in public participation or mediation, are impartial and do not represent any interests related to the proposed activity being subject to the decision-making.²⁷⁸

It is important to note that while the project proponent or developer (“applicant” under the Convention) may hire consultants specializing in public participation, neither the project proponent nor any consultants hired by it can ensure the degree of impartiality necessary to guarantee proper conduct of the public participation procedure. As observed by the Compliance Committee in its findings on communication ACCC/C/2006/16 (Lithuania), “reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention.”²⁷⁹

Time schedule for comments or questions

Paragraph 2 (v) requires the notification to inform the public concerned about the timetable for the public concerned to submit comments or questions to the relevant public authority or the other official body. The timetable should take into account the principles relating to early and effective public participation ([see the commentary to article 6, paragraphs 3 and 4](#)).

The reference in subparagraph (v) to a time schedule for questions indicates that the public should not only be able to inspect the documents as required under article 6, paragraph 6, and to submit comments under article 6, paragraph 7, but should also have a possibility to ask questions and seek clarification regarding the activity in question or the procedure for decision-making.

(vi) An indication of what environmental information relevant to the proposed activity is available; and

Finally, the notification must also include an indication of what environmental information relevant to the proposed activity is available. (For the definition of “environmental information”, [see the commentary to article 2, paragraph 3](#).) In a typical EIA procedure, the environmental information might include such items as analyses, summaries, sampling or monitoring data, background documentation, expert opinions, feasibility studies, draft impact statements, forecasts and agency reports. Article 6, paragraph 6 (a) to (f), provides some further guidance as to the minimum information that is to be considered “relevant” in every case.

As already explained, the obligation in article 6, paragraph 2, to give notification is a continuing one, and may require further physical notices to be given to the public concerned as additional information becomes available. Subparagraph (d) (vi) is one of those most likely to require the use of supplemental notification, as it is common for additional environmental information to come to light during a decision-making procedure.

Finally, this provision needs to be read in connection with article 6, paragraph 6, providing for the right of free and prompt inspection or examination of all information relevant to the decision-making, subject to certain limitations. Where that documentation is already available at the time of the notification, subparagraph (d) (vi) can be satisfied through a general description of the information, together with the information required under subparagraph (d) (iv) concerning possibilities for inspection.

Documentation relevant to decision-making in Poland

The Polish Act on Access to the Information on the Environment, Public Participation and the Environmental Impact Assessment of 3 October 2008 provides a special possibility for the public to access the “documentation relevant to the decision-making”. “Documentation relevant to the decision-making” for individual decisions is defined to include:²⁸⁰

- The application for a decision together with the required attachments (i.e., EIA report, maps, etc.).
- Any formal statements of the competent authority (for example, concerning screening or scoping).
- Statements of other authorities available at the time of public participation.

The Act requires that such documentation be displayed and made available (usually at the seat of the competent authority, but sometimes also in other places) for immediate and free-of-charge examination by any person. In practice, the entire documentation is often available directly on the web page of the competent authority.

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

As mentioned above, article 6 applies to any decision-making on activities listed in annex I and any other decision-making with a potential significant impact on the environment. While this does not refer exclusively to decisions that require an EIA, these are perhaps the most common form of decision-making falling under article 6. It is important for the public to be notified that a proposed activity falls under a national or transboundary EIA procedure, as that procedure can carry specific public participation rights and obligations (see box below).

Understanding the EIA procedure

The EIA procedure provides enhanced opportunities for effective public participation. In many countries, early and effective public participation in decision-making on specific activities happens mainly through the EIA procedure, because of the strict requirements as to the EIA documentation and the procedure itself. EIA documentation (often called the environmental impact statement or report) usually needs to meet certain requirements stipulated by law, such as a requirement for a non-technical summary. Such documentation provides the public with easy access to information regarding the activity itself, its alternative solutions, and the evaluation of related environmental and health risks. This assists the public to develop and express its own science-based opinion on the issue.

In many countries,²⁸¹ the EIA procedure allows the public to participate in the “scoping” phase, i.e., at the stage of designing the terms of reference for the EIA documentation. In such countries, the public thus have the possibility to participate at least twice during a given decision-making procedure: both at the stage of scoping and, later on, when the EIA documentation is ready. Some countries, for example, the Netherlands and Poland, also have an institutionalized mechanism for quality checking of EIA documentation (sometimes in the form of independent EIA commissions) which includes public participation.

The EIA procedure is also discussed in the introductory commentaries to the public participation pillar and article 6.

Article 6, paragraph 2 (e), requires Parties to give notice if the activity is subject to either a national or a transboundary EIA procedure. National EIA procedures are discussed further in the commentary on annex I, paragraph 20. Regarding transboundary EIA procedures, as indicated in the judgment of the ICJ in the *Case Concerning Pulp Mills on the River Uruguay* “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”²⁸² Transboundary procedure is currently required in a number of international treaties and bilateral agreements.²⁸³ The most elaborated international standard in this respect is that set by the Espoo Convention (see box below). This standard is often further elaborated in bilateral agreements between the Parties to that Convention.

The fact that an activity may be subject to a transboundary EIA procedure is of interest not only to the public concerned from the potentially affected country, but also for the public concerned from the country where the activity is to take place. Conducting a transboundary procedure usually means the need for longer than standard timelines for the procedural

steps in the procedure and sometimes also the need for additional evidence and information in order that the public may participate effectively.

Notification under the Espoo Convention on Environmental Impact Assessment in a Transboundary Context

The Espoo Convention has been ratified by many of the countries that are Parties to the Aarhus Convention. It lists activities likely to cause a significant adverse transboundary impact and provides for EIA procedures that include participation from within the entire potentially affected area, across State boundaries.

Although the Espoo Convention deals mainly with relationships between Parties affected by a transboundary activity, it requires a Party of origin (that is, the country from which a potential transboundary impact originates) to notify the affected Party (article 3) and cooperate with that Party to arrange for the distribution of the EIA documentation to the affected public and for the affected public to submit comments (article 4, para. 2). It also requires the Party of origin to take due account of the comments submitted (article 6, para. 1).

The Espoo Convention is also discussed in the introductory commentaries to the public participation pillar and article 6.

It is interesting to note that article 3, paragraph 1, of the Espoo Convention, on notification, requires the Party of origin to notify any Party which it considers may be affected by a proposed activity as early as possible and no later than when informing its own public about that proposed activity. This shows that the negotiating parties of the Espoo Convention assumed that the public of the Party of origin would generally be notified “as early as possible”. If the public notice relates to a transboundary procedure other than an EIA procedure, good practice would be to read the requirement in article 6, paragraph 2 (e), widely to require notice to be given of any other transboundary procedure also. By way of illustration, the Industrial Emissions Directive envisages special transboundary consultations if the operation of an installation is likely to have significant negative effects on the environment of another EU member State, or where an EU member State likely to be significantly affected so requests. In such cases, the public notice informing the public about the application for a permit should include information about the transboundary consultations to take place.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

The theme of adequate time frames for public participation running throughout the Convention is repeated in article 6, paragraph 3. The Convention requires time frames to be set that will allow the public sufficient time to be informed about the specific information required under paragraph 2 and to be able to participate effectively. In addition, however, this provision specifically refers to another consideration in the establishment of reasonable time frames — that is, the need to allow the public adequate time to prepare for their participation in the decision-making.

This provision of the Convention also refers to “the different phases”. Considering the rationale behind the need for reasonable time frames (giving information, allowing the public to prepare and to participate effectively), the reference to “phases” should relate directly to these phases of the public participation procedures. Thus, each phase during a public participation procedure must include reasonable time frames taking into account the fundamental requirements of public participation. In complex cases where public participation may take place at several points in the decision-making process, the reference to different phases may also be taken to refer to phases in the overall decision-making process. Thus, Parties must ensure that all stages of the decision-making where public participation takes place include time frames that allow for the effective implementation of the related requirements in article 6, including time for the public to digest the information provided in the notification according to paragraph 2, time to seek additional information from the public authorities identified in the notification, time to examine information available to the public, time to prepare for participation in a hearing or commenting opportunity and time to participate effectively in those proceedings.

While not specifically mentioned in the Convention, reasonable time frames may also benefit the public authorities, by providing sufficient time to manage the process of public participation and to process the information provided by the public.

As noted by the Compliance Committee in its report to the third session of the Meeting of the Parties:

The requirement to provide “reasonable time frames” in article 6, paragraph 3, implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, *inter alia*, the nature, complexity and size of the proposed activity. Thus a time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project.²⁸⁴

The Compliance Committee’s report would seem to suggest that the time frames should be differentiated depending on the characteristics of the proposed activity. The Committee did not make clear, however, whether such differentiation should be categorical or on an ad hoc basis. In most EU countries the time frames are fixed and often the only differentiation may be between large projects with bigger impacts (usually annex I projects under the EIA Directive) and smaller projects with local impact (usually annex II projects under the EIA Directive). Time frames in relation to public participation regarding plans and programmes are usually much longer.

Reasonable time limits in the EIA Directive

Before it was amended by the Public Participation Directive to implement the Aarhus Convention, the EIA Directive required the establishment of:

Time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.

while after the amendment it requires that:

Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

Thus, the focus of “reasonable time frames” in the amended EIA Directive changed from what was reasonable to the developer to what was reasonable for the public concerned.

Bearing in mind that the time frames are usually already fixed in the legislation, whether or not they are reasonable in any given case may depend on a number of factors. The first and most obvious of these is the number of days fixed for the public participation.

In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee stated that:

The time frame of only 10 working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3. This finding is not negated by the fact that the fixed period of 10 working days is commonly approved by Lithuanian legislation and that until now, according to the Party concerned, no one has questioned such period as being unreasonable.²⁸⁵

In contrast, in its findings on communication ACCC/C/2007/22 (France), the Compliance Committee held that it was:

convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention.²⁸⁶

The two cases above differ not only regarding the number of days envisaged for public participation, but also because in the French case the time frames provide not only a reasonable time frame, but also give a clear indication of the period for inspecting the documents and the period for commenting. The Convention does not expressly require such a differentiation, but it would seem to be very appropriate.

Another important point is the initial day from which the time frame for public participation should be calculated. In many countries it is deemed to start immediately following the public notice. However, often national law may require several different forms of public notice and, for practical reasons, it may not be possible to make these different forms of notice available all at the same time. Good practice would be for the time frame to be counted from the date the last notice required under national law is posted.

Another issue is the time of year that the public participation is held. There are certain periods in public life which are traditionally considered as holidays and not much is expected to happen. For example, the days of the major religious festivals for each country, national days and to a certain extent, the main summer vacation period. In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held: “a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country”.²⁸⁷

Finally, the reasonable time frames must also take into account the interaction between article 6 and other parts of the Convention. For example, following the notification a member of the public may wish to request information under article 4 in order to prepare comments or to participate in a hearing. Parties should build flexibility into the system to ensure, for example, that waiting for a request to be met within the time limits set out in article 4 does not undermine the public’s ability to take part in the public participation process (see also the commentary to article 3, paragraph 1, requiring compatibility between the provisions implementing the Convention). In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that a *minimum* of 30 days between the public notice and the start of public consultations was a reasonable time frame to allow the public to access the relevant documentation and prepare itself. The Committee expressed its appreciation for this flexible approach, which would enable the minimum period to be extended as might be necessary, taking into account, inter alia, the nature, complexity and size of the proposed activity (see the commentary to article 6, paragraph 2, above).²⁸⁸ However, the Committee took a less favourable view of the Party concerned’s setting of a *maximum* time frame for public consultations and the submitting of comments. The Committee held that it “does not consider appropriate a flexible approach, whereby only the maximum time frame for public participation procedures is set. ... Such an approach, regardless of how long the maximum time frame is, runs the risk that in individual cases time frames might be set which are not reasonable”.²⁸⁹

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

Paragraph 4 requires Parties to provide public participation “early” in a decision-making process. It follows on paragraph 3, which provides for reasonable time frames. Paragraph 3 is about the pace, while paragraph 4 is about getting started.

“Early” means when all options are open and effective public participation can take place. This does not prevent a public authority from taking a position or determining a preliminary opinion as to a possible decision about the proposed activity. However, the public authority must still be in the information gathering and processing stage and must be open to persuasion by members of the public to change its position or opinion. Taking steps that might have the effect of decreasing the range of available options may breach article 6, even though no decision has been formally made.

For example, while the entering of an agreement between the public authority and a private company may not constitute the taking of a decision, it may still narrow down the range of available options to be considered in the decision-making process. In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held that “entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention”.²⁹⁰

Early public participation in complex decision-making

Decision-making in relation to large activities may involve several stages and parallel processes. The effectiveness of public participation in a particular decision-making process may depend not only on effective public participation at one stage of the decision-making, but on public participation taking place more than once.



For example, a permit to fill a wetland may be ancillary to the construction of a factory, but the permitting procedure for the factory might not provide an opportunity to receive public comments on the wetland aspect of the project. In that case, article 6, paragraph 4, might be interpreted to require public participation in the separate decision on the filling of the wetland — even though it is the construction of the factory and not the filling of the wetland that is the triggering activity within the scope of article 6 — because to do otherwise would be to delay public participation to a point when it could no longer be effective.

In complex decision-making, public participation, to be effective, should take place at each stage where a (primary or secondary) decision by a public authority may potentially have a significant effect on the environment. Especially in decision-making on activities listed in annex I, where a cluster of permits may be required for complex activities, any permit that has a bearing on the environmental significance of the proposed activity should be covered under the Convention.

The requirement for “early public participation” applies not only to the entire chain of decision-making procedures but also to each of the decisions in that chain. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee made it clear that: “Within each and every such procedure where public participation is required it should be provided early in the procedure when all options are open and effective public participation can take place.”²⁹¹

However, it is not necessary to revisit every option at every stage of decision-making. In the same findings, the Committee held that:

The requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage.²⁹²

Furthermore, in the same case the Committee made it clear that:

Taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details.²⁹³

However, providing public participation at a later stage, when certain decisions have already been taken, cannot rectify the failure to provide public participation at an earlier stage when all options were still open. In its findings on communication ACCC/C/2005/12 (Albania), the Committee found it important to:

make clear that once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide “early public participation when all options are open”. This is the case even if a full environmental impact assessment is going to be carried out. Providing for public participation only at that stage would effectively reduce the public’s input to only commenting on how the environmental impact of the installation could be mitigated, but precluding the public from having any input on the decision on whether the installation should be there in the first place, as that decision would have already been taken.²⁹⁴

Similarly, in its findings on communication ACCC/C/2006/16 (Lithuania) the Committee held that a key issue is whether the public has had the opportunity to participate in the decision-making before the “events on the ground” have effectively eliminated alternative options. The Committee held:

If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention.²⁹⁵

Some countries have taken an integrated approach to environmental decision-making, whereby the consideration of environmental impact is maximized in a single procedure as far as possible. This approach might allow for a single public participation procedure to take place. However, attention must be given to the effectiveness of public participation, so that a single public participation procedure in the context of complex decision-making should be examined to determine whether it is timely and effective for all the aspects of the decision-making on which public participation is required.

Early public participation and the EIA procedure

The requirement for early public participation is especially relevant to the EIA procedure where it is sometimes interpreted as requiring mandatory public participation at the scoping phase,²⁹⁶ or even at the stage of screening.²⁹⁷ As at 2009, 16 EU member States provide for scoping as a separate procedural stage with mandatory public participation and 9 EU member States provided for mandatory public participation in screening.²⁹⁸ The above approaches have not, however, to date been made explicit requirements in EU law.

In its findings on communication ACCC/C/2004/4 (Hungary) the Compliance Committee noted that “the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region.”²⁹⁹ However, in its findings on ACCC/C/2006/16 (Lithuania), the Committee “welcome[d] the approach of the Lithuanian law which envisages public participation at the stage of scoping. This appears to provide for early public participation in EIA decision-making.”³⁰⁰

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

In line with the discussion of “proposed activity” under paragraph 1 above, a prospective applicant is a person who intends to submit an application for a decision by a public authority on an activity or a major change to an activity in accordance with an applicable national procedure.³⁰¹

Paragraph 5 points the way towards increasing the efficiency of public participation, by encouraging a prospective applicant to take certain steps *before* applying for a permit. In so doing the Party may increase the applicant’s involvement in the public participation process, and may encourage the applicant to shoulder some of the responsibility of communicating with the public. In the process, misunderstandings between the applicant and the public concerned can be resolved and conflicts minimized, so reducing the burden on public authorities to address these matters. Considering that some countries place obligations on the *proponent* of an activity to conduct the public participation procedures relating to it, early involvement of the proponent may be extremely valuable.

Paragraph 5 lists the responsibilities that Parties should, where appropriate, encourage prospective applicants to take on in three steps. The first step is to identify the public concerned (for a discussion of the definition of “public concerned”, [see the commentary to article 2, paragraph 5](#)). This step recognizes that a proponent familiar with the local conditions is often well-placed to identify those members of the public who are likely to be affected by the proposed activity.

The second step is for the applicant to enter into discussions with the public concerned. This has obvious benefits, including increasing the public’s understanding of the goals and parameters of the proposed activity, and increasing the applicant’s understanding of the nature of the public’s concerns. Direct communication between the applicant and the public not only reduces burdens on the public authority, but lessens the figurative distance that information has to travel, thereby increasing its reliability. Dialogue between the applicant and the public before the application for a permit is made can help to narrow the differences and issues to be discussed in the formal public participation procedure.

The third step is for the applicant to provide the public with information on the objectives of its application. This may enable the applicant to modify its application in view of public reactions even before the application is submitted, thereby increasing the efficiency of the process and reducing the burden on public authorities.

The provisions of article 6, paragraph 5, apply to the period before the permit application is submitted (while the applicant is still a “prospective” one), and in no way lessen Parties’ obligations under the Convention once the application has been made. Encouraging applicants to be responsible towards the public does not affect the primary obligations of the Parties under the Convention, and should not be considered a substitute. For example, the recommendation in paragraph 5 for prospective applicants to identify the public concerned does not give applicants any right to determine who should be considered as the public concerned once the application has been made. Article 6, paragraph 2, places the obligation on the Parties to inform the public concerned, which naturally requires an objective determination by the Party of which members of the public meet the definition of the “public concerned”.

The advisory nature of paragraph 5 is confirmed by the use of the wording “should, where appropriate, encourage”. The Convention does not require Parties to oblige prospective applicants to take these steps. Some Parties may consider it appropriate for the public authorities to play a more substantial role in public participation because of the authorities’ greater objectivity and impartiality. The reference to “appropriate” therefore may also include recognition of the fact that applicants may attempt to use such a process for propaganda purposes to influence the public concerned, even going so far as to lobby a subset of the public during “consultations”, and that Parties need to guard against this.

In its findings on communication ACCC/C/2007/22 (France), the Compliance Committee held that “while the Parties may implement the Convention in different ways, e.g., by fully transforming the provisions through national legislation or by, to some extent relying on notions of direct effect, it is apparent that paragraph 5 of article 6 cannot be complied with unless it is fully reflected in the national law of the Parties.”³⁰²

The role of the project developer

In its findings in ACCC/C/2006/16 (Lithuania), the Committee noted that “it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from [the] public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6).”³⁰³ The above observations do not mean, however, that the responsibility for performing some or even all the above functions related to public participation should always be put on the authority competent to issue a decision whether to permit the proposed activity. In fact, in many countries the above functions are delegated to various bodies or even private persons. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a “public authority” in article 2, paragraph 2 (b) or (c). However, such bodies or persons must be impartial and not represent any interests related to the proposed activity being subject to the decision-making. Only these qualities can guarantee proper conduct of the public participation procedure.

While prospective applicants may hire consultants specializing in public participation, neither they nor the consultants hired by them can assure the impartiality necessary to guarantee the proper conduct of the public participation procedure. Therefore, as observed by the Committee in its findings on communication ACCC/C/2006/16 (Lithuania) “reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention.”³⁰⁴

However, the above commentary should not be read as entirely excluding their involvement, so long as it is under the control of the public authorities, in the organization of public participation procedures (for example conducting public hearings) or prohibiting the imposition of special fees on them to cover the costs related to public participation.³⁰⁵

- 6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4.**

Paragraph 6 requires Parties to impose an obligation on public authorities to provide the public concerned with access to all available information relevant to a decision-making procedure covered by article 6, subject to certain limitations. It is similar to the administrative legal norm that provides that persons with standing as parties in an administrative proceeding should have access to all documentation in the case. Yet, the Convention goes further, since it allows for similar rights to be given to all members of the public concerned, whether or not they meet the test of legal standing. Paragraph 6 provides that *all information* relevant to the decision-making must be made available. This is not limited to environmental information. Consistent with the other provisions of the Convention, this means information in whatever form. It should not be interpreted in a way that would limit the availability of information to reports or summaries.

Examination, upon request, free of charge

“Examination” refers to the opportunity to study the information and to make notes. As a practical matter, this obligation can be met through the establishment of reasonable hours at a convenient location where the information can be kept in an accessible form. If the national law of a Party requires it, a member of the public concerned may need to submit a request to examine the relevant information. Otherwise a request is not required. Moreover, as confirmed by the Compliance Committee in its findings on ACCC/C/2008/24 (Spain),³⁰⁶ the Convention prohibits the imposition of fees or other charges for simple examination of the relevant information. The public authority can still impose reasonable charges for other services, for example photocopying, consistent with the other provisions of the Convention.

Available at the time of the public participation procedure

The “time” of the public participation procedure is also important, because the obligation to make information accessible is triggered by the start of the public participation procedure. The start of the public participation procedure is also important for determining when notification under paragraph 2 should be made. It is common sense that the public participation procedure starts, at the latest, at the time of notification under paragraph 2, because that paragraph expressly provides for early notification of, *inter alia*, the start of a public participation procedure.

While the “time” of the public participation procedure should start with the early notification, it covers all the consecutive stages of the procedure providing “reasonable time-frames for the different phases” ([see the commentary to article 6, paragraph 3](#)). The possibility to inspect documents under article 6, paragraph 6, should be provided at least up until the end of the commenting period under article 6, paragraph 7, and should coincide with the information-gathering stage of decision-making so that the public has a chance to indeed access “all information relevant to the decision-making”.

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee observed that article 6, paragraph 6 “applies at the time of the public participation procedure”. Therefore outside the time of public participation procedure, the right to examine information under article 6, paragraph 6, does not apply and the public needs to rely on the rights of access to information under article 4.³⁰⁷

All information relevant to decision-making that is available

Paragraph 6 requires Parties to give access to “all information relevant to the decision-making ... that is available at the time of the public participation procedure” and then proceeds to set out a list of minimum requirements, stating: “The relevant information shall include at least ...”. This formulation is open to at least two interpretations. One possible interpretation is that it does not require the generation of information to meet the minimum standards set out in subparagraphs (a) to (f), but rather requires this information to be made available *if it exists*. But if that were the case, there would be clearer ways to express this. Another possible interpretation is that the inclusion of “available” is meant to be interpreted positively to clarify that the information should include *any* information relevant to the decision-making that is in any way available at any time during the public participation procedure. This would take into account the possibility that the information might not always be in the direct possession of the public authority, but rather may be available *because it is in the possession of another*, for example the proponent of the activity. It might also take into account that some information might be available at the start of the procedure, even as early as the notification stage, but that other information might come to light during the procedure itself. The Convention goes on to list in subparagraphs (a) to (f) the information that is *in every case* relevant to a decision-making procedure, indicating a minimum standard.

This minimum standard is based on the usual requirements for EIA documentation (see box on EIA documentation under the Espoo Convention below) and for an application for a pollution permit (see box on application for an integrated permit under the Industrial Emissions Directive below). Bearing in mind the objectives of the Convention to, *inter alia*, ensure effective public participation (see article 6, paras. 3 and 4) and the obligation in article 5, paragraph 1 (a), that public authorities possess and update environmental information which is relevant to their functions, the second of the above interpretations appears to be more in the spirit of the Convention. To hold otherwise would mean that decision-making could proceed without the public authorities themselves considering all the minimum information relevant to a decision-making procedure. Thus, the implication is that public authorities should at the very least be in possession of the listed information because it is “relevant to their functions”. On this view, it is not a separate substantive obligation but rather a reflection of the obligation included in article 5, paragraph 1 (a). The minimum standards set out in subparagraphs (a) to (f) are discussed in more detail below.

Though the minimum standard may be based on the usual requirements for EIA documentation in paragraph 6, as noted by the Compliance Committee in its findings on communication ACCC/C/2004/3 (Ukraine), it “is certainly not limited to publication of an environmental impact statement”.³⁰⁸ In the same findings, the Compliance Committee also observed that “had some of the requested information fallen outside the scope of article 6, paragraph 6, of the Convention, it would be still covered by the provisions of article 4, regulating access to information upon request”.³⁰⁹ That is to say, the public’s right to make information requests exists in parallel to the obligation on the competent public authority to give access to all available information relevant to the decision-making. If a member of the public considers that their information request has been ignored, wrongfully refused or inadequately answered, the review procedures in article 9, paragraph 1, will apply.

Finally, the notification required under paragraph 2 can also fulfil at least part of the information requirements required under this paragraph, and public authorities should take that into account in the development of their public participation procedures.

EIA documentation under the Espoo Convention

Appendix II to the Espoo Convention describes the minimum contents of the EIA documentation that, in combination with its article 4, allows the public to gather relevant information on the project:

Content of the environmental impact assessment documentation

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with article 4:

- (a) A description of the proposed activity and its purpose;
- (b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
- (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
- (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
- (e) A description of mitigation measures to keep adverse environmental impact to a minimum;
- (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
- (h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
- (i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

Providing information as soon as it becomes available

Finally, the relevant public authority must give access to the information “as soon as it becomes available”. This obviously imposes a continuing obligation on the public authorities to make new information available to the public in the same manner as the original information, as soon as it comes to light. The principle found in this obligation is also to some extent found in the Espoo Convention, which requires its Parties to inform the other concerned Parties immediately if additional information on a significant transboundary impact of a proposed activity which was not available at the time a decision was made with respect to that activity and which could have materially affected the decision, becomes available before work on that activity commences (Espoo Convention, article 6, para. 3).

Grounds for refusal

Paragraph 6 also makes it clear that the grounds for refusal to disclose information found in article 4, paragraphs 3 and 4, may also be applied to the information required to be made available under this paragraph, subject of course to the limitations on the use of such exceptions found in article 4 (see [the commentary to article 4, paragraphs 3, 4 and 6](#)). In accordance with article 4, paragraph 6, for example, the public authority must separate exempt materials from the rest of the information and make all the remaining information available for public examination.

Access to EIA studies in their entirety

In its report to the third session of the Meeting of the Parties, the Compliance Committee addressed the issue of some Parties refusing to disclose EIA studies in their entirety on the grounds of confidentiality under intellectual property laws. The Committee observed that:

The question of confidentiality of information in the context of EIA procedures has been raised in several communications and has also been addressed in a number of national implementation reports by the Parties ... If a competent authority is considering whether it may refuse to disclose environmental information, the possible grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by the disclosure. In particular, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility of exempting parts of them being an exemption to the rule.³¹⁰

In its findings on communication ACCC/C/2005/15 (Romania), the Compliance Committee held:

The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure.³¹¹

In the same findings, the Committee stated with respect to article 6, paragraph 6:

Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule. A general exemption of EIA studies from disclosure is therefore not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention.³¹²

The relevant information shall include at least, and without prejudice to the provisions of article 4:

The Convention goes on to establish minimum standards for the information that must be made available to the public concerned for examination. It does this by determining a non-exhaustive list of the information that in all cases is relevant to decision-making covered by article 6. This list draws heavily on domestic and international experience relating to EIA, in which certain documentation is generally required to be made available to the public. The Convention specifically provides that the information made available under this paragraph is subject to the provisions of article 4.

The Convention does not, however, determine how the information is to be generated nor who should bear the cost of generation. Many EIA-type laws require similar information to be generated (see box on EIA documentation above). Similar information is also generally required to be included in an application for a pollution permit, for example for permit under the Industrial Emissions Directive (see box below). Parties are free to follow the example of such laws by placing the burden of information generation and its associated costs on the shoulders of the applicant, applying the polluter pays principle.

Application for an integrated permit under the Industrial Emissions Directive

Article 12, paragraph 1, of the EU Industrial Emissions Directive requires that:

Member States shall take the necessary measures to ensure that an application for a permit includes a description of the following:

- (a) The installation and its activities;
- (b) The raw and auxiliary materials, other substances and the energy used in or generated by the installation;
- (c) The sources of emissions from the installation;
- (d) The conditions of the site of the installation;
- (e) Where applicable, a baseline report in accordance with Article 22(2);
- (f) The nature and quantities of foreseeable emissions from the installation into each medium as well as identification of significant effects of the emissions on the environment;
- (g) The proposed technology and other techniques for preventing or, where this not possible, reducing emissions from the installation;

- (h) Measures for the prevention, preparation for re-use, recycling and recovery of waste generated by the installation;
 - (i) Further measures planned to comply with the general principles of the basic obligations of the operator as provided for in Article 11;
 - (j) Measures planned to monitor emissions into the environment;
 - (k) The main alternatives to the proposed technology, techniques and measures studied by the applicant in outline.
- An application for a permit shall also include a non-technical summary of the details referred to in the first subparagraph.

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

The first item of information that the competent public authority must make available for examination by the public concerned is a description of the site, that is, the location where the proposed activity is planned to take place. Next, the information must include a description of the physical and technical characteristics of the proposed activity. Such a description will often already be required as an element of the applicant's submission to the public authority. The description must include an estimate of the residues and emissions expected as a result of the proposed activity. This establishes a link between these physical and technical characteristics and the potential environmental impact of the proposed activity.

The reference to the application of article 4 has special significance with respect to emissions. Article 4, paragraph 4 (d), and the last sentence of article 4, paragraph 4, impose strict limitations on exemptions to information related to emissions into the environment ([see the commentary to article 4, paragraph 4 \(d\)](#)).

(b) A description of the significant effects of the proposed activity on the environment;

The public authority must also give the public concerned access to a description of the significant effects of the proposed activity on the environment. As article 6, by virtue of its paragraph 1, applies to proposed activities that *may* have a significant effect on the environment, the wording in paragraph 6 (b) must be taken to refer to a description of the *potential* significant effects of the proposed activity on the environment ([see the commentary to article 5, paragraph 1 \(b\)](#), and [article 6, paragraph 1 \(b\)](#), for further discussion of "significant effect").

Many ECE countries already require such a description to be included in the documentation to be submitted to authorities in a permitting procedure. A number of countries that use the OVOS/expertiza system, for example, Ukraine and Belarus, not only require the applicant to prepare an environmental impact statement regarding the potential effects on the environment of the proposed activity, but also require the impact statement to be disseminated to the public at the applicant's cost.

Various countries have established in their national legislation factors to be taken into account in the estimation of the significant environmental effects of proposed activities. These laws, which may address such issues as the description of the site, determination of the impact area and evaluation of the scope of potential effects, may provide good examples of ways to meet this provision of the Convention.

The geographical area in which such effects can reasonably be expected is known as the "impact area". Hungary's Decree on EIA³¹³ provides an example of how one country defines the impact area of a particular project. It requires that the area to be examined in the EIA documentation should be the area of presumable direct and indirect impacts determined with as much accuracy as possible on the basis of data available during the preparation of the EIA documentation. Furthermore, areas falling outside the impact area must be presumptively unable to be affected by the proposed activity. Some of the factors to consider when evaluating the scope of potential effects include, inter alia, the area in which emissions may be detectable, taking into account the characteristics of the emissions, the carrying effect of environmental media and the applicable conditions; the area from which environmental resources will be taken; and the possibility of a failure or accident.

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

In addition to the description of the possible effects of the activity on the environment, an applicant and/or relevant public authority must make accessible a description of the measures intended to prevent such effects or, where they are absolutely unavoidable, to reduce them as much as possible. Such measures should address emissions as well as other significant effects.

(d) A non-technical summary of the above;

This provision underlines the fact that the Convention requires access to information in whatever form. It also gives some indication of the detail and quality of information that the negotiating parties expected would be made available under subparagraphs (a) to (c). A non-technical summary allows the main points of the specified information to be understood by a layperson. The fact that a non-technical summary is a separate element of the materials that the public authority must make available for examination by the public concerned indicates that the above-described information would be of a detailed and technical nature. The non-technical summary must cover all the points found in subparagraphs (a) to (c).

The non-technical summary assists the members of the public concerned in digesting and understanding the often highly technical information contained in the documentation. Preparation by the public authority of the non-technical summary or requiring the proponent to do so is one of the ways in which Parties can meet the obligation in article 3, paragraph 2, to ensure that officials and authorities assist and provide guidance to the public in facilitating participation in decision-making.

Hungary's guidelines for non-technical summaries

Hungary has established guidelines for non-technical summaries of EIA documentation. This model may be useful in designing ways to implement this requirement in other countries as well. Article 13 of its Act on Environmental Protection³¹⁴ requires the non-technical summary to contain:

- A description of the "essence" of the activity.
- Expected impacts on the environment.
- Delineation of the impact area.
- Evaluation of environmental impacts.
- Expected impacts on living standards and social conditions in the affected communities.
- Environmental protection measures planned.

(e) An outline of the main alternatives studied by the applicant; and

The competent public authorities must also give the public concerned access to an outline of the main alternatives studied by the applicant. Typically, decision-making processes relating to proposed activities with potential environmental impacts involve the study of different alternatives for the implementation of the proposed activity. A major impetus behind the analysis of alternatives is the need to take the environment into account and to minimize environmental impact. Some of the alternatives might come from the public concerned as a result of preliminary discussions carried out under article 6, paragraph 5. The public's right to propose such alternatives is secured through paragraphs 2 (d) (v), 7 and 8 of article 6.

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

The competent public authorities must also make available to the public concerned the main reports and advice issued to the public authority at the time of the notification under paragraph 2. Paragraph 2 requires notification to be given in an adequate, timely and effective manner. Moreover, because notification under paragraph 2 is a continuing obligation (see the commentary on “Providing information as soon as it becomes available” above), the issuance of new reports and advice to the public authority should trigger an additional obligation to notify the public concerned. The obligation to update information is also found in the lead to this subparagraph, which requires the public authorities to give all relevant information to the public concerned “as soon as it becomes available”.

Reports and advice

The Convention uses the terms “reports and advice” to cover a broad range of input to the public authority, whether coming from consultants, the proponent, co-authorities, expert bodies, or members of the public. Such reports and advice may include, inter alia, studies of alternatives, cost-benefit analyses, technical or scientific reports and social or health impact assessments. It should also include opinions submitted by other authorities, in particular those required by law to submit their views — like environmental or health authorities and their advisory bodies — as well as opinions, if any, of bodies designated to evaluate the quality of the EIA documentation.

The term “in accordance with national legislation” is an indication that the matter may already be the subject of detailed legal provisions. Here it may be interpreted as a recognition of the usual case in which the law requires certain reports and advice to be issued to the public authority in the normal course of the administration of a particular decision-making procedure.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

Paragraph 7 differs from some of the other provisions of article 6 in that it grants rights not only to the public concerned, but to the public generally. While the public concerned has stronger rights with respect to the notification and examination provisions of article 6, any member of the public has the right to submit comments, information, analyses or opinions during the public participation procedure. The public authority cannot reject any comments, information, analyses or opinions on the ground that the particular member of the public is not a part of the public concerned. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee confirmed that legislation that limits the right to submit comments to the public concerned fails to guarantee the full scope of the rights envisaged by the Convention.³¹⁵

Moreover, because article 9, paragraph 2, is the means for enforcing all of article 6, and because it applies only to the “public concerned”, it appears to be the intention of the Convention that any member of the public who actually participates in a public participation procedure, by submitting comments in writing or at a hearing, gains the status of a member of the “public concerned”.

The relevancy of the comments, information, analyses or opinions is measured in the first place by the member of the public submitting them. As long as the member of the public considers the matter to be relevant to the proposed activity, it must be received by the public authority. The subsequent weight to be given during the decision-making to the particular comments, information, analyses or opinions submitted will be a matter for the decision maker, so long as due account of each comment is taken in accordance with article 6, paragraph 8 (see the commentary on article 6, paragraph 8).

The relevant public authority or other official body to whom the public should submit their comments and the time frame for their submission should be identified in the notification to the public concerned under article 6, paragraph 2 (d) (v).



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The Convention mentions two possible means for the submission of comments, information, analyses or opinions: written submissions; or public hearings or enquiries with the applicant. The latter offer the opportunity for the applicant to present the project, and respond to questions and comments. A public hearing or enquiry also provides a venue for dialogue among stakeholders. As observed by the Compliance Committee in its findings on communication ACCC/C/2009/37 (Belarus), “the organization of discussions on the proposed project in the newspapers and through TV programmes is not a sufficient way to assure compliance with article 6, paragraph 7, of the Convention”.³¹⁶

While the Convention does not establish particular standards for public hearings, rules for their conduct should be made in accordance with the other provisions of the Convention, in particular article 3, paragraphs 1 and 2. Parties may also establish procedures for the public to submit comments in writing.

Public hearings

In most ECE countries, public hearings may be held within the EIA procedure and other decision-making processes. The hearings should be held a sufficient period of time after the date of notification in order to allow the public to study the materials and other information relevant to the proposed activity, and to prepare opinions, suggestions, comments, alternatives or questions. Public hearings usually bring members of the public together with the public authority responsible for decision-making and the applicant or proponent of the proposed activity. Experts and other authorities may also be involved in the hearing. Such a meeting is an opportunity for the public to submit, in writing or orally, the comments, information, analyses or opinions that they consider relevant to the proposed activity. In many countries the law requires that a record of the hearing be prepared, either immediately or within a couple of days after the hearing (usually within a week). The record should provide the minutes of the proceedings and include the list of participants, as well as a list of all comments and suggestions submitted. In some countries the record of hearing must be signed by its participants in order to prove that the facts and views expressed have been recorded correctly.

While public hearings are useful tools for public participation, they are not the only way the public is entitled to submit their views. Paragraph 7 gives the public the right to submit in writing any comment, information, analyses or opinions that it considers relevant. There is no particular format or content required. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee confirmed that legislation that limits the right to submit comments to “motivated proposals”, i.e., those containing reasoned argumentation, fails to guarantee the full scope of the rights envisaged by the Convention.³¹⁷ The possibility to comment should be available during the entire commenting period, which — together with the possibility to inspect documents under article 6, paragraph 6 — should coincide with the information-gathering stage of the authorities’ decision-making.

With respect to opportunities to comment during an EIA procedure in a transboundary context, article 4, paragraph 2, of the Espoo Convention requires Parties to arrange for the submission of comments to the competent authority of the Party of origin. Article 3 of that Convention provides in its last paragraph that the concerned Parties, i.e., the Party of origin and the affected Party, must:

ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

The Aarhus Convention obliges Parties to ensure that the decision maker takes due account of the outcome of the public participation. This is not limited to public participation concerning the environmental aspects of the proposed activity, but applies to the outcome of all public participation. In most EU member States general administrative law already requires decisions to be reasoned and given in writing ([see also the commentary to article 6, paragraph 9, below](#)). In such systems, taking due account of the outcome of the public participation might be interpreted to require the written reasoned decision to include a discussion of how the public participation was taken into account. Of course, the decision-making authority must have a legal basis for taking due account of the public participation and any other factors in decision-making. Therefore, the legislative guidance on the legal standard to be applied to the factors in the particular decision-making is very important for the implementation of this provision of the Convention.

The Convention does not specify what taking “due account” means in practice. Some Parties have developed guidance to assist on this issue. For example, the EU online guide on the Aarhus Regulation states that taking due account of the outcome of the public participation “means that the Commission will duly consider the comments submitted by the public and weigh them in the light of the various public interests in issue”.³¹⁸ In 2008, Austria’s Council of Ministers adopted Standards on Public Participation to assist government officials, which, *inter alia*, state that:

“Take into account” means that you *review* the different arguments brought forward in the consultation from the technical point of view, if necessary *discuss* them with the participants, *evaluate* them in a traceable way, and then let them become part of the considerations on the drafting of your policy, your plan, your programme, or your legal instrument.³¹⁹

Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment. In connection with its discussion of communication ACCC/C/2008/29 (Poland), the Compliance Committee observed that:

The requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed.³²⁰

However, the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was rejected on substantive grounds.

In its findings on communication ACCC/C/2008/24 (Spain), the Committee found that:

It is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take “due account” under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to “make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based”. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account. ... The Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.³²¹

The need for authorities to seriously consider the outcome of public participation and to address it in decision-making, policymaking and law-making is a key aspect of the Convention. Provisions relating to taking due account of the outcome of public participation can be found in all three articles relating to public participation. Article 7 specifically incorporates article 6, paragraph 8, with respect to plans and programmes relating to the environment, while article 8 uses a slightly different formulation.

The different wording used in article 8 is a clue to the intention behind article 6, paragraph 8, and consequently to article 7 as well. Article 8 talks about the obligation to take into account the result of the public participation “as far as possible” in the context of executive regulations and generally applicable legally binding normative instruments. As discussed under article 8 below, the Convention establishes less rigid requirements for public participation in the context of law-making, where the process is affected by the mutual respect between the executive and legislative branches of government. Even so, the obligation to take into account public participation “as far as possible” establishes an objectively high standard to show in a particular case that public comments have been seriously considered. According to the structure of the Convention, therefore, the requirement to take into account the outcome of public participation in the context of article 6, where the rights and interests of particular members of the public are directly affected, requires something more than “as far as possible”; rather, the paragraph should be strictly construed to require the establishment of definite substantive and procedural standards.

As to what the public authority, after taking the public participation into account, should ultimately decide, article 6 is silent. As observed by the Compliance Committee in its findings on communication ACCC/C/2007/22 (France):

In many national laws, the question of whether an application for a permit concerning an activity that is potentially harmful to the environment should be approved may, at least in part, depend on the usefulness of the project, this is not a requirement of the Convention. The Convention Parties may apply different criteria for approving and dismissing an application for authorization, for instance with regard to the standard of technology, the effects on health and the environment, and the usefulness of the activity in question. However, these issues are not addressed by the Convention.³²²

Notwithstanding the above, it is implicit in article 6, paragraph 8, that any failure to take due account of the outcome of public participation is a procedural violation that may invalidate the decision. In appropriate circumstances a member of the public whose comments were not duly taken into account will be able to challenge the final decision in an administrative or judicial proceeding on this basis under article 9, paragraph 2. It is therefore very important that authorities pay serious attention to the requirement that due account be taken of the outcome of public participation.

Practical ways to facilitate the taking of due account

Standards for taking into account the outcome of public participation continue to be a point of development in the countries of the ECE region. Taking due account of the outcome of public participation can be facilitated by certain logistical measures, such as the registration of written comments and the recording of public hearings. A table documenting the comments submitted and the ways in which they have changed the draft may be a good method when many comments are received, because similar arguments can be clustered in the table. For comments not taken on board, the table can be used to record why they were rejected. Where the wording of the proposed text is important, e.g., legislative proposals, it may be useful to integrate comments directly in the draft text, using track changes to make them visible. In some situations, it may be possible to meet with those who submitted comments to explain which arguments will or will not be taken on board and why.³²³ The above types of measures may also become important where an aggrieved person uses article 9, paragraph 2, to challenge a particular decision-making process.

A good practice used in some countries in handling comments received is to require the relevant authority to respond directly to the substance of the comments. For this purpose, comments that are substantially identical may be grouped together. Some countries require the substance of all comments to be addressed in a written document justifying the final decision, which may be called a “response document”. This written document may also be used to satisfy the requirements of paragraph 9, which requires decisions to be given in writing along with the reasons and considerations on which they are based.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures.

Parties are obliged to promptly inform the public of the decision taken, in accordance with appropriate procedures. As in paragraph 7, this obligation not only entails notification of the parties to the proceeding, or the public concerned, but requires a general notification of the public at large.

In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee held:

The public shall be informed “promptly” and “in accordance with the appropriate procedures”. The Convention does not specify here, as opposed to article 6, paragraph 2, any further requirements regarding informing the public about taking the decision thus leaving to the Parties some discretion in designing “the appropriate procedures” in their national legal frameworks.³²⁴

The Committee added that:

Whether informing the public 15 days after the adoption of the decision can be considered to be prompt depends on the specific circumstances (e.g. the kind of the decision, the type and size of the activity in question) and the relevant provisions of the domestic legal system (e.g. the relevant appeal procedures and their timing).³²⁵

The Committee concluded that: “Whatever time period for informing the public about the decision is granted by domestic legislation, it should be ‘reasonable’ and in particular bearing in mind the relevant time frames for initiating review procedures under article 9, paragraph 2.”³²⁶

As noted by the Committee in the above findings, the timeliness of notification of the decision must be judged in the context of the other requirements of the Convention.³²⁷ One of these is the opportunity of members of the public who wish to appeal some aspect of the decision-making to do so. While under most legal systems the time limit for appeal would not begin to run until the notification, a delay in notification might affect the subject matter of appeal. An example would be if the proponent of an activity is notified of an approval and proceeds with construction, while a member of the public whose comments were not adequately taken into account has not received notice of the final decision. Obviously, it is important for the public to receive notice so that it can challenge the decision upon valid grounds *before* there is an opportunity for the proponent to proceed so far with a particular activity that the status quo cannot be preserved or can be restored only at great cost.

It is customary for notification of decisions to parties to include specific information of interest to them, such as information about opportunities for appeal. The general administrative law of a Party may also include provisions about the notification of parties to a proceeding and these requirements should be taken into account in designing requirements for informing the public of final decisions under this paragraph. Bulgaria’s administrative procedure act, for example, requires the appellant in administrative appeals of decisions by public authorities to be notified within seven days after a decision on the appeal is made.³²⁸

Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

The Convention requires the text of a reasoned decision to be made accessible to the public along with the reasons and considerations on which it is based. By including the reasons and considerations on which a particular decision is based, the decision maker can show that it examined the evidence presented by the participants and considered their arguments. As with the first sentence of paragraph 9, this provision also applies to the general public and not only to the public concerned or to those members of the public that participated in the decision-making. A similar provision can be found in article 9 of the EIA Directive. The general administrative law of a particular Party may also provide for general publication of decisions in particular cases. In Croatia, for example, administrative decisions have to include the reasoning in support of the decision and be publicized. Failure to adhere to either of these two requirements will invalidate an administrative decision.³²⁹

While the full text of the decision must be made accessible to the public, due to length considerations, the full text does not necessarily have to be included in the notice informing the public that the decision has been taken. However, that notice must indicate where the full text of the decision can be accessed by the public. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee held that:

The Convention does not require the decision itself to be published. It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based. ... Similarly, the Convention does not set any precise requirements as to documenting “the reasons and considerations on which the decision is based” except for the requirement to provide evidence of taking due account of “the outcome of public participation” as required under article 6, paragraph 8.³³⁰

In that case, the Committee also noted that:

The manner in which the public is informed and the requirements for documenting the reasons and considerations on which the decision is based should be designed bearing in mind the relevant time frames and other requirements for initiating review procedures under article 9, paragraph 2, of the Convention.³³¹

As mentioned in the [commentary on paragraph 8](#), in its findings on communication ACCC/C/2008/24 (Spain), the Committee held that “the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.”³³² In so doing, the authority can also satisfy the requirement in paragraph 9 that the decision should set forth the “reasons and considerations” on which it was based. As noted in the [commentary on paragraph 8](#), a good practice employed in some countries is to require the relevant public authority to address the substance of all comments in a written document justifying the final decision. This “response document” is delivered directly to anyone who made comments, and simultaneously made available to the general public. Countries where this is not yet in practice might adopt this mechanism.

Reasoned decisions

There are many benefits to be gained from giving reasons in a decision. Among them:

- Formulating reasons requires the decision maker to identify the issues, process evidence systematically and to state and explain conclusions. This increases the reliability of the decision.
- A reasoned decision on file can assist future decision makers facing similar circumstances, and can assist bodies in developing clear, consistent and regular decisions.
- Reasons may assure the parties that the hearing has given them a meaningful opportunity to influence the decision maker and to limit the risk of error.
- Public exposure to the reasons behind a decision increases confidence and shows that relevant arguments and evidence have been understood and properly taken into account.
- Reasons may provide the basis for further proceedings, such as appeals, acting as a further control over the quality of decision-making.
- Authorities can be held accountable for their decisions and acts if the reasons are shown.
- Reasons help to uphold decisions under review, by showing that they are not made arbitrarily or contrary to law.³³³

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis*, and where appropriate.

This provision supplements paragraph 22 of annex I, which extends article 6 to changes in or extensions of activities covered in that annex when those changes themselves meet the thresholds/criteria set out in it. Whereas paragraph 22 follows the approach found in EIA legislation in many countries and triggers obligations on the basis of physical changes, paragraph 10 is triggered in the case of subsequent administrative procedures. Such administrative procedures are usually not related to EIA legislation but rather to environmental licensing, such as integrated environmental permitting. In many countries environmental licences are granted only for a limited period of time (usually up to 10 years) and thereafter need to be renewed and/or updated. In addition, in certain circumstances, the reconsideration of the operating conditions of such

licences is a routine practice in many countries. In EU member States the reconsideration of permit conditions is covered by the Industrial Emissions Directive (see box below). The administrative procedures relating to the reconsideration of operating conditions for a covered activity require the application of full public participation procedures under article 6.

Reconsideration of permit conditions under the Industrial Emissions Directive

Article 24, paragraph 1, of the Industrial Emissions Directive requires that:

Member States shall ensure that the public concerned are given early and effective opportunities to participate in the following procedures:

- (a) The granting of a permit for new installations;
 - (b) The granting of a permit for any substantial change;
 - (c) The granting or updating of a permit for an installation where the application of Article 15(4) is proposed;
 - (d) The updating of a permit or permit conditions for an installation in accordance with Article 21(5) (a).
- The procedure set out in Annex IV shall apply to such participation.

Article 21, paragraph 5 (a), of the Industrial Emissions Directive states:

The permit conditions shall be reconsidered and, where necessary, updated at least in the following cases:

- (a) The pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit;

The reference in paragraph 10 to “mutatis mutandis” means “with the necessary changes”,³³⁴ and requires that the provisions of paragraphs 2 to 9 of article 6 are to be applied, with the necessary changes, when a public authority reconsiders or updates the operating conditions for an article 6 activity. The reference to “and where appropriate” indicates that certain reconsiderations or updating of operating conditions for an activity will not necessarily require the reapplication of all the paragraphs noted. It may be interpreted to allow Parties *not* to apply article 6 to reconsiderations or updating of operating conditions, if they deem it inappropriate. However, implicit in the concept of “mutatis mutandis”, as applied in the light of the objectives of the Convention, is the presumption that, in case of any doubt, the provisions *should* be applied. Furthermore, from an administrative point of view, it may be more efficient to develop a single set of procedures that could be applied in all cases, rather than to make a case-by-case determination. In its findings on communication ACCC/C/2009/41 (Slovakia) the Compliance Committee stressed that “although each Party is given some discretion in these cases to determine where public participation is appropriate, the clause ‘mutatis mutandis, and where appropriate’ does not imply complete discretion for the Party concerned to determine whether or not it was appropriate to provide for public participation”.³³⁵ The Committee considered that “the clause ‘where appropriate’ introduces an objective criterion to be seen in the context of the goals of the Convention”. It held that the clause did “not preclude a review by the Committee on whether the above objective criteria were met and whether the Party concerned should have therefore provided for public participation in the present case”.³³⁶

ARTICLE 6, PARAGRAPH 11 PUBLIC PARTICIPATION IN DECISIONS ON GENETICALLY MODIFIED ORGANISMS

While most of its provisions relate to the environment generally, the Aarhus Convention atypically gives special attention to information and public participation in decision-making pertaining to genetically modified organisms (GMOs). Besides article 6, paragraph 11, on public participation in decision-making, GMOs are also discussed in the twentieth preambular paragraph to the Convention. The provision on product information under article 5, paragraph 8, is also relevant to the consideration of GMOs under the Convention.

A short history of GMOs and the Aarhus Convention

During the negotiation of the Convention, the negotiating parties could not reach agreement on the extent to which its provisions should apply to the deliberate release of GMOs into the environment. It was agreed to keep the issue open for further determination in the light of future developments. At the time of the Convention's adoption at the Fourth EUE Ministerial Conference in Aarhus in 1998, the Signatories requested the Parties to further develop the Convention in the field of GMOs. At their first session (Chisinau, April 1999), the Meeting of the Signatories to the Aarhus Convention established a Task Force on GMOs, with Austria as the lead country. The Task Force was mandated to monitor developments in other forums and to make recommendations for the future treatment of GMOs under the Convention.

In addition to considerable differences in the national biosafety frameworks of the Signatories as of 1999, in particular concerning the level of public participation in the decision-making processes related to GMOs, the Task Force identified major open questions for the implementation of the Convention regarding the phrasing of article 6, paragraph 11. As the term "deliberate release" is used only in article 6, paragraph 11, and not defined anywhere else in the Convention, it was unclear to which activities with GMOs article 6, paragraph 11, would apply. The Task Force discussed various procedural options for overcoming this legal uncertainty and defining the scope of the Convention with regard to decisions on GMOs.



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At their second session (Cavtat, Croatia, July 2000), the Meeting of the Signatories established a Working Group on GMOs, led by Austria. In the course of discussions in the Working Group on GMOs, the majority of Signatories did not support a legally binding option regarding decision-making on GMOs and a compromise was therefore reached by the development of non-binding "Guidelines on access to information, public participation and access to justice with respect to genetically modified organisms."³³⁷ These Guidelines were adopted at the first session of the Meeting of the Parties in Lucca, Italy, in 2002, and are often referred to as the "Lucca Guidelines". At its first session, the Meeting of the Parties also adopted decision I/4 outlining further work on the issue, possibly including a legally binding approach to develop the Convention in this area.³³⁸ The task of exploring possible legally binding options, including a draft amendment to the Convention, was assigned to a new Working Group on GMOs.

The report on the implementation of the Lucca Guidelines, prepared for the second session of the Meeting of the Parties in Almaty, Kazakhstan, in 2005, found that the Guidelines, due to their advisory nature, could not secure a minimum standard in access to information, public participation and access to justice for the public in countries having no proper national biosafety legislation in place.³³⁹ After years of difficult negotiations in the Working Group, a compromise was reached so that at the second session of the Meeting of the Parties a new article 6 bis and annex I bis on GMOs was adopted, the so-called GMO amendment to the Convention (also sometimes called the “Almaty amendment”).³⁴⁰ As at April 2014, the GMO amendment was not yet in force.

The commentary below first discusses the Convention as adopted (original article 6, para. 11) before turning to the GMO Amendment to the Convention (amended article 6, para. 11, article 6 bis and annex I bis).

Original versus amended article 6, paragraph 11 — which applies?

The amendment to article 6 will enter into force when it has been ratified by at least three fourths of the Parties (article 14, para. 4). However, it is not clear from the Convention whether “three fourths of the Parties” means three fourths of the Parties that were Parties at the time the amendment was adopted, or three fourths of the Parties at any time in the future (sometimes known as the “moving target” or “current time” approach). In the light of this ambiguity, the Meeting of the Parties adopted decision III/1 on the interpretation of article 14 of the Convention at its third session in 2008. Decision III/1 clarifies that the expression “by at least three fourths of these Parties” should be interpreted as meaning at least three fourths of the Parties to the Convention that were Parties at the time of the adoption of the amendment (ECE/MP.PP/2005/2/Add.2). As there were 35 Parties to the Convention at the time the amendment was adopted, 27 of those Parties must ratify, accede to or approve the amendment before it can enter into force. Once the twenty-seventh of these Parties has deposited its instrument of ratification, approval or acceptance with the Depositary, the amendment will enter into force 90 days later. As at April 2014, the amendment had been ratified by 28 Parties, 22 of whom were Parties at the time the amendment was adopted.

Upon its entry into force, the GMO amendment will apply to all those Parties that have by that time become party to it. For any Party that accedes to the amendment after it enters into force generally, it will enter into force on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendment.

Until a Party has deposited its instrument of ratification/accession/approval, the original article 6, paragraph 11, will continue to apply. If a Party chooses never to ratify the amendment, then the original article 6, paragraph 11, will always apply.

For any countries that become Party to the Convention itself after the amendment enters into force, the amendment will automatically be considered part of the Convention.

To find out whether the amendment has gained enough ratifications to enter into force or to find out whether a particular country has ratified or acceded to the amendment, see the United Nations Treaties Office website.³⁴¹

Original article 6, paragraph 11

Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

The Convention places an obligation on Parties to the Convention that have not ratified the GMO amendment (see below) to apply article 6 to decisions on whether to permit the deliberate release of GMOs into the environment “to the extent feasible and appropriate”. The application of article 6 is to be accomplished within the framework of national law.

For example, article 50 of Bulgaria’s Law on Genetically Modified Organisms requires the Ministry of Environment and Water to organize a public discussion in respect of any application to release a GMO into the environment. The public discussion must be held not later than 45 days after Bulgaria’s Consultative Commission on GMOs gives its opinion on the application. The date, location and subject matter of the upcoming public discussion, as well as the location where the public may access all relevant information, must be announced not later than 30 days prior to the date of the discussion in a central daily paper, in the mass media in the region of the proposed release, through placement of notices in townhalls within that region and on the Ministry website. Any person may submit comments on the application in writing or in electronic form. The applicant or his representatives and the members of the Commission will be invited to participate in the public

discussion. Minutes must be kept of the public discussion and these must be considered in decision-making regarding the issuance of the permit.³⁴²

France's Environment Code regulates decision-making on the deliberate release of GMOs into the environment³⁴³ and their placing on the market in that country.³⁴⁴ Assessment of the risks associated with the release of a GMO is carried out by France's Biomolecular Engineering Commission in respect of the environment and public health, and by the French Food Health Security Agency in respect of food safety.³⁴⁵ The Biomolecular Engineering Commission includes representatives of civil society, and also organizes seminars on cross-cutting issues which are open to NGOs. The risk assessments and opinions of the Biomolecular Engineering Commission and the French Food Health Security Agency are published on the Internet.³⁴⁶ When an application is made to carry out a GMO field trial, an information sheet is posted in the local mayor's office and a public consultation procedure is initiated via the Internet. For applications regarding the placing on the market of GMOs, a public consultation procedure is carried out at the European Community level via the Internet.³⁴⁷

New article 6, paragraph 11

Without prejudice to article 3, paragraph 5, the provisions of this article shall not apply to decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.

For those Parties that have ratified the GMO amendment, upon the amendment's entry into force, the current article 6, paragraph 11, of the Convention will be superseded by the new article 6, paragraph 11. The new article 6, paragraph 11, states that the provisions of article 6 do not apply to decisions on whether to permit the deliberate release into the environment and placing on the market of GMOs. However, the provision is prefaced by "without prejudice to article 3, paragraph 5". Article 3, paragraph 5, states that a Party may introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention. By prefacing new article 6, paragraph 11, in this manner, the GMO amendment may be seen to be reminding Parties that each is still free to apply the more extensive requirements of article 6 to its GMO decision-making if it wishes to do so.

ARTICLE 6 BIS

PUBLIC PARTICIPATION IN DECISIONS ON THE DELIBERATE RELEASE INTO THE ENVIRONMENT AND PLACING ON THE MARKET OF GENETICALLY MODIFIED ORGANISMS

Article 6 bis lays down requirements for public participation in decisions on the deliberate release into the environment as well as the placing on the market of GMOs. Article 6 bis does not apply to the contained use of GMOs; however, this type of activity is covered by the Lucca Guidelines on GMOs.³⁴⁸

Deliberate release, placing on the market, contained use

While neither the Convention nor the amendment define the terms “deliberate release”, “placing on the market” or “contained use”, annex I of the Lucca Guidelines provides the following definitions:

“Deliberate release” is defined as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment.³⁴⁹

“Placing of GMOs on the market” is defined as making GMOs available to third parties, whether in return for payment or free of charge.³⁵⁰

“Contained use” means any activity, undertaken within a facility, installation or other physical structure, which involves genetically modified organisms that are controlled by specific measures that effectively limit their contact with, and their impact on, the external environment.³⁵¹

- 1. In accordance with the modalities laid down in annex I bis, each Party shall provide for early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.**

Paragraph 1 of article 6 bis contains two main principles: early and effective information and early and effective public participation. The principle of early information is to be understood by public authorities responsible for decision-making concerning the deliberate release and the placing on the market of GMOs as the obligation to inform the public at the earliest stage of a decision-making procedure. That means in practice that as soon as an appropriate notification has been submitted to the public authority, the public has to be informed, e.g., by public notice, about the proposed activities. The principle of effective information primarily means that the public should be provided with the relevant information in an easily accessible and comprehensible way. The principle of early and effective public participation should provide for a transparent decision-making process with the active involvement of the public. Of course the public has to be informed prior to decision-making

so that early participation, when all options are open, can take place. In order to give the public the possibility to express an opinion it is therefore very important to include reasonable time frames in the public participation process.

2. The requirements made by Parties in accordance with the provisions of paragraph 1 of this article should be complementary and mutually supportive to the provisions of their national biosafety framework, consistent with the objectives of the Cartagena Protocol on Biosafety.

Article 6 bis, paragraph 2, requires Parties to implement paragraph 1 of that article in a manner which is complementary and mutually supportive to the provisions of their national biosafety framework and consistent with the objectives of the Cartagena Protocol on Biosafety. Ideally, in this regard, good practice would be to incorporate the requirements of article 6 bis, paragraph 1, directly into the national biosafety framework. Those Parties that do not yet have a national biosafety framework in place consistent with their international obligations should take these provisions into account when developing their national biosafety framework. In keeping with article 3, paragraphs 5 and 6, of the Convention, Parties are free to introduce, or to maintain, measures that provide for broader access to information and more extensive public participation in GMO decision-making than required under article 6 bis.

In general, biosafety frameworks comprise three essential elements that, in combination, are commonly referred to as risk analysis: risk assessment; risk management; and risk communication.³⁵² The core activity is the so-called risk assessment, a multidisciplinary, scientific exercise. In the EU, the term “environmental risk assessment” is used, indicating its focus on potential impacts on the environment, taking also into account potential effects on human health.³⁵³ The second element of risk analysis is risk management. This means, on the one hand, any measures (e.g., isolation distances) intended to limit potential risks resulting from the use of a GMO, i.e., technical risk management, and, on the other hand, administrative risk management, in the form of decisions imposing possible conditions for the safe handling and use of a certain GMO. Finally, the third essential element of risk analysis is risk communication, which addresses public information and public participation. A thorough risk analysis requires communication and discussion about both the content of the risk assessment (e.g., results of the scientific evaluation) and the risk management (e.g., reasons and considerations a decision is based upon).

Considering the fact that GMOs are living organisms that may reproduce in the environment, their release may be irreversible. A fundamental principle derived from that reasoning that has found its way into almost all national biosafety frameworks around the world is the step-by-step principle. This means that the scale of release of a GMO is gradually increased only if evaluation of the earlier steps did not suggest potential negative effects for human health or the environment. At the legal level this is reflected in the classification and procedures concerning the different activities regarding GMOs: contained use, deliberate release and placing on the market. As noted previously, the GMO amendment does not cover the contained use of GMOs; however, this activity is addressed in the Lucca Guidelines.

Synergies with the CBD and its Cartagena Protocol on Biosafety

In decision II/1 adopting the GMO amendment, the Parties to the Aarhus Convention recognized the need to cooperate with other international organizations and forums, in particular the Cartagena Protocol on Biosafety, with a view to maximizing synergies and avoiding duplication of efforts, including through encouraging the exchange of information and collaboration between the respective secretariats. The Riga Declaration,³⁵⁴ adopted at the third session of the Meeting of the Parties, recognized the value of further collaboration with bodies of the Cartagena Protocol in activities aimed at supporting the application of the Lucca Guidelines on GMOs and the implementation of the Almaty amendment on GMOs.

The Cartagena Protocol on Biosafety to the CBD was drafted by the Parties to the CBD in the same period as the Aarhus Convention was being negotiated. The Cartagena Protocol was adopted on 29 January 2000 after long and intense negotiations, and entered into force on 11 September 2003. The Conference of the Parties to the CBD serves as the Meeting of the Parties to the Protocol.

Like the CBD, the Cartagena Protocol does not use the term “genetically modified organism”. Instead, it refers to “living modified organisms resulting from biotechnology”.³⁵⁵ The extent of any difference in the scope of these two terms has not been settled in practice.

The objective of the Cartagena Protocol, in accordance with the precautionary approach, is “to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focusing on transboundary movements” (Protocol, article 1). According to article 23 of the Protocol, Parties are required to “promote and facilitate public awareness, education and participation”, “to consult the public in the decision making process regarding living modified organisms”, and to “make the results of such decisions publicly available”. These provisions are kept rather general, supplemented by obligations concerning the exchange of information within the Biosafety Clearing-House mechanism.

At their fifth session (Nagoya, Japan, October 2010), the Parties to Cartagena Protocol adopted the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress.³⁵⁶ The objective of the Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health, by providing international rules and procedures in the field of liability and redress relating to living modified organisms. Being a Supplementary Protocol, the provisions of the Cartagena Protocol on public awareness and participation, including article 23, apply to processes under the Supplementary Protocol.

While the objective of the Aarhus Convention is “to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (article 1), the CBD and the Cartagena Protocol focus more particularly on the protection of biological diversity for its own sake. However, despite their different foci, the provisions of the Cartagena Protocol and the GMO amendment to the Aarhus Convention overlap on the issue of public participation in decision-making. In this regard, the two instruments should not be seen as contradicting, but rather as complementing one another. In the light of the GMO amendment, the Aarhus Convention might be considered as the more elaborated instrument in respect of the modalities for public participation, for which it lays down detailed requirements; whereas article 23 of the Cartagena Protocol on public participation is of a more framework nature (although at their fifth session the Parties to the Protocol adopted a Programme of Work on Public Awareness, Education and Participation Concerning the Safe Transfer, Handling and Use Of Living Modified Organisms which envisages activities addressing, inter alia, the issue of public participation). Conversely, regarding access to information, the Cartagena Protocol, in its article 20 establishing the Biosafety Clearing-House mechanism, defines more clearly than the Aarhus Convention what kind of scientific, technical, environmental and legal information and information has to be made publicly available.

In accordance with the recognition, in decision II/1 adopting the Aarhus Convention’s GMO amendment,³⁵⁷ of the need to cooperate with the Cartagena Protocol, the two instruments have subsequently collaborated in a number of respects. This collaboration has included the convening of joint workshops on access to information and public participation with respect to GMOs back to back with the fourth and fifth sessions of the Meeting of the Parties to the Cartagena Protocol (Bonn, Germany, May 2008³⁵⁸ and Nagoya, Japan, October 2010³⁵⁹). The secretariats of the two instruments have also collaborated in the intersessional periods in various respects. For example, at the invitation of the Cartagena Protocol secretariat, the Aarhus Convention secretariat provided comments on the draft work programme on public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms prior to the finalization of its text.

ANNEX I BIS

MODALITIES REFERRED TO IN ARTICLE 6 BIS

- 1. Each Party shall lay down, in its regulatory framework, arrangements for effective information and public participation for decisions subject to the provisions of article 6 bis, which shall include a reasonable time frame, in order to give the public an adequate opportunity to express an opinion on such proposed decisions.**

Paragraph 1 of annex 1 bis more or less summarizes the basic requirements on public participation laid down in article 6 of the Aarhus Convention for decisions on GMOs. These are, in particular, the principle of effective information and the basic elements of public participation (further elaborated under paras. 4–8 of annex 1 bis). The latter imply that within public participation procedures, whatever forms these may take (e.g., public hearings, stakeholder dialogues and consensus conferences), the public are granted adequate time frames to prepare and to participate effectively during the decision-

making process. Access to relevant information is thus considered a prerequisite to the opportunity for the public to provide opinions. The time frame admitted may vary between decisions on the deliberate release of GMOs and decisions on the placing on the market of GMOs, and also among countries.

In the EU, for instance, the public has 30 days to comment on the opinion of the European Food Safety Authority (EFSA), which constitutes the assessment report of a notification concerning the placing on the market of GMOs. In Norway, where specific legislation on access to GMO information is in place, the public generally has six weeks for comments. In Austria, after the public announcement of a notification for the deliberate release of a GMO, the public may submit written comments to the competent authority within three weeks, during which the public has the right/possibility of access to the notification. If the public provides comments, the competent Austrian authority has to hold a public hearing within three weeks after the end of the commenting period.

The use of an annex to set out the prescribed modalities is interesting. While annexes are considered an integral part of the Convention (article 13), the process for amending them is much less onerous than for amending a provision in the main body of the Convention (article 14, paras. 4, 5 and 6).

2. In its regulatory framework, a Party may, if appropriate, provide for exceptions to the public participation procedure laid down in this annex:

For many of the activities listed in annex 1 of the Convention a threshold is established regarding the applicability of the provisions of article 6. The notion behind this provision is that the potential impact of a given activity on the environment is generally proportional to the size of the venture. As balancing potential risks for the environment against potential benefits for the society always results in a compromise depending on the case, each exemption demands a detailed statement of grounds.

Similarly, annex I bis specifying modalities for public participation regarding the deliberate release and the placing on the market of GMOs provides the possibility for exemptions to this procedure. However, these exemptions are not mandatory and can be applied at each Party's own discretion. As the two activities of GMOs covered by article 6 bis — deliberate release and placing on the market — differ in scope, exemptions are specifically defined for each of them (see below).

(a) In the case of the deliberate release of a genetically modified organism (GMO) into the environment for any purpose other than its placing on the market, if:

Article 6 bis, paragraph 2 (a), entitles a Party to provide for exemptions to the public participation procedure laid down in the annex regarding the deliberate release of a GMO (other than its placing on the market) if (a) such a release under comparable biogeographical conditions has already been approved within the Party's regulatory framework and (b) sufficient experience has already been gained with the release of the GMO in question in comparable ecosystems. Both of these conditions are required before a Party is entitled to rely on this exception.

(i) Such a release under comparable bio-geographical conditions has already been approved within the regulatory framework of the Party concerned; and

Except as otherwise provided for in the national biosafety framework of a Party, a Party may make an exemption to the obligation for a public participation procedure required for decisions on the deliberate release of GMOs, if under comparable biogeographical conditions such a release has already been approved. It is important to note, however, that a relevant release would have had to be performed within the territory of the Party. Any deliberate release that took place in a comparable biogeographical region in a neighbouring country, for instance, would not represent an adequate basis for granting such an exemption.

The wording “comparable biogeographical conditions” should be seen against the background that potential effects of GMOs on the environment depend not only on the type of GMO, but also on the prevailing environmental conditions (e.g., climatic factors, number of generations of target pest, occurrence of non-target organisms, wild relatives, agricultural practices, etc.). Data gained in a field trial with a GMO in a region under a particular set of conditions cannot substitute experimental releases in environments with differing conditions. So any decision to grant an exemption has to be judged on a case-by-case basis and the concept of biogeographical regions may provide basic guidance in this respect.

(ii) Sufficient experience has previously been gained with the release of the GMO in question in comparable ecosystems;

The biosafety frameworks of many countries, and also the EU biosafety framework, provide for so-called simplified or differentiated procedures. The idea behind this is to streamline the regulatory procedures, if sufficient experience has been obtained with the release of a particular type of GMO in particular ecosystems. Consequently, if a GMO notification is subject to a differentiated procedure in a country, but not necessarily only in such cases, paragraph 2 (a) (ii) of annex 1 bis allows for exemptions to the public participation procedure.

What “sufficient experience” means may in practice vary from country to country. As one example, according to EU Directive 2001/18/EC certain criteria, specified in its annex V, have to be met before a proposal for a differentiated procedure can be submitted. According to annex V, for instance, sufficient information on any interaction of particular relevance for the risk assessment needs to be available and the GMO may not present additional or increased risks to human health or the environment under the conditions of the experimental release. Under the Directive, the public has 60 days to comment on the reasoned proposal for the application of a differentiated procedure.³⁶⁰

Regulation of public participation in decision-making on GMOs in the EU

In the EU one important legal instrument concerning GMOs is Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms. The Directive has been complemented by Commission decisions with guidance notes on risk assessment³⁶¹ and monitoring.³⁶² Additionally, there are relevant EU regulations that are directly applicable in EU member States, for instance, Regulation 1829/2003/EC on genetically modified food and feed. These pieces of legislation also contain provisions on public participation.

Council Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC defines GMO as “an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination”.³⁶³ All EU member States and a number of other ECE member States have passed GMO legislation. Some of them have taken legal measures against the placing on the market of GMOs in recent years, including Austria, France, Greece, Hungary, Luxembourg and Norway.

According to Directive 2001/18/EC “deliberate release means any intentional introduction into the environment of a GMO ... for which no specific containment measures are used”, whereas “placing on the market means making available to third parties”. Consequently, a GMO, by itself or contained in products, must be subject to field testing at the research and developmental stage before it can be considered for placing on the market.

Directive 2001/18/EC mandates human health and environmental impact assessments. Article 4 of the Directive states that “member States shall ensure that all appropriate measures are taken to avoid adverse effects to human health and the environment which might arise from the deliberate release and placing on the market of GMOs”. Article 9, though, holds that if member States consider it appropriate they may consult groups or the public on such aspects of the proposed deliberate release. Article 24 foresees a public information and participation procedure also in case of GMO product notifications.

The provisions of Directive 2001/18/EC on public information and public participation regarding GMOs differ depending on the scope of the notification. For a deliberate release of a GMO, an EU member State is required to “consult the public, and where appropriate groups”,³⁶⁴ whereas, for the placing on the market of a GMO, “the public may make comments to the Commission” on the assessment report provided.³⁶⁵ In practice, the provisions regarding the deliberate release of GMOs implemented by each member State also differ in detail concerning the public information and participation.

(b) In the case of the placing of a GMO on the market, if:

(i) It was already approved within the regulatory framework of the Party concerned; or

Authorizations to the placing on the market of GMOs are normally not granted in an unlimited manner, but usually define a period of validity. In Regulation 1829/2003/EC on genetically modified food and feed,³⁶⁶ for example, it is arranged that consent has to be renewed every 10 years (article 11, para. 1), at the latest one year before the expiry date of the authorization. In cases where an authorization is due to expire and a renewal has been applied for, the GMO amendment to the Aarhus Convention allows for exemptions to the public participation procedure.

(ii) It is intended for research or for culture collections.

The GMO amendment provides for the possibility of exempting GMO notifications from the public participation procedure if they are exclusively used for research purposes or culture collections, in order not to interfere with the principle of freedom of science and research.

For example, the EU Directive 2001/18/EC provides that some operations with GMOs are not regarded as “placing on the market”.³⁶⁷ These, inter alia, concern operations with genetically modified micro-organisms in contained systems regulated under Directive 90/219/EEC³⁶⁸ (amended by Directive 98/81/EC),³⁶⁹ including culture collections, as well as making available GMOs other than genetically modified micro-organisms to be used under contained conditions (e.g., greenhouses).

3. Without prejudice to the applicable legislation on confidentiality in accordance with the provisions of article 4, each Party shall make available to the public in an adequate, timely and effective manner a summary of the notification introduced to obtain an authorization for the deliberate release into the environment or the placing on the market of a GMO on its territory, as well as the assessment report where available and in accordance with its national biosafety framework.

A prerequisite for effective public participation is access to information, i.e., the public is provided with the relevant information in a timely manner. As a good practice, “timely” in this respect means that the public is granted sufficient time to deal with the information provided and to develop an opinion about the existing application. As an example of good practice in this respect, the Lucca Guidelines propose that public authorities should encourage potential applicants to enter into discussion with the public concerned and to provide information even before entering the authorization procedure. The Guidelines are consistent in this regard with article 6, paragraph 5, of the Aarhus Convention. Additionally, annex IV of the Lucca Guidelines provides examples concerning the question of how information should be made available, for instance, recommending that information for the public is provided free of charge. Moreover, not only passive access to information (e.g., on a website, in registers), but also active dissemination of information using a variety of media is of importance (e.g., reports, labelling of genetically modified products).

In summary, the information that needs to be available in the course of a participation procedure should include information on the content of the notification (see also annex I bis, para. 4 (a)–(c)), as well as procedural information (see annex I bis, para. 5 (i)–(v)). The Aarhus Convention is not very explicit as to what constitutes GMO information, thus the GMO amendment provides a more concrete interpretation. The two most important elements of such information are mentioned in paragraph 3 of annex I bis: the summary of the notification and the assessment report.

By way of example, in the EU, the content of the summary of the notifications — the so-called summary notification information format — is clearly defined in two Commission decisions, for the placing on the market of GMOs themselves or in products³⁷⁰ and for the deliberate release of GMOs,³⁷¹ respectively. The Lucca Guidelines recommend that a non-technical summary be made available to the public, in order to assist the public's understanding of the matter.

In general, the assessment report is based on the scientific evaluations of the intended use of the GMOs, and includes an environmental risk assessment (ERA), a food safety evaluation, etc. Where the competent authorities do not compile the assessment report themselves, they generally rely (as much as possible) on the respective assessment reports compiled by regulatory experts or scientific committees when reaching a decision.

While in EU Directive 2001/18/EC the term “assessment report” is used, Regulation EC/1829/2003³⁷² refers to the “opinion of the Authority”, i.e., EFSA. According to the Regulation, the placing on the market of genetically modified food and feed is governed by a community-wide procedure. The task of compiling an assessment report, or “overall opinion”, according to the Regulation, is assigned to EFSA while the decision-making rests with the member States on the basis of a proposal for a Council decision presented by the European Commission. The EFSA overall opinion contains the scientific opinion of the EFSA GMO panel and, in the case of applications which cover the cultivation of a genetically modified plant, also the ERA by the national competent authority assigned by EFSA to conduct it according to article 6, paragraph 3 (c), of Regulation EC/1829/2003.

4. Parties shall in no case consider the following information as confidential:

It is common practice under many countries' regulatory frameworks that certain commercial and industrial information, the disclosure of which may harm a company or research institution's competitive position, may be treated as confidential. However, in the same manner as article 4, paragraph (4) (d), of the Convention requires information on emissions relevant for the protection of the environment to always be disclosed, paragraph 4 of annex I bis lists certain information which can never be kept confidential.

Paragraph 4 of article 25 of Directive 2001/18/EC lists certain pieces of information that must never be regarded as confidential. Together with article 6, paragraphs 2 and 6, of the Aarhus Convention and annex III of the Lucca Guidelines, the Directive 2001/18/EC provisions served as a model for paragraph 4 (a)–(c) of annex I bis of the GMO amendment to the Aarhus Convention.

It should be noted that each of the provisions referred to in the previous paragraph depict *minimum* requirements for information that has to be made public in the course of a public participation procedure. In a number of EU countries, e.g. Austria and the Czech Republic, it is common practice to disclose the whole notification except for its confidential parts.

(a) In the case of the deliberate release of a genetically modified organism (GMO) into the environment for any purpose other than its placing on the market, if:

Here the basic pieces of information are mentioned which ought to be communicated to the public in an early and effective manner during an environmental decision-making procedure. This includes, first of all, a description of the GMO and the name and address of the applicant responsible for proposed activity with the GMO. Moreover, the intended use of the GMO, i.e., the scope of the notification, needs to be part of this information. If the GMO in question is intended to be deliberately released for research purposes, the location of the release should also be made public. Depending on the legal and administrative practice in a country the term “location” may be interpreted with different degrees of detail or precision. In the 2009 case of *Commune de Sausheim v. Pierre Azelvandre*,³⁷³ the ECJ held that the requirement in article 25, paragraph 4, of Directive 2001/18/EC not to keep confidential the location of the release meant that the disclosure of the information concerning the specific location of the site of the release, including grid reference, is mandatory. Exemptions relating to public order or other interests are not allowed.

To know where a certain type of GMO is grown is essential for the monitoring of GMOs, such as that required under articles 19 and 20 of Directive 2001/18/EC. According to article 31, paragraph 3, of that Directive, member States are required to establish public registers not only to record the locations of deliberate releases of GMOs, but also to record the locations of GMOs grown commercially “in the manner deemed appropriate to the competent authority”. In Austria, for example, the local community in which a GMO product may be cultivated has to give notice of the cultivation to the national competent authority, which is obliged to maintain this information in a register.

(b) The methods and plans for monitoring the genetically modified organism or organisms concerned and for emergency response;

Methods and plans for monitoring of potential adverse effects resulting from the activities specified in annex I, as well as emergency response plans, cannot be kept confidential.

As noted in Directive 2001/18/EC, monitoring helps both to confirm that any assumption regarding the occurrence and impact of potential adverse effects of the GMO or its use in the ERA is correct, and also to identify the occurrence of adverse effects of the GMO or its use on human health or the environment that were not anticipated in the ERA.³⁷⁴

(c) The environmental risk assessment.

Here, the GMO amendment substantiates the provision of article 6, paragraph 6, of the Aarhus Convention with regard to GMOs. The disclosure of the ERA to the public guarantees that the public is provided with extensive information on all environmental aspects associated with the proposed activity concerning the GMO in question.

There might be a lack of clarity regarding the question what the term ERA means in practice. The EU, for instance, defines ERA as “the evaluation of risks to human health and the environment, whether direct or indirect, immediate or delayed, which the deliberate release or the placing on the market of GMOs may pose” (Directive 2001/18/EC, article 2, para. 8). With the principles laid down in Directive 2001/18/EC and the legally binding Guidance Notes on risk assessment,³⁷⁵ the EU has established a common methodology for carrying out the ERA of GMOs. In 2010 EFSA published updated guidance for the ERA of genetically modified plants.³⁷⁶

5. Each Party shall ensure transparency of decision-making procedures and provide access to the relevant procedural information to the public. This information could include for example:

(i) The nature of possible decisions;

(ii) The public authority responsible for making the decision;

(iii) Public participation arrangements laid down pursuant to paragraph 1;

(iv) An indication of the public authority from which relevant information can be obtained;

(v) An indication of the public authority to which comments can be submitted and of the time schedule for the transmittal of comments.

Besides information on the content of the GMO notification (see annex I bis, paras. 3 and 4), the public has to be provided with information on the envisaged environmental decision-making procedure. The annex refers to “the public” generally, rather than using the narrower term “the public concerned”, which is used in article 6, paragraph 2, of the Convention. By using the term “the public”, Parties to the Convention recognize that the mobility of GMOs, including when they are placed on the market, means that it is not possible to identify a discrete subsection of the public as the “public concerned”.

First of all, the public authority responsible for the decision-making should find effective means to inform the public about the proposed activity with GMOs by public notice (e.g., in an appropriate national, regional or local newspaper; in the official government gazette; on their Internet site; via any existing clearing-house mechanism, etc.). From this information it should be clear to the public what kind of activity with GMOs is submitted for decision and what types of decisions may be made (para. 5 (i)), and which public authority is responsible for taking the decision (para. 5 (ii)). Moreover, it is important that the public is made aware of their rights and opportunities to participate in the decision-making process. Therefore, such a public notice should also contain information on the envisaged process according to the provisions of national legislation (para. 5 (iii)), for instance, the start of the procedure, any time limits for public consultation and any opportunities for participation (e.g., time and venue of a public hearing). Another very important piece of information for the public is the indication of the public authority or any other official body from which relevant information can be obtained from (para. 5 (iv)). Relevant information may include not only information on the notification, but also any other information that may be relevant in this respect (e.g., reports and advice issued by expert committees or advisory bodies, international and national legislation and policy documents, etc.). The obligations of public authorities to collect and disseminate further information on GMO activities (e.g., in registers, databases and reports) are addressed. Last but not least, the public should be informed about the public authority to which comments or questions can be submitted and the respective time schedule and modalities for doing so (para. 5 (v)). The public’s right to submit comments is addressed further in paragraph 6 of annex I bis.

6. The provisions made pursuant to paragraph 1 shall allow the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed deliberate release, including placing on the market, in any appropriate manner.

Paragraph 6 states that a public authority has to ensure the possibility for proper input from the public. In keeping with article 6, paragraph 7, of the Convention, the annex gives this right to the public generally, rather than the narrower “public concerned”. Not only written comments are to be taken into account by the public authority, but, for instance, also oral questions and opinions put forward at a public hearing or enquiry. Attention should be paid to any point raised in the course of the public participation procedure (see the commentary to article 6, paragraph 7, and in particular the discussion of the Compliance Committee’s findings in ACCC/C/2006/16 (Lithuania),³⁷⁷ above). In Norway, the relevant legislation expressly provides for ethical considerations to be taken into account in decisions on activities with GMOs.³⁷⁸

Regarding good practices in this area, the Lucca Guidelines encourage public authorities to explore other mechanisms and measures, including consensus conferences, round-table discussions, stakeholder dialogues and citizens’ juries on issues relating to, for example, the risk assessment and risk management of GMOs, in order to improve public knowledge, public participation and awareness of activities involving GMOs.³⁷⁹

7. Each Party shall endeavour to ensure that, when decisions are taken on whether to permit the deliberate release of GMOs into the environment, including placing on the market, due account is taken of the outcome of the public participation procedure organized pursuant to paragraph 1.

Paragraph 7 requires the competent authority to take due account of the outcome of the public participation procedure in taking the final decision on a GMO notification. For a more general discussion of what is meant by taking “due account” of the outcome of the public participation procedure, see the commentary to article 6, paragraph 8, above.

8. Parties shall provide that when a decision subject to the provisions of this annex has been taken by a public authority, the text of the decision is made publicly available along with the reasons and considerations upon which it is based.

This paragraph is consistent with article 6, paragraph 9, of the Convention. Accordingly, each Party has to make sure that the text of the final decision and the reasons and considerations on which it is based are made publicly available, for instance, at a public building and on the Internet. Additionally, the decision should contain a description of how due account has been taken of the outcome of the public participation procedure.

In the Netherlands, the public may make comments on a draft decision prior to it being finalized. Comments by the public have to be answered individually and are taken into account in the final decision. The entire process is available to the public on the Internet.³⁸⁰

ARTICLE 7

PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Article 7 covers public participation with respect to plans, programmes and policies. The obligations of authorities and the rights of the public are somewhat less clearly defined than in article 6, although several of the provisions of article 6 are expressly incorporated into article 7, at least with respect to plans and programmes. Article 7 allows Parties more flexibility in finding appropriate solutions for public participation in this category of decision-making.

Even though not expressly stipulated in the Convention, it seems common ground that article 7 relates only to plans, programmes and policies prepared by public authorities and not to those of private persons (who also sometimes prepare plans, programmes or policies “relating to the environment”). This is in keeping with the general approach of the Convention which addresses its obligations to the Parties themselves. An indirect indication to support this view of article 7 is the requirement that the “public which may participate shall be identified by the relevant public authority”.

Article 7 distinguishes between plans and programmes on the one hand and policies on the other. As far as plans and programmes are concerned, it incorporates certain provisions of article 6 relating to the time frames and the effectiveness of opportunities for public participation, as well as the obligation to ensure that public participation is actually taken into account. There is also an express reference to the objectives of the Convention. With respect to policies there is no express incorporation of the provisions of article 6.

The Convention does not define the terms “plans”, “programmes” and “policies”. These terms do have common-sense and sometimes legal meanings throughout the ECE region, however.



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Enforcement of obligations under article 7 by members of the public through the access to justice provisions of article 9 requires a national “opt-in” under article 9, paragraph 2 — that is, it requires Parties to take legislative steps to ensure that members of the public have access to a review procedure to enforce the rights contained in that article (see [the commentary to article 9, paragraph 2](#)). If Parties do not make such an “opt in”, opportunities for the enforcement of obligations under article 7 must be based on article 9, paragraph 3, which provides for the right of citizens to bring actions in cases of violations of environmental law.

The table below provides an overview of the core obligations imposed on Parties through article 7 and practical guidance for their implementation.

| Provision | Obligation | Implementation elements |
|---------------------------------|---|--|
| First sentence | Requires Parties to provide public participation during preparation of plans and programmes relating to the environment | <ul style="list-style-type: none"> • Transparent and fair framework • Necessary information provided |
| Second sentence | Incorporates article 6, paragraphs 3, 4 and 8 | |
| [Article 6, paragraph 3] | Sets time frames for public participation procedures | <ul style="list-style-type: none"> • Specific time limits must be established • Must provide enough time for notification, preparation and effective participation by the public |
| [Article 6, paragraph 4] | Requires public participation to take place early in process | <ul style="list-style-type: none"> • Options are open • Public participation may not be pro forma |
| [Article 6, paragraph 8] | Parties must ensure that the plan or programme takes due account of public participation | <ul style="list-style-type: none"> • Reasons and considerations on which decision is based should provide evidence of how due account taken of public participation |
| Third sentence | Requires the relevant public authority to identify the participating public | <ul style="list-style-type: none"> • Taking into account the objectives of the Convention |
| Fourth sentence | Public participation in preparation of policies relating to the environment | <ul style="list-style-type: none"> • To the extent appropriate • Endeavour to provide |

Article 7 and strategic environmental assessment

While the Convention does not oblige Parties to undertake environmental assessments, a legal basis for the consideration of the environmental aspects of plans, programmes and policies is a prerequisite for the implementation of article 7 ([see similar discussion under article 6, above](#)). For example, the requirement in article 7 that Parties ensure that “due account is taken of the outcome of public participation” implies that there must be a legal basis to take environmental considerations into account in plans, programmes and policies. The requirement to take the outcome of public participation into account likewise points to a need to establish a system for evaluating comments.

Proper public participation procedures in the context of SEA are a valuable tool to assist in the implementation of article 7. SEA provides public authorities with a process for integrating the consideration of environmental impacts into the development of plans, programmes and policies.

It should be noted however, that, while a valuable aid to the implementation of article 7, SEA procedures, as currently set at the international and regional level (see below) and as regulated at the national level, cannot be considered as fully implementing its requirements. While such procedures are useful tools towards implementation, they need to be supplemented by other procedures (see box on plans, programmes and policies relating to the environment).

Two important instruments on SEA are the Protocol on SEA to the Espoo Convention and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive).

The purpose of SEA under both instruments is to ensure that the environmental consequences of plans and programmes are identified and assessed before their adoption. Both instruments cover public plans and programmes in various sectors, including transport, energy, waste, water, industry, telecommunications, tourism, town and country planning and land use, “which are likely to have significant effects on the environment” (SEA Directive) or “which are likely to have significant environmental, including health, effects” (SEA Protocol). The two instruments prescribe similar procedures to be followed and requirements regarding the content of the assessment documentation. Both instruments refer specifically to the Aarhus Convention and make provision for the public to express its views and for the results of that public participation to be taken into account during the adoption of the plans and programmes.

The SEA Directive deals only with plans and programmes, and does not cover policies regarding the environment. While the SEA Protocol’s strongest obligations relate to plans and programmes, it does require Parties to “endeavour to ensure that

environmental, including health, concerns are considered and integrated to the extent appropriate in the preparation of its proposals for policies and legislation that are likely to have significant effects on the environment, including health". In applying this, each Party "shall consider the appropriate principles and elements" of the Protocol. The scope of application of article 7 of the Aarhus Convention is thus wider than the SEA Directive and the SEA Protocol. Article 7 applies to plans, programmes and policies "relating to the environment" while the SEA Protocol and Directive are based on the narrower concept of likelihood of significant effects on the environment. The legal scheme for identifying the likelihood of having significant effects is almost identical in both the Protocol and the Directive.³⁸¹ They both determine which plans and programmes will be subject to mandatory SEA and those which will require "screening" (i.e., a significance test to determine whether an SEA should be required). In addition, the same categories of plans and programmes are excluded from the ambit of both instruments.

Article 7 does not envisage any test of "significance" and "likelihood" nor any procedure or criteria for screening. The rule is simple: any plan, programme or policy "relating to the environment" is subject to its regime. In particular, a plan, programme or policy may be considered as "relating to the environment" regardless of whether it "sets the framework" for a development consent for any project or not. For some of the 11 sectors mentioned in the SEA instruments, e.g., telecommunications or tourism, setting the framework for projects deemed to have a significant environmental effect could be an important trigger to consider them as "relating to the environment". However, for other sectors, e.g., waste management or water management, any plan, programme or policy, even if it does not set the framework for a development consent, would seem very much related to the environment. The same applies to some plans, programmes and policies from other sectors than the 11 listed in the SEA instruments. For example, air pollution reduction programmes or noise combating programmes that set the framework for future development projects are subject to screening under the SEA instruments and may or may not be found to have significant environmental effects.³⁸² In any case, however, they are very much related to the environment. Moreover, there are plans and programmes which by their nature are unlikely to set the framework for a development consent, e.g., strategies for environmental education or programmes for the cooperation of authorities with environmental NGOs. Such plans and programmes would not be considered to have significant environmental effects under the SEA instruments, but, nevertheless, are still very much related to the environment and covered by article 7.

The SEA instruments cover minor modifications to plans and programmes and plans and programmes which determine the use of small areas at local level only if mandatory screening determines they may have significant environmental effects. In contrast, article 7 applies to all plans and programmes regarding the environment. It does not expressly exclude minor modifications or small areas at the local level from its scope.

| SEA Directive | SEA Protocol | Article 7, Aarhus Convention |
|---|--|--|
| Applies to plans and programmes likely to have significant effects on the environment. | Applies to plans and programmes likely to have significant environmental, including health, effects. | Applies to plans, programmes and policies relating to the environment. |
| Lists 11 sectors (agriculture, forestry, etc.) ³⁸³ where plans and programmes, which set the framework for future development consent for certain types of projects, are deemed to have significant effect and therefore always require SEA. | Same as SEA Directive. | Applies to all plans, programmes or policies relating to the environment. |
| Minor modifications to plans and programmes in the above sectors, as well as those which determine the use of small areas at the local level, are not subject to mandatory SEA but are still subject to screening. | Same as SEA Directive. | Applies to all plans, programmes or policies relating to the environment. Minor modifications and plans and programmes for small areas are not expressly excluded. |
| Other plans and programmes which set the framework for future development consent of projects are also subject to screening. | Same as SEA Directive. | Applies to all plans, programmes or policies relating to the environment. |
| Plans and programmes solely for national defence or civil emergencies excluded. | Same as SEA Directive. | Plans and programmes solely for national defence or civil emergencies not excluded. |
| Financial or budget plans and programmes excluded. | Same as SEA Directive. | Financial or budget plans and programmes not excluded. |

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.

The Convention establishes a set of obligations for Parties to meet regarding public participation during the preparation of plans and programmes relating to the environment.

Plans and programmes relating to the environment

Article 7 refers to plans and programmes “relating to” the environment, rather than plans and programmes potentially affecting the environment, a slightly higher standard. As noted above, the Convention does not define the terms “plans” and “programmes”. However, these terms have common-sense and sometimes legal meanings throughout the ECE region. For example, the SEA Protocol, in its article 2, paragraph 5, provides the following definition for “plans and programmes”:

Plans and programmes and any modifications to them that are:

- (a) Required by legislative, regulatory or administrative provisions; and
- (b) Subject to preparation and/or adoption by an authority or prepared by an authority for adoption, through a formal procedure, by a parliament or a government

Whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of “environment” found in the definition of “environmental information” (article 2, para. 3).

Plans and programmes relating to the environment may include land-use and regional development strategies and sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation, etc., at all levels of government. They may also include government initiatives to achieve particular policy goals relating to the environment, such as incentive programmes to meet certain pollution reduction targets or voluntary recycling programmes, and complex strategies, such as national and local environmental action plans and environmental health action plans. Often such strategies are the first step in action to reach environmental protection goals, followed by the development of plans based on the strategies. Integrated planning based on river basins or other geographical features is another example.

Plans, programmes and policies relating to the environment

The following types of plans, programmes and policies may be considered as “relating to the environment”:

- Those which “may have a significant effect on the environment” and require SEA.
- Those which “may have a significant effect on the environment” but do not require SEA, for example, those that do not set the framework for a development consent.
- Those which “may have effect on the environment” but the effect is not “significant”, for example, those that determine the use of small areas.
- Those intended to help to protect the environment.

As far as modifications to plans and programmes are concerned, the legal situation is not very clear. In contrast to article 6 and the SEA Protocol and SEA Directive, article 7 of the Convention does not specifically address the issue of modifications. Therefore, on a formalistic view, it might be argued that article 7 applies only “during the preparation of plans and programmes” and not during any subsequent modifications of those plans and programmes. Alternatively, it could be said that there is no need for article 7 to explicitly mention modifications, because any modification to a plan or programme in itself amounts to a plan or programme and therefore is subject to article 7. The latter view would seem to be supported by the SEA Protocol’s definition of plans and programmes (see box above) which may be useful in determining the scope of application of article 7 of the Aarhus Convention.

A further issue is plans and programmes that determine the use of small areas at the local level. While the size of the area covered and the level of decision-making may be important factors in determining “significance” or “likelihood”, they may

be irrelevant when it comes to determining whether the plans and programmes are “relating to the environment”. Waste or water management plans, as well as air pollution reduction programmes or noise combating programmes, will be “relating to the environment” regardless of the size of the area covered and the level of decision-making and therefore will require public participation under article 7 even if they only determine the use of small areas at local level.

The Aarhus Convention does not include any provision that would exclude from the ambit of article 7 plans and programmes the sole purpose of which is to serve national defence or civil emergencies. Nor does it exclude financial or budget plans and programmes. In cases where such plans and programmes may be “relating to the environment”, implementation of article 7 may prove difficult, however, if information necessary for the public to participate has been exempted from disclosure under article 4, paragraph 4. The direction in article 4, paragraph 4, that the grounds for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure, will be important here.

Public participation in preparation of plans: Development plans in EU member States and applicant countries

EU law requires public participation in the drawing up of development plans for the allocation of EU financial assistance under EU structural funds. EU structural funds are intended for:

- Promoting the development and structural adjustment of regions whose development is lagging behind.
- Supporting the economic and social conversion of areas facing structural difficulties.
- Supporting the adaptation and modernization of education, training and employment policies and systems.

Council Regulation (EC) No. 1083/2006 of 11 July 2006 repealing Structural Funds Regulation (EC) No. 1260/1999 and laying down general provisions for the European Regional Development Fund, the European Social Fund and the Cohesion Fund requires member States seeking financial assistance from the funds to submit development plans developed in “partnership” between the public administration and “social and economic” partners, including those representing civil society and environmental partners. The development plans should include an analysis of the situation prepared by a member State and the priority needs for attaining the objectives of structural funds, together with the strategy, the planned action priorities, their specific goals and the related indicative financial resources.

In some countries (such as Ireland and the United Kingdom) these “partnership arrangements” between the public administration and social and economic partners require public review of the draft development plans through public hearings and by the provision of written comment on the draft plans. They also enable NGOs to participate — with the same rights and duties as public authorities and other social and economic partners — in the committees that monitor the preparation of development plans. For example, in Ireland, since 2009 the Environmental Pillar (a representative group for some 27 environmental groups nationally) is regularly asked for its comments on plans involving structural funds, such as the EU 2020 growth strategy, along with other social partners, to ensure that policymaking takes environmental issues into account.



Appropriate practical and/or other provisions

The Convention emphasizes that Parties must, at a minimum, make practical provisions for public participation in plans and programmes relating to the environment. This is consistent with its overall goal that opportunities for public participation should be real and effective. The Convention also provides that Parties may make “other provisions” to implement this provision. During the negotiations, the possibility of including “legal” provisions for public participation under this article was discussed. Some countries resisted this, and it was decided that the word “other” permitted Parties to satisfy article 7 through legal provisions on public participation if they wished to do so. A similar solution was found in article 3, paragraph 1, which talks of the obligation of Parties to take the necessary legislative, regulatory and “other” measures.

In contrast to article 6, article 7 requires that the provisions apply to “the public” generally rather than the narrower “public concerned”. “The public” is defined in article 2 to include any natural or legal person.

Transparent and fair framework

The reference to a transparent and fair framework emphasizes that the public must have opportunities to participate effectively. To do so the public must be able to use rules that are applied in a clear and consistent fashion, which in turn requires the implementation of a transparent and fair framework. Article 1 helps to clarify the intention behind this provision. Article 1 states that one objective of the Convention is to guarantee rights in respect of public participation in decision-making. For rights to be guaranteed, a transparent and fair framework must be in place, both for decision-making itself and to afford affected members of the public the possibility to uphold the standards of decision-making processes by challenging procedures and decisions ([see also the commentary to article 9](#)).

Necessary information to the public

It goes without saying that any public participation procedure must inform the public about the commencement of the process and their possibilities to participate. Similarly, it must provide the public with access to the information relevant to the preparation of the plans and programmes themselves. These points are illustrated by the article 7 requirement that Parties provide “the necessary information to the public”. The word “necessary” should be understood in the context of effective participation.

Again, it should be noted that, in contrast to article 6, article 7 requires the necessary information to be provided to “the public” rather than the narrower “public concerned”.

A more precise discussion of some of the information that should be provided to the public under this provision is set out in the [commentary on the second sentence of article 7 below](#).

The requirement to provide information regarding policies, plans and programmes is found in other places in the Convention also. Article 5, paragraph 3 (c), provides for the progressive availability in electronic databases of policies, plans and programmes relating to the environment, and article 5, paragraph 7 (a), obliges Parties to publish the facts and analyses contributing to major environmental policy proposals.

Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied.

The words “within this framework” refer back to the transparent and fair framework for public participation established under the first sentence of article 6. Paragraphs 3, 4 and 8 of article 6 are to be applied as elements of this framework. In addition, the requirements of article 6, paragraph 2, are brought in through paragraph 3 of that article.

The different nature of proceedings under article 7 should be taken into account in the application of article 6, paragraphs 3, 2 (incorporated through article 6, paragraph 3), 4 and 8 to proceedings under article 7. Article 6, paragraph 3, requires reasonable time frames for the different phases of the public participation procedures, allowing sufficient time for informing the public in accordance with article 6, paragraph 2, and for the public to prepare and participate effectively.

Article 6, paragraph 2 (incorporated through article 6, paragraph 3) sets out the information to which the public should have access in order to participate effectively. While not all the information under article 6, paragraph 2, may be “necessary” for the purposes of article 7, bearing in mind the similarities in the environmental decision-making involved, most of the obligations concerning provision of information which were deemed necessary in the case of specific decisions subject to article 6 would seem to be also necessary in case of plans and programmes, and might be applied, *mutatis mutandis*. This would of course include the obligation to inform the public about commencement of the proceedings and possibilities to participate.

Article 6, paragraph 4, requires Parties to provide for early public participation in the process, when all options are open. Article 6, paragraph 8, requires Parties to ensure that the decision takes “due account” of the outcome of the public participation.

Article 7 makes no reference to the other paragraphs of article 6. Its paragraphs 1, 10 and 11 are specific to decision-making and of course cannot apply to article 7.

The inapplicability of article 6, paragraph 5, indicates that the scope of the public included in participation under article 7 is not the same as that included under article 6, and for which a special category (“public concerned”) has been devised. This is discussed further below.

In planning and programme development, the information and documentation developed would normally differ from that specified in article 6, paragraph 6. Though the differences between decisions on specific activities, plans and programmes should be taken into account if applying this paragraph, *mutatis mutandis*, paragraph 6 may still serve as a source of inspiration.

Article 6, paragraph 7, which deals with the opportunity to comment, could well have been incorporated into article 7. Its omission indicates that the Parties wish to allow flexibility in defining the exact procedures for participation, without being bound as to the submission of comments in writing or at a hearing by any member of the public.

Finally, article 7 does not incorporate article 6, paragraph 9, on the notification to the public of the decision, including reasons and considerations. While taking due account of the result of public participation might require the final plan or programme to be explained with reasons (for example, through the preparation of a “response document” as discussed in the [commentary on article 6, paragraph 9](#)), this is more a matter of logic or of good practice than an obligation under the Convention.

The close relationship between articles 6 and 7 and the direct incorporation of some of the requirements of article 6 are an indication that the rights and obligations under article 7 are good candidates for the application of the access-to-justice provisions in article 9, paragraph 2. That provision sets forth review procedures for persons aggrieved by decisions, acts or omissions under article 6 or “other relevant provisions” of the Convention. However, as noted previously, in order for article 9, paragraph 2, to apply, Parties must “opt in” by taking legislative measures to extend that provision’s coverage to the obligations contained in article 7.

The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.

The second sentence of article 7 requires the relevant authority to identify the public which may participate, taking into account the objectives of the Convention. Unlike other aspects of article 7, this second task is not put on the Party but directly on the relevant public authority.

This clause should not be seen as a method of limiting the scope of the public entitled to participate. Had this been the intention, the narrower term “public concerned” would likely have been used instead.³⁸⁴ In addition to the expected representatives of special interest groups that are traditionally included in these processes, other members of the public that learn about the process through the required notification may also express their interest in participating.

Article 7 expressly states that the public that may participate is to be identified “taking into account the objectives of this Convention”. In keeping with the objective in the fourteenth preambular paragraph “to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development”, the obligation to identify the public which may participate should not be seen as a tool to limit participation, but rather as a way to streamline the participation in order to make it more effective.

The seventh to eleventh, thirteenth, sixteenth, seventeenth and twenty-first preambular paragraphs may also give guidance to authorities in identifying those who may wish to participate in particular cases. In accordance with the thirteenth preambular paragraph, and in keeping with their inclusion through article 2, paragraph 5, within the narrower concept of the “public concerned”, NGOs promoting environmental protection ought to be considered to have such an interest.

Any obstacles that this provision might raise for an aggrieved member of the public to complain that he or she was unjustifiably excluded from a proceeding under article 7 can be overcome through a clear definition in national implementing law of the public that may participate to include any interested or concerned member of the public.

In keeping with the article 7 requirement for a transparent and fair framework, the means for identifying the public to participate should be transparent and fair. Parties may wish to establish standards to be applied to determine the scope of the public that the public authority should attempt to reach, and procedures to allow members of the public to express their interest. Standing lists of interested individuals and NGOs, in which persons express their interest in being informed of and in participating in planning and policymaking in specific areas or on specific subjects, are useful in this regard.

E-representation platform in Bulgaria

Bulgaria’s e-representation platform is an Internet-based instrument for electing civil society representatives to participate in various administrative bodies taking decisions in the area of environmental protection and sustainable development in Bulgaria. It was set up by Bulgarian environmental NGOs in 2005 in accordance with the election procedure developed by the environmental NGO community at a series of national conferences. It is now regularly used by several governmental bodies, including the Ministry of Environment and Waters, the Ministry of Regional Development, the Ministry of Agriculture, the Ministry of Health and the Sofia Municipality. The online platform is a useful tool for government and municipal bodies seeking the input of civil society representatives in their work, while at the same time enabling the environmental NGO community to nominate and elect their representatives and to receive feedback from them. The platform has to date been used to elect approximately 50 civil society representatives to about 40 administrative bodies.³⁸⁵

To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

As with “plans and programmes”, the Convention does not define “policies”. A policy may be defined as a “a course or principle of action adopted or proposed by an organization or individual”.³⁸⁶ Policies are set apart from plans and programmes under the Convention, in recognition of the fact that they are typically less concrete than plans and programmes. This does not necessarily mean, however, that policies are not set forth in writing.

Policies also require a more thorough and profound understanding of the legalities and political context of a particular place. Policy incorporates history and culture and entire legal frameworks that extend beyond the finite area in which they are developed.

This provision can also be considered in the light of article 3, paragraph 7, which requires Parties to promote the principles of the Convention in international processes and bodies ([see the commentary to article 3, paragraph 7](#)).

ARTICLE 8

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

The Convention recognizes that, in addition to the right to take part in basic decisions affecting their lives, members of the public also have a role to play in the development of laws and normative acts that may have a significant effect on the environment. The applicability of the Convention to law-making was thoroughly discussed during the negotiations. This is reflected in the preambular provision that recognizes “the desirability of transparency in all branches of government” and invites “legislative bodies to implement the principles of this Convention in their proceedings”. But Governments were reluctant to negotiate specific requirements for parliaments, considering this a prerogative of the legislative branch.

Nevertheless, the Convention addresses the role of the executive branch of government in law-making, and specifically provides that the public must be involved. Public participation in the making of law is thus an important aspect of the overall scope of the Convention. This area of activity is covered by a comparatively soft obligation to use best efforts, and uses indicative rather than mandatory wording for the steps to be taken. Nonetheless, article 8 should be interpreted as obliging the Parties to take concrete measures in order to fulfil the objectives of the Convention.

The measurement of the extent to which Parties meet their obligations under article 8 is not based on results, but on efforts. Parties are required to make efforts towards the attainment of public participation goals. Members of the public may potentially be able to enforce these obligations through the access to justice provisions of article 9, paragraph 3, and — in respect of those Parties who make the required “opt-in” — through article 9, paragraph 2, also. ([See the commentary on article 9, paragraph 2](#), noting the possibility for Parties to “opt in” by taking legislative measures to extend that provision’s coverage to enforce other provisions of the Convention.)

If Parties already have guarantees, these must be maintained under article 3, paragraphs 5 and 6. If Parties do not have guarantees and do not adopt new legislative guarantees, opportunities for the enforcement of obligations under article 8 must be based on article 9, paragraph 3, which provides for the right of citizens to bring actions in cases of violations of environmental law.

Article 8 addresses public participation in a particular area of decision-making: the preparation, by public authorities, of executive regulations and generally applicable legally binding rules. A large part of a public authority’s responsibilities is met by making specific decisions based on particular sets of facts and circumstances. Another significant part, however, is carried out by developing and passing rules of general application. The term “rules” is here used in its broadest sense, and may include decrees, regulations, ordinances, instructions, normative orders, norms and rules. It also includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature. Article 8 establishes public participation in the preparation of such rules as a goal of the Convention, and sets forth certain requirements that Parties should meet in reaching it (see table below).

| Provision | Obligation | Implementation guidance |
|------------------------|--|---|
| First sentence | Parties must strive to promote public participation in the preparation of laws and rules by public authorities | <ul style="list-style-type: none"> • Parties to use best efforts • While options still open • Applies to rules that may have a significant effect on the environment |
| Second sentence | Elements of the public participation procedure required | <ul style="list-style-type: none"> • Sufficient time frames for effective participation • Publication of draft rules • Opportunity to comment |
| Third sentence | Parties must ensure that the result of the public participation is taken account of | <ul style="list-style-type: none"> • As far as possible |

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

Because different legal systems may use different terminology for various forms of normative acts, the Convention uses wording to try to avoid any unnecessary narrowing of the concept of “executive regulations”. In some legal systems this term might be interpreted to cover only immediately executable rules. Therefore, to erase all doubt, article 8 refers to other generally applicable legally binding rules as well. The title also helps to explain what is meant by such rules by using the term “normative instruments” in the same manner. Such generally applicable legally binding rules include decrees, regulations, ordinances, instructions, normative orders, norms and rules. These means for the public authorities to discharge their responsibilities differ from decision-making under article 6 in that they result in directions that apply equally to all similarly situated persons, not only to those involved in the particular matter before the authority. They differ from planning and policymaking under article 7 in that they create binding legal obligations.

Article 8 also includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature. Because the Convention is primarily addressed to public authorities (see definition, article 2), it seeks to implement public participation in law-making through these actors.

Article 8

Role of the public authorities in the preparation of legislation

In many ECE countries, the public authorities play a major role in the preparation of legislation that is then submitted to the legislative branch for consideration.

Because the legislative bodies are the competent institutions for the final adoption of legal acts, with subsequent binding effect, the preparation of legislation by the public authorities cannot be considered as acting in a legislative capacity within the meaning of the Convention. Where public authorities drafting legislation will subsequently pass it on to a parliament or other legislative body, public participation while the drafts are under the auspices of public authorities does, in fact, constitute participation at an early stage.

The operative principle is similar to the one behind article 6, paragraph 5, in that the early resolution of disagreements and the taking into account of legitimate concerns at a preliminary stage can help to prevent problems later. Once the draft legislation is out of the hands of the public authorities and passes to the legislature, it is no longer in “preparation” by a public authority and article 8 would no longer apply.

Furthermore, where a public authority adopts a law that is prepared by a legislative body acting in a legislative capacity (for example, when a president signs a bill into law), article 8 would not apply because this is not “preparation” within the meaning of the Convention.

This provision of the Convention incorporates some of the basic principles found in earlier provisions. For example, the reference to “effective participation” requires authorities to ensure that the basic conditions for public participation are provided. Article 8 also emphasizes that the public should be involved at an early stage, while options are still open, so that the participation of the public can have a real impact on the draft laws, regulations and normative acts. The term “significant effect on the environment” is also used elsewhere in the Convention (see the commentary to article 6, paragraph 1).

Many ECE countries have a long-standing practice of involving at least part of the public in the preparation of executive regulations and generally applicable legally binding rules. Hungary's Act XI of 1987 on Legislation is a typical example. That law provides that NGOs and professional associations have the opportunity to give an opinion on legislative drafts prepared by the Government and drafts of ministerial and other governmental decrees.³⁸⁷

To this end, the following steps should be taken:

The Convention sets forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation in the preparation of executive regulations and other generally applicable legally binding rules. These elements establish a basic procedural framework for public participation, including time frames, access to information and opportunity for commenting.

(a) Time-frames sufficient for effective participations should be fixed;

While time frames are not specified, the Convention states that the authorities should plan for public participation by fixing their own schedule that is "sufficient" for effective participation. Publicizing these time frames will give the public the possibility to understand its opportunities for participation and maximize its input. While not establishing strict time limits, the Hungarian law mentioned above establishes some principles in the development of time frames. It provides that the deadlines for giving opinions on drafts are to be established taking into account four factors:

- The person giving the opinion should have the opportunity to form a well-based opinion.
- The opinion must be able to be taken into consideration in the drafting.
- The size of the draft.
- The type of organization giving the opinion.³⁸⁸

(b) Draft rules should be published or otherwise made publicly available; and

This provision echoes earlier provisions pertaining to effective notification of the public. It takes into account the practice of many States to publish draft rules in an official governmental publication ([see the box below](#) and also the [commentary to article 6, paragraph 2](#)). Such a mechanism will often be the appropriate vehicle for public notice and offers several benefits. First, it may already be institutionalized with an adequate staff and other resources (most ECE countries already have such a publication in place). Secondly, it can serve many other governmental purposes relating to information, besides those required under this provision. Finally, standardizing the location of such information increases efficiency and reduces costs in terms of time and money, as the public becomes used to consulting the publication to monitor government activity. Where such information is routinely published, specific ad hoc requests to authorities are also reduced.

In addition to publishing draft rules in an official government publication, the environment ministries in some countries, such as the Czech Republic, Georgia, Hungary, Latvia, Slovenia, Ukraine and the United Kingdom, have the practice of publishing draft laws on electronic networks, sometimes using their own facilities and sometimes taking advantage of NGO initiatives. For example, in agreement with the parliament of Georgia, draft laws in the field of environmental protection are published on the website of the Aarhus Centre Georgia. The Hungarian Ministry of the Environment uses both its own electronic distribution list of interested NGOs, as well as an existing electronic NGO network (Green Spider), linking over 200 NGOs throughout the country.³⁸⁹

The mechanics of publishing draft rules

Slovenia's "Act amending the Environmental Protection Act"³⁹⁰ specifies the process for public participation in the adoption of regulations that could significantly influence the environment. Under that Act, ministries and the competent authorities must make draft regulations available to the widest public and enable the public to express their opinions and comments on each draft regulation. As set out in the "Instructions on public participation in adopting regulations which may significantly impact the environment,"³⁹¹ draft regulations are to be published on the Ministry's website, together with a notice inviting the public to provide their comments. The deadline for comments is to be stated in the notice and must not be shorter than 30 days. Comments may be submitted in electronic or written form. Following the publication of the adopted regulation in Slovenia's *Official Gazette*, a document summarizing the official position on the public's comments regarding the draft regulation is also published on the Ministry's website.³⁹²

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

Many ECE countries already have policies for public authorities to routinely consult the public in the process of drafting laws and in the development of other normative acts. The European Commission, for example, in 1997 established a consultative committee on environmental affairs, which includes the participation of representatives from environmental NGOs.³⁹³

In keeping with such practice, authorities have the option to take public comments through a mechanism called by the Convention "representative consultative bodies". This term includes several important ideas. The first is that such bodies are not established in order to give expert assistance on their own, but only insofar as they are representative of interested or concerned segments of the public or of the public at large. Of course authorities can ask for the assistance of particular experts or expert bodies, but the participation of such experts is no substitute for the participation of the general public. Secondly, these bodies must be "consultative". That is, they must employ a process of consultation that indicates a degree of transparency, openness and impartiality. Analogy may be drawn here with the "clear, transparent and consistent framework" required under article 3, paragraph 1, of the Convention. It is in the interests of the authorities to monitor and to assess the degree to which the representative bodies meet these requirements, in order to ensure that the process provides for effective public participation in practice.



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The result of the public participation shall be taken into account as far as possible.

While the specific modalities of public participation in the preparation of rules are not prescribed by the Convention, it is mandatory for the Parties to ensure that the outcome of public participation is taken into account as far as possible. As discussed above under article 6, paragraph 8, this provision establishes a relatively high burden of proof for public authorities to demonstrate that they have taken into account public comments in processes under article 8.

As a practical matter, the final document adopting the legislation or rules should explain the public participation process and how the results of the public participation was taken into account. This is also useful since very often a number of public authorities and bodies are involved in the development of legislation and rules, and the public participation may be rather diffuse. It is therefore helpful for one public authority to take the lead in coordinating the public participation process. In the preparation of the final documents relating to adoption of the legislation or rules, the public authority responsible for the public participation should provide a full picture of the public participation, including outlining the process itself, the public input received and how that input has been taken into account in the final result.

In a particular case it might be proved that a given public authority did not meet minimum procedural requirements, if it can be shown that the public was not consulted or that the public's comments were not taken into account at all. The phrase "as far as possible" acknowledges, however, that there is an element of politics in law-making that Parties will need to take into consideration. It is implicit in this provision that lawmakers and legislators bear ultimate responsibility for the outcome of law-making and rule-making processes, and that therefore some accommodation must be made for them.





PILLAR III

ACCESS TO JUSTICE

Article 9 contains the provisions for the third “pillar” of the Convention, on access to justice. Under the Convention, access to justice means that members of the public have access to legal review procedures to enforce the Convention’s standards on access to information and public participation, as well as the provisions of domestic environmental law.

Purpose of access to justice

The rationale behind the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention on access to environmental information and environmental decision-making, as well as national laws relating to the environment, enforced by law. Access to justice helps to create a level playing field for the public seeking to enforce these rights. It also helps to strengthen the Parties’ implementation of, and compliance with, the Convention as well as the effective application of national laws relating to the environment. The public’s ability to help enforce environmental law adds important resources to government efforts.

There are, at present, numerous obstacles to access to justice in many countries. In some countries, members of the public, including NGOs, are denied standing to bring a legal challenge for violation of their rights or to enforce the law. In other cases, review procedures, although formally in place, are too costly for the public to use in practice. Yet another obstacle may be that bodies with judicial functions lack authority to provide injunctive relief or other appropriate remedies to effectively enforce their decisions. These and other barriers weaken the ability of the public to seek redress if public authorities or private persons do not comply with the Convention or with national environmental law. The provisions in article 9 are intended to address such issues.

What is access to justice under the Convention?

Access to justice under the Convention means access for the public to procedures where legal review of alleged violations of the Convention and national laws relating to the environment can be requested. Thereby, the rights and obligations concerning access to information and public participation set out in the Convention, as well as provisions of national law relating to the environment, can be enforced not only by the Parties’ public authorities, but also by individuals and NGOs, as members of the public.

While article 9 explicitly refers to the Convention’s provisions on access to information in article 4, and public participation in decisions on specific activities in article 6, it also requires that access to justice be ensured for other decisions, acts and omissions related to the environment. The provisions on access to justice essentially apply to all matters of environmental law, but a distinction is made in the Convention between three categories of decisions, acts and omissions:

- Refusals and inadequate handling by public authorities of requests for environmental information.
- Decisions, acts and omissions by public authorities concerning permits, permit procedures and decision-making for specific activities.
- All other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.

Depending on the kind of decision, act or omission in question, the Convention sets different criteria and allows different degrees of flexibility for the Parties in providing access to justice. Despite these differences, however, it is important to recall that the various references in the Convention to national law, national legislation and criteria in national law do not imply leeway for the Parties to deviate from the objective of granting wide access to justice within the scope of the Convention. Rather, these references recognize that Parties may achieve this objective in different ways in accordance with their national legal frameworks.

Whereas for the first two of the three categories listed above, the Parties must provide review procedure before a court or court-like body established by law, for the third category the Parties may ensure access to justice either by administrative or judicial procedures. The term “judicial procedures” may be seen as another way to describe courts and court-like bodies. A general characteristic of courts and court-like bodies is that they act independently and impartially outside the administration, i.e., without any instruction from the executive bodies on how to decide a specific case. While making the distinction between judicial and administrative procedures, certain general requirements are imposed on all reviewing instances and procedures within the scope of the Convention. First, they must be fair, equitable, timely and not prohibitively expensive. Second, they must provide adequate and effective remedies. Third, information on administrative and judicial review procedures must be disseminated to the public, and the Parties are encouraged to establish appropriate assistance mechanisms to remove or reduce financial and other barriers.

As far as court or court-like bodies are concerned, Parties have flexibility in deciding how to structure their appeal systems. For instance, they may have systems for the judicial review of environmental decisions in their ordinary, civil or administrative courts. An administrative court may either be a specific chamber of a court dealing with cases against public authorities or a specific court mandated to decide on appeals of administrative decisions. Parties may also establish particular courts for dealing with cases concerning access to information or the environment. Yet all court and court-like bodies must comply with the requirements of being independent and impartial. Their procedures must also be fair, equitable, timely and not prohibitively expensive. Moreover, to maintain their independence and impartiality, any appeal of a court decision should be made to a superior court instance, and not to the government or other public authority. Although no explicit requirement of independence or impartiality is made for administrative procedures, where such procedures are within the scope of the Convention, they must be fair, equitable, timely and not prohibitively expensive. Moreover, Parties must provide adequate and effective remedies for all these procedures.

Although the Aarhus Convention is autonomous from other international human rights instruments, it is clear that its provisions on access to justice draw on and develop established notions from international human rights law. In particular, article 9 of the Convention reinforces the right to a fair trial, as provided for in the European Convention on Human Rights³⁹⁴ and several other international human rights instruments (see box below). The Aarhus Convention adapts such human rights principles to contexts where the protection of the environment and human health is at stake, for instance, by providing for access to justice also for environmental NGOs. In keeping with the links between its access to justice provisions and international human rights norms, the Aarhus Convention has been considered in the jurisprudence of the ECHR, which has decided several cases on Aarhus Convention issues, and has also quoted the Aarhus Convention in its decisions.³⁹⁵

Access to justice as a fundamental human right

European Convention on Human Rights

Article 6 — Right to a fair trial

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Article 13 — Right to an effective remedy

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Treaty on the European Union (The Lisbon Treaty)*Article 19, paragraph 1*

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

EU Charter of Fundamental Rights*Article 47 — Right to an effective remedy and to a fair trial*

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Just like the other parts of the Convention, it follows from article 3, paragraph 9, that access to justice must be provided to the public without discrimination as to citizenship, nationality or domicile, and as regards legal persons, without discrimination as to their registered seat or effective centre of activity. First, this implies that a Party may not discriminate against foreigners within its territory. Second, each Party must ensure that members of the public outside its territory have access to justice to challenge acts, decisions and omissions within its jurisdiction under no less favourable conditions than members of the public in its territory. In this sense, the Convention provides for access to justice across State borders.

Does the ombudsman fit under the Convention?

In many countries, some type of “ombudsman” serves as an independent and impartial review body for violations of administrative law against citizens. During the negotiation of the Convention, the issue of whether ombudsman institutions would correspond with the requirements of article 9 was raised. While, in practical terms, the ombudsman may facilitate the achievement of the Convention, whether that institution fully meets the criteria under article 9 depends, for example, on how the ombudsman office is structured and fits within the national review system. For instance, in order to meet the requirements of article 9, paragraph 1, final decisions by the ombudsman must be binding on the public authority holding the information and, to meet article 9, paragraph 4, the ombudsman must be able to provide effective remedies, including injunctive relief, as appropriate.

If the ombudsman office established by a Party does not meet all the requirements of article 9, the public must still have opportunities to access other judicial or administrative procedures, in a manner consistent with the Convention.

Court-like bodies

Through its jurisprudence, the ECHR has established certain criteria for court-like bodies. For example, with respect to tribunals, the Court has held:

- A tribunal must be established by law and undertake its functions of determining matters within its competence on the basis of rules of law and following proceedings that are conducted in a prescribed manner.³⁹⁶
- Its members must be independent and impartial. Independence is to be determined by the manner of appointment of its members, the duration of their terms of office and guarantees against outside pressures. It is also important whether or not the body is seen to be independent by impartial spectators.³⁹⁷ Lay assessors are generally acceptable, but in specific cases their objectivity can be questioned.³⁹⁸
- It is acceptable that the first decision in a case is taken by an authority, so long as the possibility exists of having that decision appealed to a court, without restriction on the scope of examination.
- The decision of the court must be binding, without the possibility for the government or other authorities to have it set aside.³⁹⁹

The CJEU has its own, closely related jurisprudence on these issues.⁴⁰⁰

ARTICLE 9

ACCESS TO JUSTICE

Article 9 requires adequate review procedures that safeguard the rights afforded in the other pillars of the Convention and under national environmental law. The following table provides an overview of the obligations under article 9, paragraph by paragraph. The implementation elements are taken from the requirements in the Convention itself.

| Provision | Obligation | Implementation elements |
|-------------------------------|---|---|
| Article 9, paragraph 1 | Requires access to review procedures relating to information requests under article 4. | <ul style="list-style-type: none"> • Available to any person that has requested information • Judicial or other independent and impartial review • Additional expeditious and inexpensive reconsideration or review procedure • Binding final decisions • Reasons for decision in writing |
| Article 9, paragraph 2 | Requires access to review procedures relating to decisions, acts or omissions subject to article 6 and other relevant provisions of the Convention. | <ul style="list-style-type: none"> • Judicial or other independent and impartial review of substantive or procedural legality • Standing requirements to be determined in accordance with national law and the objective of wide access to justice • Possibility for preliminary administrative review procedure |
| Article 9, paragraph 3 | Requires access to review procedures for public review of acts and omissions of private persons and public authorities concerning national law relating to the environment. | <ul style="list-style-type: none"> • Administrative review procedures • Judicial review procedures • Criteria for access, if any, to be laid down in national law |
| Article 9, paragraph 4 | Sets general minimum standards that apply to all relevant review procedures, decisions and remedies. | <ul style="list-style-type: none"> • Adequate and effective remedies, including injunctive relief as appropriate • Fair • Equitable • Timely • Not prohibitively expensive • Decisions given in writing • Decisions publicly accessible |
| Article 9, paragraph 5 | Requires Parties to facilitate effective access to justice. | <ul style="list-style-type: none"> • Information on access to administrative and judicial review procedures • Appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice |

- Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.**

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

What can be reviewed?

The provisions of paragraph 1 guarantee the public the opportunity to have decisions made under article 4 on access to environmental information reviewed. Paragraph 1 requires Parties to ensure that any person has access to a review procedure when he or she believes that his or her information request has not been properly dealt with in accordance with article 4. Parties have some flexibility to implement the Convention's obligations under paragraph 1 within the framework of their national laws, e.g., in designating the competent court or establishing the route of appeal.

Triggers and scope of review

Parties must make a review procedure available when a person contends that his or her request for information has been ignored or wrongfully refused, that the response was inadequate, or that the request was otherwise not dealt with in accordance with the provisions of article 4. In this way, an applicant may have received a response to his or her request and may even have received information, but may still have a basis for review. Article 4 contains many specific procedural requirements and substantive criteria, such as the time permitted to respond to an information request (article 4, para. 2), the form in which a response must be given (article 4, para. 1 (b)), and the grounds upon which requests may be refused (article 4, paras. 3 and 4). The review provided by article 9, paragraph 1, may address these provisions and any other aspects of an information request and response under article 4. Thus, while article 9, paragraph 1, in contrast to article 9, paragraph 2, does not explicitly refer to "substantial or procedural legality", it is implicit that the review must include both kinds of grounds when invoked by the applicant.

Who can ask for review?—The issue of standing

Under article 9, paragraph 1, "any person" who has requested information is entitled to use the review procedures. In other words, any person who is not satisfied with the response to or handling of his or her request for information must be granted "standing" before the reviewing body to challenge decisions made under article 4. This is consistent with the wording of article 4, which allows any member of the public to request information, and of article 2, paragraph 4, which defines the "public" as one or more natural or legal persons, and their associations, organizations or groups. Thus, as held by the Compliance Committee in its findings on communication ACCC/C/2004/1 (Kazakhstan), it would be in violation of the Convention to deny an NGO that had made an information request standing to challenge the public authorities' response to that request.⁴⁰¹

As mentioned previously, article 3, paragraph 9, requires public authorities to allow access to information and access to justice even to citizens or residents of other countries and requires organizations to be provided with this access even if their centre of activities is in another country.

Who carries out the review?

Article 9, paragraph 1, specifies that the review procedure must be before a court of law or another "independent and impartial body established by law". "Independent and impartial" bodies do not have to be courts, but must be at least quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.

The reviewing body must also be competent to make decisions that are binding on the public authority holding the requested information. Thus, advisory findings or non-binding suggestions by the reviewing body are not sufficient. This is essential in determining whether an ombudsman institution suffices to meet the criteria in article 9, paragraph 1, of the Convention.

Alternative to court review

The Convention requires Parties whose courts have jurisdiction over access to information disputes to also make an alternative “expeditious” and “inexpensive” review mechanism available. A court appeal can be time-consuming and expensive and access to information is often needed quickly. While Parties are also required to ensure that court review procedures must not be too lengthy or costly, decisions concerning access to information can often be reconsidered by the public authority in question or through an administrative procedure in a quicker and less costly way.

The additional review mechanism must be “expeditious” and “inexpensive”. “Expeditious” means “efficient and speedy”. The requirement that the process should be

inexpensive, or even free of charge, is meant to ensure that any member of the public will be able to afford it. In its findings on communication ACCC/C/2004/1 (Kazakhstan), the Compliance Committee considered the lengthy review procedure to deal with a request by an NGO to get access to environmental information, and held that the requirements of providing an expeditious procedure had not been met by the Party concerned.⁴⁰²

The additional “expeditious” and “inexpensive” review process can take several forms, including reconsideration by the public authority or review by an independent and impartial body other than a court of law. While “review” means that another independent and impartial body looks at a decision to ensure its accuracy, “reconsideration” indicates that the same body goes over its own decision once again for the same purpose.

An example is the Netherlands, where the applicant, wishing to appeal against a decision denying access to information, must first file a notice of objection to the same administrative authority that made the decision. If the administrative authority then confirms its refusal to supply the requested information, appeal is made directly to the court.

Many ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention.

For example, in Poland a free and expeditious review can be carried out by a higher administrative body than the public authority that made the original decision. The Polish Act on Access to Public Information requires the higher administrative body to handle the appeal within one month. After the higher administrative review, the applicant still has the opportunity to take the case to an administrative court. The latter is inexpensive, but can take up to one year to reach a final decision.

In Georgia, an applicant who wishes to appeal a decision of a government body must first apply free of charge to the relevant higher governmental authority before going to the courts.

Some countries have chosen to create special, independent and impartial bodies to review access to information cases. For example, the United Kingdom has an Information Commissioner’s Office⁴⁰³ whose mission is to uphold information rights in the public interest, by promoting openness by public bodies and data privacy for individuals. It rules on eligible complaints, gives guidance to individuals and organizations and takes appropriate action when the law is broken. In addition, a First-tier Tribunal (Information Rights)⁴⁰⁴ hears appeals from notices issued by the Information Commissioner under various information-related legislation.

Final decisions must be binding

Under the Convention, final decisions under article 9, paragraph 1, must be binding on the public authority that holds the requested information. The Convention does not require every decision under paragraph 1 to be binding, only final ones. So, the various mechanisms and opportunities for appeal can work in combination to reach a final binding decision. Typically, if there is a possibility of further appeal, a decision is not considered to be final until such time as the period for lodging



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an appeal has passed. Final judicial and quasi-judicial decisions are usually binding, while in many countries, decisions of independent bodies, such as commissions and ombudsmen, are advisory. In addition to any advisory processes, Parties must ensure that obtaining a final, binding decision is still possible.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee held that the failure of the public authority to fully execute the final decision of the Court of Appeal ordering the authority to provide the communicant with copies of the requested land rental contracts amounted to non-compliance with article 9, paragraph 1, of the Convention. The Committee noted that if a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, then doubts arise as to the binding nature of the decisions of the courts within a given legal system.⁴⁰⁵

Finally, at least where access to the requested information is refused under this paragraph, reasons for the decision must be stated in writing. The wording of the paragraph encourages Parties to establish a general rule that all decisions should be in writing.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What can be reviewed?

Paragraph 2 provides for access to justice regarding “any decision, act or omission” relating to public participation and decision-making under article 6. It also expressly applies to “other relevant provisions” of the Convention as provided for under national law. This means that Parties are free to extend the review procedures prescribed in article 9, paragraph 2, to cover other provisions in the Convention. Parties might view the general provisions of article 3 and the provisions concerning the collection and dissemination of information in article 5 as examples of provisions that would qualify as “other relevant provisions”, as they lay the groundwork for many of the obligations set out in article 6 and are relevant to its implementation. In addition, the provisions of article 7 on public participation concerning plans, programmes and policies relating to the environment (especially the provisions incorporated from article 6) and the provisions of article 8 concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments, describe additional processes that require public participation. Implementation of those procedures could also be reviewable under article 9, paragraph 2. It should be noted, however, that as articles 3, 5, 7 and 8 do not use the term the “public concerned”, in applying article 9, paragraph 2, to these provisions, a Party must decide how to determine the scope of the public concerned in those cases. Finally, the fact that a member of the public may be able to invoke article 9, paragraph 2, to challenge “any decision, act or omission” relating to public participation and decision-making does not affect the possibility that article 9, paragraph 3, may also apply.

What constitutes a sufficient interest and impairment of a right shall be determined 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. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above

Who can ask for a review?—The issue of standing

Nothing in the Convention prevents the Parties from granting standing to any person without distinction. However, the Convention requires — as a minimum — that members of the “public concerned” either having a sufficient interest or maintaining impairment of a right have standing to review the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6. The public concerned is defined in article 2, paragraph 5, as “the public affected or likely to be affected by, or having an interest in, the environmental decision-making” ([see the commentary to article 2, paragraph 5](#)).

With respect to NGOs, the Convention states clearly that NGOs meeting the requirements of article 2 paragraph 5, are deemed to have a “sufficient interest” or a right capable of being impaired. The CJEU, in Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*⁴⁰⁶ (commonly known as “the Trianel case”), affirmed that, under Directive 85/337/EEC:⁴⁰⁷

Whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled, pursuant to Article 10a of Directive 85/337, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that article.⁴⁰⁸

The CJEU further held:

Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.⁴⁰⁹

And:

It follows first that the concept of “impairment of a right” cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation’s operation.⁴¹⁰

It follows more generally that ... the “rights capable of being impaired” which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.⁴¹¹

The CJEU concluded that Directive 85/337/EEC precludes legislation by the member States which does not permit NGOs promoting environmental protection, in actions contesting permit decisions, to rely before the courts on the infringement of a rule intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.⁴¹²

For other members of the public concerned, including individuals, the Convention allows sufficiency of interest and impairment of a right to be determined in accordance with requirements of national law. The Convention criteria of sufficient interest and impairment of a right should not be understood as inviting Parties to limit the scope of persons



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requirements in the light of the general obligations of the Convention found in articles 1, 3 and 9. Second, as mentioned above, in line with the definition of “the public concerned” in article 2, paragraph 5, NGOs meeting any requirements under national law will be deemed to meet the criteria of having a sufficient interest or a right capable of being impaired.

Article 6 has provisions applying to the “public” as well as the “public concerned” (paragraphs 7 and 9). It is consistent with the objectives of the Convention to hold that actual participation in a decision-making procedure under article 6, paragraph 7, would indicate that the member of the public has the status of a member of the public concerned. Yet, it could well be too restrictive to require that only persons who participate in the decision-making procedure would be granted access under article 9, paragraph 2.

Proper implementation of, and compliance with, the Convention requires that the objective of wide access to justice is upheld when determining the scope of persons — both natural and legal — with standing. Several Parties to the Convention apply some kind of test to establish standing, often in terms of a direct, sufficient, personal or legal interest, or of a legally protected individual right. While some such criteria, for instance limiting standing only to members of the public with private property rights,⁴¹³ would not be in line with the Convention, the permissibility of other criteria will depend on how they are construed by the reviewing body in practice. In other words, even criteria such as having a sufficient interest or a right that can be impaired may be incompatible with the Convention if understood too narrowly in the case law of the reviewing bodies.

As illustrated by the Compliance Committee’s findings on communication ACCC/C/2005/11 (Belgium),⁴¹⁴ meeting the Convention’s objective of giving the public concerned wide access to justice may require a significant shift of thinking in countries where NGOs have previously lacked standing in cases because they were held not to have a sufficient interest, or an impaired right. In ACCC/C/2005/11, the Belgian judiciary had applied the general criteria for standing under Belgian law to NGOs, meaning that NGO applicants had to show a direct, personal and legitimate interest as well as a “required quality”. The Compliance Committee concluded that even though the wording of the relevant Belgian laws did not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as developed before the entry into force of the Convention for Belgium, implied a too restrictive access to justice to environmental organizations, and thus did not meet the requirements of the Convention.⁴¹⁵ However, since in that case there was no evidence that the jurisprudence had been maintained after the entry into force of the Convention for Belgium, the Party concerned was not found to be in non-compliance with the Convention.⁴¹⁶

An example of national criteria for standing that would clearly not be in compliance with the Convention was the former Swedish criteria for NGOs. According to former Swedish law, to be able to appeal environmental permits, environmental associations were required to be active in Sweden for more than three years and to have at least 2,000 members. This was found by the CJEU to be in violation of the EU legislation intended to implement the Aarhus Convention, since “the number of members required cannot be fixed by national law at such a level that runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope”.⁴¹⁷ The EU Court also found that standing should be provided to the public regardless of the role — e.g., expressing their views, making comments, etc. — the public might have played during the prior administrative procedure. The Swedish law on access to justice for NGOs was subsequently changed as a result of the court decision.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Who carries out the review?

Article 9, paragraph 2, also specifies that the review procedure must be before a court of law or another “independent and impartial body established by law”. Thus, the review procedure must have safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.

Under paragraph 2, a Party may provide for a preliminary review procedure before an administrative authority. The administrative appeal system is not intended to replace the opportunity of appeal to a court, but it may in many cases resolve the matter expeditiously and avoid the need to go to court.

In addition, a Party may require that plaintiffs “exhaust administrative remedies”, that is, try all available administrative review procedures, before going to court. A person may then need first to request a review by the public authority in charge of the public participation process, then appeal against that decision to a higher administrative authority, before being able to appeal against the decision to a court. Such a requirement to exhaust administrative review procedures is allowed under the Convention, when it exists in national law, subject to the requirement in article 9, paragraph 4, that the procedures be timely.

Triggers and scope of review

Members of the public have the right to challenge decisions based on substantive or procedural legality. The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered. Under article 9, Parties must ensure that members of the public concerned within the meaning of this paragraph can obtain review of any “decision, act or omission”. For instance, a governmental decision or act that limits the participants at a public hearing, or the holding of a public hearing very late in the process, may be subject to review. Review may also be available if the administration fails to take an action or make a decision required by the Convention, for example by failing to notify certain members of the public concerned or to take due account of the outcome of their participation. Examples of other issues of legality that may be challenged under this provision might include EIA screening decisions,⁴¹⁸ permit conditions that fail to meet applicable technical standards or failures to consider nature conservation or environmental quality standards in permit procedures. In its findings on communication ACCC/C/2010/50 (Czech Republic), the Committee held:

This necessarily also includes decisions and determinations subject to article 6, paragraph 1 (b). The Committee thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1 (b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process.⁴¹⁹

In its findings on communication ACCC/C/2006/17 (European Community), the Compliance Committee stated, without finding the Party concerned to be in non-compliance with the Convention, that it would definitely be incompatible with article 9, paragraph 2, if there were no opportunity for access to justice in relation to any permit procedures until after the construction had started. In this context, the Committee also stressed that access to justice must indeed be provided when it is effectively possible to challenge a permit decision.⁴²⁰

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Paragraph 3 creates a further class of cases where members of the public can appeal to administrative or judicial bodies. While applicable to a far broader range of acts and omissions than paragraphs 1 and 2, it also allows Parties more flexibility in its implementation. It builds upon the eighteenth preambular paragraph of the Convention and paragraph 26 of the Sofia Guidelines to provide standing to certain members of the public to enforce environmental law. Paragraph 3 envisages that members of the public may enforce environmental law either directly, i.e., by bringing the case to court to have the law enforced (rather than simply to redress personal harm), or indirectly, by triggering and participating in administrative procedures so as to have the law enforced. Public enforcement of the law, besides allowing the public to achieve the results it seeks, may also be a major help to understaffed environmental enforcement agencies.

In its findings on communication ACCC/C/2006/18 (Denmark), the Compliance Committee acknowledged the rather broad range of possibilities for the Parties to ensure procedures to challenge acts and omissions contravening provisions of national law relating to the environment. The communicant had complained that he did not have any means of challenging an act of culling bird species by a public authority in Denmark. The Committee held that access to justice under paragraph 3 requires more than a right to address an administrative authority about an illegal activity.⁴²¹ To conclude whether the Party concerned failed to comply with the Convention, the Committee paid attention to Danish law in general, in order to consider whether any other members of the public had the right to challenge the decision in question or whether national law effectively barred members of the public in general from challenging such acts.⁴²²

Examples of enforcement rights can be found in EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage,⁴²³ which sets out that natural or legal persons meeting the criteria for standing are entitled to request national authorities to take action in cases of environmental damage. The same persons are also to have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under that directive.



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What can be reviewed?

Under the Convention, members of the public have the right to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. First, as regards “contravening national law relating to the environment”, it does not have to be established *prima facie*, i.e., before the review, that there has been a violation. Rather, there must have been an *allegation* by the member of the public that there has been an act or omission violating national law relating to the environment (see ACCC/C/2006/18 (Denmark) discussed above). Second, national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws. This was illustrated in the Compliance Committee’s findings on communication ACCC/C/2005/11 (Belgium),⁴²⁴ where the Committee assessed Belgian planning laws under article 9, paragraph 3, and in its findings on Bulgarian planning law in communication ACCC/C/2011/58.⁴²⁵

As held by the Compliance Committee in its findings on communication ACCC/C/2006/18 (Denmark), for EU member States the reference to “national law” should be understood as including EU law applicable in the member State.⁴²⁶ Thus, acts and omissions that may contravene EU regulations and EU directives relating to the environment and applicable by national courts and authorities in the member States may be challenged under paragraph 3.

Who can ask for review?—The issue of standing

The Convention requires Parties to ensure standing to enforce environmental law for members of the public meeting the criteria, if any, that may exist in national law. The Convention allows Parties to set criteria for standing and access to environmental enforcement proceedings under paragraph 3, but any such criteria should be consistent with the objectives of the Convention regarding ensuring access to justice.

The Compliance Committee has considered the criteria for standing under article 9, paragraph 3, in a few cases. With respect to environmental organizations, in its findings on communication ACCC/C/2005/11 (Belgium), the Committee held that:

The Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.⁴²⁷

In the same findings, the Compliance Committee held that “the phrase ‘the criteria, if any, in national law’ indicates a self-restraint on the Parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.”⁴²⁸

In a similar vein, including with respect to members of the public generally, in its findings on communication ACCC/C/2006/18 (Denmark) the Compliance Committee held that the criteria for standing may not be so strict that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions under paragraph 3. In coming to its conclusion that the Party concerned had not failed to comply with the Convention in that case, the Committee paid attention to the Party concerned’s law in general, in order to consider whether any other members of the public had the right to challenge the decision in question or whether national law effectively barred members of the public in general from challenging such acts.⁴²⁹ Based on the same reasoning, in its findings on communication ACCC/C/2011/58 (Bulgaria), the Committee found that that Party had failed to comply with the Convention.⁴³⁰

Paragraph 26 of the Sofia Guidelines similarly promotes the notion of broad standing in proceedings on environmental issues.

Who carries out the review?

Article 9, paragraph 3, gives the public access to administrative or judicial procedures. This provision potentially covers a wide range of procedures for “citizen enforcement”. This may be ensured by granting members of the public standing to directly enforce environmental law in court. The obligation can also be met, for example, by ensuring a right for members of the public to initiate administrative or criminal procedures. Parties retain considerable discretion in designating which forums (court or administrative body) and forms of procedure (e.g., civil law, administrative law or criminal law) should be available to challenge the acts and omissions in question. While bearing in mind the general obligation in article 3, paragraph 1, to establish and maintain a clear, transparent and consistent framework, Parties are not prevented from providing different review procedures for different kinds of acts and omissions.

In most countries, criminal enforcement remains in the hands of the government. However, there are a few exceptions. For example, in Poland, the Petty Offences Code of 1971 authorizes some associations, including the Nature Protection Guard and the Animal Protection Association, to act as public prosecutors in cases of petty criminal offences under the Nature Conservation Act of 1991. This right to act as public prosecutor includes the right to appeal to the criminal court. The United Kingdom also allows for “private prosecutions”, which is a prosecution started by a private individual who is not acting on behalf of the police or any other prosecuting authority or body which conducts prosecutions. The right to bring private prosecutions is preserved by the United Kingdom’s Prosecution of Offences Act, 1985. There are, however, some restrictions, including that the Director of Public Prosecutions has power to take over private prosecutions, and in some

cases, the private prosecutor must seek the consent of the Attorney General or of the Director of Public Prosecutions before the commencement of proceedings.⁴³¹

Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but the public also has an important role to play.

Triggers and scope of review

Under the Convention, Parties must ensure that members of the public can directly enforce the law in the case of alleged violations by either private persons or public authorities. Although no explicit reference to substantive or procedural legality is made in paragraph 3, a Party cannot limit the scope of review under this provision to either procedural or substantive legality. Rather, the review procedures for acts and omissions challenged must enable both the substantive as well as the procedural legality of the alleged violation to be challenged. For example, individuals and environmental organizations that meet the national criteria may challenge a violation by a facility of wastewater discharge limitations in its permit. One means of challenging such a violation would be to take the owner or operator of the facility to court, claiming a violation of the law, and receive a remedy such as a court order to stop the illegal wastewater discharges. Another would be to trigger an administrative procedure against the operator, where the claimant is given a status as a party in the procedure (see also the [commentary to article 9, paragraph 4, below](#), concerning injunctive relief).

Members of the public should also be able to challenge acts or omissions of public authorities that transgress national environmental law. "Omissions" in this case includes a public authority's failure to implement or enforce environmental law with respect to other public authorities or private entities.

Standing requirements under article 9

Paragraph 1 — Standing to review access to information:

Any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article.

Paragraph 2 — Standing to review public participation and other relevant provisions:

Members of the public concerned, having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition.

Paragraph 3 — Standing to review contraventions of national environmental law:

Members of the public, where they meet the criteria, if any, laid down in national law.

- 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.**

Paragraphs 1, 2, and 3 of article 9 each apply to particular grounds for the public to pursue a review procedure. Paragraph 4 describes the minimum qualitative standards that must be met in all such procedures, as well as the type of remedies that must be provided. It requires that adequate and effective remedies be ensured not only for reviews concerning access to information or decision-making for specific activities, as set out in paragraphs 1 and 2, but also for all other acts and omissions covered by paragraph 3. As already mentioned, it is in the light of the requirement for adequate and effective remedies that it should be assessed whether an ombudsman can act as a review body under article 9, paragraphs 1–3.

Adequate and effective remedies

The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law. Under paragraph 4, Parties must ensure that the review bodies provide “adequate and effective” remedies, including injunctive relief as appropriate. Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration. The requirement that the remedies should be effective means that they should be capable of real and efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.

When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies must be able to issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is called “injunctive relief” (see box below). In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases may be inadequate.

In other cases, compensatory measures, e.g., to improve the quality of the environment elsewhere, may be the most adequate remedy possible. Although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed. Monetary compensation may also be a relevant remedy when paid to public authorities by the operator, so as to compensate for the public money spent in vain to protect an area or a species that was adversely affected by an act or omission by the operator in question.

Yet another related form of remedy available in some countries, for example in France, enables a member of the public to bring civil proceedings to challenge a breach of environmental law (as contemplated in article 9, paragraph 3) to recover civil monetary penalties from the owner or operator of a facility transgressing environmental law in place of the appropriate government agency. Such proceedings are sometimes known as “citizen enforcer” proceedings and are discussed again below.

Injunctive relief as appropriate

What is injunctive relief?

Injunctive relief: Injunctive relief is a remedy designed to prevent or remedy injury by requesting the addressee either to stop an activity or cease a violation, or to take certain measures. It allows a person to secure an order against another person requiring him or her to do something, for example, to provide access to information or access to a site, to hold a hearing, or to cease an unlawful activity. Injunctive relief can be either “interim” or “final”.

Interim injunctive relief: An interim injunction, also known as a preliminary or interlocutory injunction, is an injunction granted by the court or tribunal before a full hearing of the matter. In cases where harm is occurring or is threatened, or where a statute designed to protect public health and welfare is being or may be violated, the court or tribunal may have the power to grant injunctive relief to maintain the status quo or restore the situation to an earlier condition pending resolution of the case. Generally, tribunals require the party seeking preliminary injunctive relief to show that: (a) irreparable injury is immediately threatened or may occur before the case can be heard in full; and (b) the remedy sought is likely to be awarded in the final hearing on the merits. In environmental cases, it may be sufficient to show that a statute or regulation is being or may be violated. In emergency or other serious cases, the tribunal sometimes will award preliminary relief *ex parte*, without a hearing, on the basis of the pleadings and evidence.

Final injunctive relief: A final injunction is one granted by the court or tribunal once the final judgement has been delivered. It is intended to have indefinite effect. In environmental cases, injunctions, which allow the court or tribunal to cause a person to cease a violation or undertake some act, are therefore often more flexible and responsive to the underlying environmental problem than other remedies, such as monetary damages or criminal sanctions.

In its findings on communication ACCC/C/2005/11 (Belgium), the Compliance Committee held that if the Party concerned maintained its jurisprudence on access to review procedures with respect to town planning permits and decisions on area plans, as developed before the entry into force of the Convention for Belgium, it would fail not only to ensure access to justice, as set out in article 9, paragraph 3, but also fail to provide an effective remedy as required by paragraph 4.⁴³²

The findings of the Compliance Committee with respect to communication ACCC/C/2006/17 (European Community), referred to above with respect to article 9, paragraph 2, are also relevant regarding adequate and effective remedies.⁴³³ In

its findings, the Committee stated that it would definitely be incompatible with paragraph 2 to grant access to a review procedure concerning a permit only after the construction had started, since access to justice must be provided when it is effectively possible to challenge a permit decision. Lacking such a possibility would also imply lacking an adequate and effective remedy.

In communication ACCC/C/2008/24 (Spain), the communicant had first approached the Spanish court to request the suspension of a land allotment plan and modification. The court held that the request was too early and reversed the application on the ground that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the court held that it was too late, because this decision was subject to consideration and the subject of preceding decisions, namely the land allotment plan and modification which had not been suspended. On appeal, the court endorsed this judgement and did not suspend the decision. In its findings, the Compliance Committee held that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, the Committee found that the Party concerned was in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief.⁴³⁴

Options for when to use injunctive relief

In Hungary, preliminary injunctive relief may be ordered:

- (a) If it is “indispensable” to avert damage;
- (b) To avoid a change in the factual basis of the legal proceedings; or
- (c) If necessary in other instances deserving special attention.

If the court finds that any of these conditions is satisfied, it must further find that the harm caused by the injunction will not exceed the advantage gained by its issuance.⁴³⁵ This legal test allows the court to decide whether an injunction is appropriate in a given case.

As noted above, injunctive relief is not the only effective remedy. In some countries, for example, a member of the public who brings proceedings to challenge a violation of national environmental law may collect civil monetary penalties from, or bring a case on compensation for damage against, the owner or operator of the violating facility in place of the appropriate government agency. For example, in the United States of America, the Clean Water Act, Resource Conservation and Recovery Act and Clean Air Act provide for “citizen enforcer proceedings” through which the citizen enforcer may collect monetary penalties.

Fair, equitable, timely

In addition to specifying kinds of remedies, article 9, paragraph 4, requires Parties to ensure that review procedures under paragraphs 1, 2 and 3 are “fair, equitable, timely and not prohibitively expensive”. Fair procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest. It is important to note that this applies also to any administrative review procedure intended to meet the requirements of article 9, paragraph 3. Fair procedures must also apply equally to all persons, regardless of economic or social position, ethnicity, nationality or other such criteria (see also the commentary to article 3, paragraph 9, although fairness may also require non-discrimination with respect to other criteria than those addressed in that provision, such as age, gender, religious affiliation, etc.). Moreover, fairness requires that the public be duly informed about the review procedure, as well as informed about the outcome of the review. Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner.

Timeliness of review procedures is also very important under article 9. This requirement reinforces the requirement of article 9, paragraph 1, that Parties ensure an “expeditious” review process. Under the Convention, Parties must adhere to this standard of timeliness in providing any review process, whether by a court or other review body. Many countries have already recognized the importance of timeliness to the administration of justice. For example, in Belarus, appeals and complaints regarding environmental administrative decisions must be considered within one month, with a possible extension of an additional two months. In some countries, for example, Ireland, courts have the discretion to pull certain cases from the docket queue and deal with them immediately when the case involves issues of an urgent and time-sensitive nature.

In its findings on communication ACCC/C/2004/6, (Kazakhstan), the Compliance Committee held that allowing a court hearing to start without proper notification did not meet the requirement of a fair procedure under article 9, paragraph

4. It also held that the failure to communicate the court decision to the parties implied a lack of fairness and timeliness as required by the Convention.⁴³⁶

In communication ACCC/C/2008/23 (United Kingdom), the communicants alleged that a court order requiring them to pay the public authorities' legal costs was unfair and inequitable under article 9, paragraph 4. The Compliance Committee held that it was the defendant operator's refusal to cooperate in naming an expert that led to the public authorities having to attend the hearing, incurring the legal costs as a result. In the circumstances, the Committee considered that the subsequent court order that the communicants pay the whole of the public authorities' legal costs (without the operator being ordered to contribute at all) was unfair and inequitable and constituted *stricto sensu* non-compliance with article 9, paragraph 4, of the Convention.⁴³⁷

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee emphasized that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention.

Thus the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases.⁴³⁸

In the same findings, the Compliance Committee also noted that, from a formal point of view, Spanish legislation did not appear to prevent decisions concerning cost orders for appeals from taking fully into account the requirements of article 9, paragraph 4, that procedures be fair, equitable and not prohibitively expensive. However, the evidence presented to the Committee demonstrated clearly that in practice if a natural or legal person lost in the court of first instance against a public authority, and then appealed the decision and lost again, the related costs were being imposed on the appellant. The Committee stressed that if the trend referred to reflected a general practice of courts of appeal in the Party concerned in such cases that constituted non-compliance with article 9, paragraph 4, of the Convention.⁴³⁹

In its findings on communication ACCC/C/2008/27 (United Kingdom), the Compliance Committee held the communicant's judicial review proceedings were judicial procedures under article 9, paragraph 3, of the Convention, and thus also subject to the requirements of article 9, paragraph 4, of the Convention. The Committee stressed that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, held that in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. The Committee held that the manner in which the costs were allocated in that case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance.⁴⁴⁰

With respect to fairness regarding the time frames for filing a judicial review procedure, in its findings on communication ACCC/C/2008/33 (United Kingdom), the Committee emphasized that the Party concerned could not rely on the judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4.⁴⁴¹ The Committee held that in the interest of fairness and legal certainty it is necessary to (a) set a clear minimum time limit within which a claim should be brought; and (b) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.⁴⁴²

In its findings on communication ACCC/C/2009/36 (Spain), the Compliance Committee considered that, by instituting a system on legal aid which excluded small NGOs from receiving legal aid, the Party concerned had failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention, and had not taken into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5, of the Convention.⁴⁴³



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With regard to the requirement for timely remedies, in its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held that a decision on whether to grant suspension as a preventive measure should be issued before the project is executed.⁴⁴⁴ In that case, it took eight months for the court to issue a decision on whether to grant the suspension sought for the project, ultimately rejecting the application for the suspension. Even if it had been granted, the suspension would have been meaningless, as construction works were already in progress. The Committee held that since no timely, adequate or effective remedies were available, the Party concerned was in non-compliance with article 9, paragraph 4.⁴⁴⁵ The Committee referred to its findings in ACCC/C/2006/17 (European Community), where it had held that:

If there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question.⁴⁴⁶

Not prohibitively expensive

Finally, the Convention requires Parties to provide review procedures that are “not prohibitively expensive”. The cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive that it prevents the public, whether individuals or NGOs, from doing so. Various mechanisms, including waivers and cost-recovery mechanisms, are available to Parties to meet this obligation. In practice, alongside too strict criteria for standing, too high costs are the main barrier to access to justice in many countries.

While the Convention does not define the means for keeping the costs, if any, at an acceptable level, it imposes a very clear obligation on the Parties to ensure that the procedures are not prohibitively expensive. That is, the Convention sets an obligation of result, which allows the Parties great discretion in how to proceed, but limited discretion in what to achieve. When assessing compliance with this provision, the decisive issue is the outcome rather than how each Party ensures that the procedures remain at an acceptable cost. Although the phrase “not prohibitively expensive” is not very detailed, the obligation it conveys on Parties is straightforward and unconditional.

As noted above in the [commentary on “fair, equitable, timely”](#), in its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee emphasized that the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent prohibitively expensive cost orders being imposed on a member of the public that seeks to appeal an unfavourable court decision involving a public authority and matters covered by the Aarhus Convention.⁴⁴⁷

In its findings on communication ACCC/C/2008/27 (United Kingdom), the Compliance Committee held that the quantum of costs awarded in that case was prohibitively expensive within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance.⁴⁴⁸

In its findings on communication ACCC/C/2008/33 (United Kingdom), the Compliance Committee held that when assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee would consider the cost system as a whole and in a systemic manner.⁴⁴⁹ It considered that the “costs follow the event rule” contained in the Party concerned’s Civil Procedure Rules was not inherently objectionable under the Convention, although the compatibility of that rule with the Convention depended on the outcome in each specific case and the existence of a clear rule that prevented prohibitively expensive procedures. The Committee considered whether the effects of the “costs follow the event rule” could be softened by the Party concerned’s system of legal aid, conditional fee agreements and protective costs orders, as well as by the considerable discretionary powers that the courts had in interpreting and applying the relevant law.

In that case, it found that at least four potential problems emerged with regard to the Party concerned’s legal system: (a) first, the strict criteria applied by the courts when considering the granting of protective cost orders; (b) second, the limiting effects of (i) the cost of applying for the order if it was then not granted and (ii) “reciprocal” protective cost orders that capped the costs of both parties; the Committee found that it was essential that, where costs are concerned, the equality of arms between parties to a case should be secured, including that claimants should in practice not have to rely on pro bono or junior legal counsel; (c) third, the potential effect of cross undertakings in damages on the costs incurred by a claimant; (d) fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration was not in and of itself given sufficient consideration.⁴⁵⁰

The Committee concluded that, despite the various measures available to address prohibitive costs in the Party concerned, taken together they did not ensure that the costs remained at a level which met the requirements under the Convention.

It held that the considerable discretion given to the Party concerned's courts in deciding the costs — without any clear legally binding direction from the legislature or judiciary to ensure the costs were not prohibitively expensive — led to considerable uncertainty regarding the costs to be faced where claimants were legitimately pursuing environmental concerns that involved the public interest.⁴⁵¹ In the light of the above, the Committee concluded that the Party concerned had not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 were not prohibitively expensive.⁴⁵²

In its findings on ACCC/C/2011/57 (Denmark), the Committee held:

The Committee has been provided information by the Party concerned regarding the cost to appeal administrative decisions before other similar quasi-judicial bodies in the Party concerned, including those concerned with patients' rights (health), consumer issues, energy supply and tax matters. The Committee notes that such appeals are either free of charge or have fees of considerably less than DKK 3,000, whereas higher fees are charged for appeals concerning matters regarding primarily commercial interests, such as competition, patent and trademark rights. The Committee also notes that NGO appeals before [the Nature and Environmental Appeal Board (NEAB)] have more the nature of appeals to the first group of bodies than appeals regarding primarily commercial interests.

Based on the above three considerations, the Committee finds that the fee of DKK 3,000 for NGOs to appeal to NEAB is in breach of the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive.⁴⁵³

In a similar vein, in Case C-427/07, *Commission v. Ireland*, the CJEU held that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the Convention's requirement that the procedure must not be "prohibitively expensive" in accordance with Directive 2003/35/EC.

Keeping costs down

Costs associated with going to court can include:

- Court fees.
- Attorney's fees.
- Witness transport costs.
- Expert fees.

These types of costs represent a substantial financial barrier for the public. Some countries have taken steps to control them, e.g., by exempting NGOs from paying court fees, by making appeals free of charge and by not requiring a lawyer to launch the appeal:

- In Sweden, members of the public may appeal acts and decisions by public authorities in environmental matters to a superior administrative authority or to a court free of charge. Moreover, the person seeking administrative or judicial review of the case does not risk paying the costs for the public authority or the operator of the activity in case the appeal is lost. This applies, for instance, when requests for environmental information have been denied, when neighbours find a decision by a public authority on precautionary measures for a hazardous activity too weak and when permits for a hazardous activity have been appealed. In addition there is no requirement for persons appealing such acts and decisions to be accompanied by a lawyer.
- In Slovakia, NGOs and other parties or participants are exempt from paying court fees for judicial review of the lawfulness of decisions by administrative bodies.
- In Austria, an appeal of a refusal of access to information is free of charge and the plaintiff does not need a lawyer to launch an appeal.
- In Georgia, court appeals brought by disabled persons, their unions, educational unions and foreigners are free of charge.

In many countries attorneys' fees are awarded to the prevailing party in a case. This is known in some countries as the "costs follow the event" rule or the "loser pays" principle. Such a principle may ensure that the proceedings are not prohibitively expensive should the member of the public bringing the case prevail. However, the practice could potentially have the opposite effect if the member of the public is unsuccessful. In several jurisdictions of the United States, Canada and Australia members of the public bringing a case to enforce the law in the public interest may not be required to pay the defendant's costs, even if the case is unsuccessful or dismissed. This practice is sometimes referred to as "reverse cost shifting".

In writing and publicly accessible

The Convention requires all decisions of any of the review bodies under article 9 to be in writing. This includes interim decisions as well as binding, final decisions. Court decisions must, in addition, be publicly accessible. Decisions by other bodies must be publicly accessible whenever possible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Paragraph 5 contains two main obligations. First, it requires Parties to provide information to the public on procedures for access to justice. This reinforces the requirement of article 3, paragraph 3, that each Party must promote environmental education and awareness about how to obtain access to justice. Such information can be provided in a variety of ways. One example is found in the Convention itself. According to article 4, paragraph 7, refusals of access to information requests must include information on access to the review procedure provided for in accordance with article 9. Parties may wish to introduce similar requirements for providing information on access to review procedures when issuing decisions under articles 6, 7 and 8. Article 5, paragraph 7 (b), also requires Parties to publicize matters within the scope of the Convention, which would include matters relating to access to justice.

Information on access to review procedures

In Case C-427/07, *Commission v. Ireland*, the CJEU noted that one of the underlying principles of Directive 2003/35/EC is to promote access to justice in environmental matters along the lines of the Aarhus Convention. The Court held that, in that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the EIA and IPPC Directives amounts to an obligation to obtain a precise result which EU member States must ensure is achieved. The Court held that the mere availability, through publications or on the Internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.⁴⁵⁴

The second main obligation in article 9, paragraph 5, requires Parties to consider the establishment of “appropriate assistance mechanisms” to overcome barriers to access to justice. This builds on the provision in article 3, paragraph 2, that public authorities should assist and provide guidance to the public in seeking access to justice, and links to article 9, paragraph 4, which requires that review procedures must provide adequate and effective remedies and not be prohibitively expensive.

Potential barriers to access to justice

Possible barriers under article 9, paragraph 5, might include, inter alia:

- Financial barriers.
- Limitations on standing.
- A lack of information.
- Difficulty in obtaining legal counsel.
- Unclear review procedures.
- Lack of independence and impartiality by decision makers.
- A lack of awareness within the review bodies of the public’s rights under the Convention and of environmental law more generally.
- Weak enforcement of judgements.

In addition, violations of environmental laws are usually difficult to prove without clear environmental standards, clear emissions requirements in permits and regular monitoring and reporting of emissions data.

Other parts of the Convention also require or encourage practices that will reduce some of the barriers noted above and increase opportunities for access to justice. For example, article 9 encourages a broad interpretation of who may bring a review under national law. A broad interpretation, allowing, in general, any interested individual or organization to bring a challenge, would substantially reduce a fundamental barrier to access to justice, and practice in some countries suggests that it would not be overly burdensome on the work of the courts or other tribunals. Article 9 also requires reviews to be conducted by impartial and independent bodies. When countries ensure that judicial, administrative and other review bodies are independent and impartial, institutional barriers to access to justice are reduced.

Judicial training on access to justice issues

Judicial training may in appropriate cases also serve as an assistance mechanism in overcoming barriers to access to justice. One of the main objectives of the European Commission's "Cooperation with Judges Programme", launched in Paris in 2008, is to create EU law training material for member States' judges on the application of EU legislation - including rules regarding access to justice in environmental matters. The programme covers different areas of EU law, including waste, nature and EIA. The material produced and delivered during the seminars is available free to national judicial training centres.

In December 2008, the Supreme Court of Kazakhstan, in cooperation with the OSCE Centre in Astana, published a handbook for judges on implementing the third pillar of the Aarhus Convention. As well as discussing the rights enshrined in the Convention, the Convention's Compliance Committee and environmental rights more generally, the handbook provides examples of real environmental cases initiated by Kazakh citizens and NGOs and collated from courts throughout the country by special request of the Supreme Court. The handbook was used in several trainings on access to administrative and judicial review procedures in various regions of the country. At these trainings, judges, NGOs, lawyers and other stakeholders had an opportunity to jointly discuss practical issues regarding public access to information, participation and environmental enforcement.

It is essential for access to justice under article 9 that the review procedures in question are affordable for members of the public. In this regard, there is a clear link between the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive and the obligation on Parties in article 9, paragraph 5, to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers.

In its findings on communication ACCC/C/2009/36 (Spain), the Compliance Committee noted that the Party concerned's system of legal aid appeared to be very restrictive for small NGOs. The Committee considered that by setting high financial requirements for an entity to qualify as a "public utility entity" enabling it to receive free legal aid, the Party concerned's system was contradictory. It held that such a financial requirement challenged the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker. The Committee found that instituting a system of legal aid which excluded small NGOs from receiving such aid provided sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice as required by article 9, paragraph 5, and also failed to provide for adequate and effective remedies, as required by article 9, paragraph 4.⁴⁵⁵ In its findings on communication ACCC/C/2008/33 (United Kingdom)

(discussed in more detail in the [commentary on article 9, paragraph 4, above](#)), the Compliance Committee held that the Party concerned's system as a whole, was "not such as to 'remove or reduce financial ... barriers to access to justice', as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider".⁴⁵⁶

The earlier discussion under article 9, paragraph 4, provides examples of how to overcome some of the financial barriers to access to justice. Such examples include no-cost alternatives to courts, shifting fees for court expenses to the violator, reducing court costs and finding alternatives to bond requirements. In addition, some countries establish and support legal assistance offices that provide free or low-cost legal advice to individuals and citizens' organizations. In Poland, for example, individuals and associations that cannot pay the costs associated with going to court may be entitled to a court-appointed lawyer. Other countries, such as Armenia, the Czech Republic, Hungary, the Netherlands, the Republic of



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Moldova, Slovakia, Ukraine and the United Kingdom have privately funded or university-based legal assistance centres. In these cases, the government's elimination of technical obstacles to the creation, operation and funding of not-for-profit organizations is crucial to ensure that such privately funded legal assistance centres can continue to exist.

Article 9, paragraph 4, requires effective remedies to be available. If courts and other review bodies have the power to enforce their decisions, one further potential barrier to access to justice — weak enforcement of judgements — will be removed. In many countries, administrative or court judgements have effectively been negated by delay in or lack of enforcement. To avoid this, some countries, for instance, Sweden, provide that permit decisions cannot be used by the operator if the decision is appealed, unless a specific decision is made to the contrary. Another means used in some countries is to give the review body powers to enforce its own judgements. For example, in the Russian Federation, both civil and arbitration procedures are supported by special institutions of court executors to enforce court decisions through a system of fines. In the United Kingdom and other common law jurisdictions, failure to comply with a court order may constitute contempt of court ultimately punishable by fine or imprisonment. Awards of compensation can be enforced through a variety of means, ranging from seizure of goods and property, impoundment of bank accounts and attachment of wages.

Finally, clear environmental laws, rules and standards may help to remove or reduce barriers to access to justice. For example, clear emissions levels set out in permits and clear standards of conduct to which actual emissions and actions can be compared may facilitate a person who seeks to challenge an illegal emission under article 9, paragraph 3, to effectively enforce the law. In the same vein, clear information concerning required emissions levels, deadlines for compliance or other enforceable substantive requirements in statutes, rules or permits makes it easier to identify and prove violations.

Elements of access to justice

Who can bring a challenge? The Convention encourages a broad interpretation of who has “standing” to bring a challenge.

What can be challenged? The Convention allows decisions, acts and omissions to be challenged. It allows both access to justice with respect to its own provisions and to enforce national environmental law.

Who can hear a challenge? An appropriate court or impartial and independent review body as established under national law may hear a challenge under the Convention. The procedure must be fair, equitable and timely and not prohibitively expensive.

What are the remedies once a challenge is brought? The Convention requires Parties to provide adequate and effective remedies, including injunctions.

How can barriers to access to justice be overcome? Parties can assist the public to obtain access to justice by providing information on access to administrative and judicial review procedures and by removing financial and other barriers.




**CONVENTION
D'AARHUS**

Convention de la CEE-ONU sur l'accès à l'information, la participation du public au processus décisionnel et l'accès à la justice en matière d'environnement

QUATRIÈME SESSION DE
LA RÉUNION DES PARTIES

CHISINAU 2011 29-31

**AARHUS
CONVENTION**

UNECE Convention on Access to Information, Public
Participation in Decision-making and Access to
Justice in Environmental Matters

FOURTH SESSION OF THE
MEETING OF THE PARTIES

CHISINAU 2011 29-31

**ОРХУССКАЯ
КОНВЕНЦИЯ**

Конвенция ЭКЕ ООН о доступе к информации, участии общественности в процессе принятия решений и доступе к правосудию по вопросам, касающимся окружающей среды

ЧЕТВЕРТАЯ СЕССИЯ
СОВЕЩАНИЯ СТОРОН

КИШИНЕВ 2011



FINAL PROVISIONS

The following sections of the Convention may be called the final provisions and cover management, implementation and institutional matters relating to it. Once a convention comes into force, the tasks of implementation still lie ahead. Conventions also evolve as the knowledge or the needs of the Parties change. To keep up with these changing needs, Parties need to have a way to communicate with each other and keep the Convention a living, working, legal regime.

The final provisions of the Aarhus Convention are very similar to those of other environmental conventions. They provide for a meeting of the Parties and a secretariat as the institutional framework for decisions relating to the Convention. They provide for the addition of new Parties to the Convention through signature, ratification, and accession. They also provide for changes and additions to the Convention through amendments and annexes, and provide for implementation mechanisms, such as compliance review and methods to settle disputes. As with most conventions, the Parties to the Aarhus Convention meet regularly to discuss how to more effectively meet the Convention's goals and objectives. The Parties, served by the secretariat, set their own rules and workplan to better implement the Convention in practice.

ARTICLE 10 MEETING OF THE PARTIES

- 1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.**

In addition to establishing the specific obligations of Parties, most treaties also create their own administrative and policymaking bureaucracy to help Parties fulfil treaty obligations, to further the treaty's mission and to provide for international governance.

Article 10 establishes the Convention's primary policymaking body: the Meeting of the Parties. Often called the "Conference" of the Parties in other international treaties, the Meeting brings together representatives of all Parties to the Convention and observers, including NGOs, non-Party States, international organizations,



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etc. The Meeting's basic function is to steer and supervise the process of implementing and further developing the Convention. The Meeting of the Parties conducts the major business of monitoring, updating, revising and assisting with implementation. It enables the contracting Parties to review the implementation of the Convention and to adopt decisions to improve the way in which the Convention works.

Article 10, paragraph 1, sets out the timing for the meetings of the Parties. Two or three years is the typical amount of time between sessions of Meetings of the Parties to most international treaties. In accordance with article 10, paragraph 1, the first ordinary session of the Meeting of the Parties to the Aarhus Convention was held in Lucca, Italy, from 21 to 23 October 2002, just under one year after the Convention entered into force on 30 October 2001. Recently, the Meeting of the Parties has held ordinary sessions at approximately three-year intervals. In addition, the Meeting of the Parties has held several extraordinary sessions in between its ordinary sessions.

Under article 12, the Executive Secretary of ECE carries out the secretariat functions for the Aarhus Convention. As part of its secretariat role, the Executive Secretary of ECE is responsible for conveying information to the Parties concerning requests for a meeting of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

Paragraph 2 sets out certain means for supervising and facilitating the implementation of the Convention among its Parties and for further developing the Convention through protocols or additions. The Convention requires Parties to continually review its implementation. Parties must report regularly to the Meeting on their achievements. The subparagraphs of paragraph 2 provide details of the types of issues to be kept under continuous review by the Parties.

Most treaties require Parties to submit periodic reports on their compliance. The extent of this obligation varies, but it usually covers at least the measures taken by Parties towards implementing their obligations. For example, the CBD requires its Parties to report on their implementation measures and the effectiveness of those measures in meeting the objectives of the Convention. Information must usually be provided to enable the Parties to assess how effectively the treaty is operating. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) requires an annual report on all aspects of the transboundary trade and disposal of such substances.⁴⁵⁷ Similarly, article VIII of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires its Parties to maintain records of their trade in listed species and to report on the number and type of permits granted. This information must be made available to the public. In some cases reporting requirements are designed to monitor how well the Parties are enforcing a treaty. Thus, the 1946 International Convention for the Regulation of Whaling and the 1991 Protocol on Environmental Protection to the Antarctic Treaty oblige their Parties to communicate reports submitted by national inspectors concerning infractions, while the 1973 International Convention for the Prevention of Pollution from Ships calls for reports from national authorities on action taken to deal with reported violations and on incidents involving harmful substances.

At its first ordinary session, the Meeting of the Parties adopted decision I/8 on reporting requirements. Through decision I/8, the Meeting requested each Party to submit to the secretariat, "in advance of the second ordinary meeting of the Parties, or in advance of the first ordinary meeting of the Parties following the entry into force of the Convention for that Party, whichever is the later"⁴⁵⁸ a report in the format set out in the annex to the decision. This included reporting on the legislative, regulatory or other measures taken by a Party to implement the provisions of the Convention and their practical implementation.

Reports should be prepared through a transparent and consultative process involving the public. They should be submitted to the secretariat so as to arrive no later than 120 days before the meeting of the Parties for which they are submitted. Both electronic and paper versions should be submitted in one of the official languages of the Convention, as well as in the language(s) of the Party. In advance of each subsequent session of the Meeting of the Parties, each Party must review their report and submit an updated version of it to the secretariat. The secretariat is then tasked with preparing a synthesis report for each session of the Meeting of the Parties, summarizing the progress made and identifying significant trends, challenges and solutions.

Signatories and other States not Party to the Convention, pending their ratification or accession, are invited to submit reports on measures taken to apply the Convention, in accordance with these procedures. International, regional and non-governmental organizations engaged in programmes or activities providing support to Parties and/or other States in the implementation of the Convention are also invited to provide the secretariat with reports on their programmes or activities and lessons learned.

Finally, Parties and other States preparing their reports are invited to consider adapting them so as to provide guidance to members of the public on the exercise of their rights under the Convention and the relevant implementing legislation.

At its second session, the Meeting of the Parties adopted decision II/10 on reporting requirements, establishing that the reporting procedure set out in decision I/8 would continue to apply for the next reporting cycle, subject only to the following changes: in complying with the reporting requirements for subsequent reporting cycles, each Party must submit to the secretariat new information and, where available, a consolidated national implementation report; to facilitate the preparation of the synthesis report by the secretariat, reports are to be submitted to the secretariat so as to arrive no later than 180 days before the session of the Meeting of the Parties for which they are submitted.

Through decision IV/4, adopted at its fourth session, the Meeting of the Parties endorsed a revised reporting format set out in the annex to that decision and requested Parties to use the revised format in future reporting cycles. The revised format incorporated reporting on the implementation of articles 3, paragraph 7, and 6 bis, as well as the follow-up regarding possible specific cases of non-compliance. The Meeting also invited Parties to continue following the guidance on reporting requirements prepared by the Compliance Committee.⁴⁵⁹

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

The Convention requires Parties to supervise implementation by reviewing national approaches to implementation. This review is meant to improve domestic implementation and identify problem areas. Together with article 15 on review of compliance, this paragraph establishes a two-tier review mechanism. Article 10, paragraph 2 (a), requires a mandatory general review of implementation for all Parties, whereas article 15 establishes optional arrangements for Parties wishing to take advantage of a more intensive compliance review and assistance regime.

Reviewing policies and approaches to implementing a convention is common in international governance. For example, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) requires its Parties to submit information about the quantity of ozone-depleting substances that they manufactured or used during the year. Under the Basel Convention, Parties must submit reports on the amount of hazardous waste that they exported or imported. These reports are then available for review to ensure an exchange of information on best practices, to identify problem areas for Parties having difficulty in implementing the treaty and to monitor Parties that consistently violate the treaty.

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

Bilateral and multilateral agreements increasingly contain provisions concerning access to information, public participation or access to justice. The Parties' experience in implementing these agreements is very valuable to the overall implementation of the Aarhus Convention. The Convention therefore requires Parties to share information concerning their experiences with public involvement in the context of other bilateral and multilateral agreements. Many agreements, such as those specifically mentioned in the twenty-third preambular paragraph, contain provisions covering access to information, public participation and some elements of access to justice. The experiences gained in concluding and implementing these agreements will be useful for implementing the Aarhus Convention, in particular, article 3, paragraph 7, and the Almaty Guidelines.

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

Many of the ECE committees and other international bodies and committees have had experience with the substance of the three pillars of the Aarhus Convention. ECE, for example, has established quite a few subsidiary bodies relevant to the Aarhus Convention, including the Committee on Environmental Policy, the Committee on Sustainable Energy, the Inland Transport Committee, the Timber Committee, the Committee for Trade, Industry and Enterprise Development and the Committee on Human Settlements. Other competent international bodies could include UNEP, the United Nations Development Programme (UNDP), the United Nations Commission on Sustainable Development, WTO, EEA, the Regional Environmental Centre for Central and Eastern Europe and many others. A number of these bodies have taken an active part in Aarhus Convention processes to date.

(d) Establish any subsidiary bodies as they deem necessary;

A subsidiary body is an institution created to support the work of the Meeting of the Parties. The subsidiary body can be multidisciplinary or specific. Typically, a subsidiary body conducts research or monitoring or provides advice and recommendations on specific topics. Sometimes subsidiary bodies take forward the entire work of the Meeting of the Parties between sessions. A subsidiary body can be created in response to a specific request from the Meeting of the Parties or can be established to follow up issues mandated under the Aarhus Convention. The current subsidiary bodies of the Aarhus Convention include:

- The Working Group of the Parties.
- The Task Force on Access to Information.
- The Task Force on Public Participation.
- The Task Force on Access to Justice.

Subsidiary bodies are composed of government representatives and observers, including NGO representatives. Rule 23, paragraph 2, of the rules of procedure of the Meeting of the Parties states that the rules apply, *mutatis mutandis*, in the proceedings of subsidiary bodies, save as otherwise decided by the Meeting of the Parties.⁴⁶⁰

(e) Prepare, where appropriate, protocols to this Convention;

Article 10, paragraph 2 (f) establishes that Parties may subsequently develop additional legal agreements containing further rights and obligations. Such agreements are negotiated, signed and ratified separately from the original convention and are known as "protocols". The purpose of a protocol could be to implement the general objectives of the Aarhus Convention by going into more detail in a specific area. Alternatively, as in the case of the Protocol on Water and Health to the Water Convention, they may also extend into areas not covered by the parent convention.

Parties to the Aarhus Convention have to date adopted one protocol to the Convention — the Protocol on PRTRs, adopted at an extraordinary session of the Meeting of the Parties to the Convention on 21 May 2003 in Kyiv. The Protocol is the first legally binding international instrument on PRTRs. Its objective is "to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers". The Protocol is designed to be an open, global protocol, and all States can participate in it, including those that have not ratified the Aarhus Convention and those that are not members of the ECE. The Protocol entered into force on 8 October 2009 and, as at April 2014, had 33 Parties. The Protocol is discussed in more detail in the [commentary on article 5, paragraph 9](#).

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

Article 14 lays down the amendment procedures and these are discussed later. This provision establishes the Meeting of the Parties as the proper forum for putting forward amendments. To date, the Meeting of the Parties has adopted one amendment to the Convention, namely an amendment to the Convention regarding public participation in decisions in respect of the deliberate release and placing on the market of GMOs (also called the Almaty or GMO amendment). The Almaty amendment is discussed in more detail in the [commentary on article 6, paragraph 11](#), and [article 6 bis](#).

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

This provision shows that the Parties may be innovative in taking action that promotes the Convention. Parties may go beyond the protocols, amendments and subsidiary bodies specified in this article and take any additional action they believe to be in the best interests of the Convention. International law provides a basis for taking measures outside the context of the specific measures mentioned in subparagraphs (a) to (f).

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

The Convention does not specify the full range of procedural rules for the Meeting of the Parties, nor for those of the subsidiary bodies. Article 10, paragraph 2 (h), gives Parties the responsibility of adopting additional such rules at their first meeting. Rules are to be adopted by consensus and not by voting.

Through decision I/1 at its first session, the Meeting of the Parties adopted rules of procedure.⁴⁶¹ The rules of procedure include rules relating to place and date of meetings, notification of meetings, the participation of observers, the presence of the public, meeting agendas and documentation, Party representation and credentials, officers of the Meeting, subsidiary bodies, the secretariat, conduct of business, decision-making, official languages and amendments to the rules of procedure.

Rule 23, paragraph 2, of the rules of procedure states that the rules apply, *mutatis mutandis*, in the proceedings of subsidiary bodies save as otherwise decided by the Meeting of the Parties.

Rule 48 stipulates that, in the event of a conflict between any provision of the rules of procedure and a provision of the Convention, the provision of the Convention prevails.

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

Conventions sometimes deal with difficult, technical or time-sensitive issues by requiring Parties to continue to work on the details of these issues after the Convention is signed, for example through the development of protocols, amendments or annexes.

In the negotiations for the Aarhus Convention, the development of systems for pollution inventories or registers was widely discussed. Although many ECE countries had some form of pollution registers, few had fully developed PRTRs that were publicly accessible.

Article 5, paragraph 9, requires each Party to take steps to establish progressively a coherent nationwide PRTR system. Article 10, paragraph 2 (i) requires Parties, at their first meeting, to review national experiences in implementing the provisions of article 5, paragraph 9. It then requires Parties to consider what steps are necessary to further develop national PRTR systems.

In accordance with article 10, paragraph 2 (e) and (i), the Protocol on PRTRs — the first legally binding international instrument on PRTRs — was adopted. The Protocol is discussed in more detail in the [commentary on article 5, paragraph 9](#).

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

Article 10 allows the Meeting of the Parties to establish financial arrangements, as necessary. However, these must be made on a consensus basis among the Parties. The requirement for consensus is fairly unusual for financial arrangements under international conventions.

Financial arrangements typically support the institutional needs of a convention and can cover costs for items such as the meetings of the Parties, subsidiary bodies, the secretariat and non-governmental participation. Financial arrangements can be either voluntary or mandatory depending on the wishes of the Parties. For example, under the Basel Convention, mandatory financial arrangements were decided at the first meeting of the Conference of the Parties. Contributions from the Parties to the budget of the Convention and the secretariat are based on a percentage of the Parties' gross national product. In contrast, to date, Parties to the Aarhus Convention have chosen to make voluntary contributions.

The first session of the Meeting of the Parties established an interim voluntary scheme of contributions based on a system of shares, open to contributions from Parties, Signatories and other States having opted to participate in it.⁴⁶² It also established a task force to explore the possibility of establishing more stable and predictable financial arrangements for the Convention. In the intersessional period the task force examined various options for establishing financial arrangements, including the possible application of a scale of assessments based on the United Nations scale. The task force also assessed the effectiveness of the existing financial arrangements established by the Meeting of the Parties at its first session, based on a system of shares.

At its second session, the Meeting of the Parties agreed to continue the interim voluntary scheme of contributions.⁴⁶³ However, it asked the Working Group of the Parties to explore and develop, as appropriate, options for establishing stable and predictable financial arrangements based on the United Nations scale of assessments or other appropriate scales and to prepare recommendations on those matters for possible adoption at the third session of the Meeting of the Parties.

At its third session, the Meeting of the Parties agreed to continue the interim voluntary scheme of contributions and asked the Working Group of the Parties to continue to explore options to establish stable and predictable financial arrangements for possible adoption at the fourth session of the Meeting of the Parties.⁴⁶⁴ At its fourth session, the Meeting of the Parties agreed to maintain an interim voluntary scheme of contributions and to review the operation of the scheme of financial arrangements at its fifth session.⁴⁶⁵

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

Certain international institutions have the right to participate in meetings of the Parties as observers. The types of institutions listed in this provision must be admitted as observers upon meeting the requirements. No Party may object.

First, bodies of the United Nations and units of its Secretariat, such as UNEP or UNDP, and its specialized agencies may participate as observers. Secondly, the International Atomic Energy Agency may participate as an observer. Any State entitled to sign the Convention but which is not a Party to it may participate as an observer. And, any regional economic integration organization entitled to sign the Convention, as defined under article 17, but which is not a Party to the Convention, may participate as an observer.

Other intergovernmental organizations also have the right to participate in meetings of the Parties, if they are qualified in the fields of access to information, public participation and access to justice in environmental matters.

Rule 27 of the Convention's rules of procedure states that admitted intergovernmental organizations are entitled to seek to address meetings of the Parties under each agenda item and, having made such a request, will be included on the list of speakers. The Chair will in general call upon speakers in the order in which they signify their desire to speak, but may, at his or her discretion, decide to call upon representatives of Parties before observers.

Rule 6 of the Convention's rules of procedure states that intergovernmental organizations admitted as observers do not have the right to vote.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

NGOs may also be observers under the Convention. They have to meet slightly different admission criteria than the international institutions mentioned in paragraph 4. NGOs wishing to participate at a meeting of the Parties must submit to an admission process that requires:

- Qualification in the fields of access to information, public participation in decision-making, and/or access to justice in environmental matters.
- Notification of the secretariat (see article 12) that observer status is sought.

NGOs meeting these criteria are entitled to participate as observers unless at least one third of the Parties present in the meeting raise objections. However, in accordance with rule 6 of the Convention's rules of procedure, NGOs admitted as observers do not have the right to vote.

Rule 27 of the Convention's rules of procedure states that NGOs admitted as observers are entitled to seek to address the meetings of the Parties under each agenda item and, having made such a request, are to be included on the list of speakers.⁴⁶⁶ The Chair will in general call upon speakers in the order in which they signify their desire to speak, but may, at his or her discretion, decide to call upon representatives of Parties before observers. To facilitate the proceedings, the Chair may request representatives of two or more NGOs having common goals and interests insofar as the subject matter of the Convention is concerned to constitute themselves into a single delegation for the purposes of the meeting, or to present their views through a single representative.

Many treaties allow NGOs to receive observer status at meetings of the Parties, including the Vienna Convention for the Protection of the Ozone Layer, CITES, the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) and the Basel Convention.

Typically, NGO observers may submit memorandums to the Parties and to any committees, receive the agenda and public documents in advance of the meeting and are invited to plenary meetings. At times, NGO observers are permitted to participate in smaller meetings and to propose agenda items. For example, the rules of procedure of UNFCCC allow accredited observers to participate in “private meetings”.⁴⁶⁷

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

In accordance with article 10, paragraph 6, the rules of procedure adopted by the Meeting of the Parties specify practical arrangements for the admittance of representatives of international organizations, governments and NGOs as observers. In particular, rule 5 specifies the procedure by which the organizations in paragraphs 4 and 5 are to be notified of upcoming meetings and rule 6 clarifies their rights to participate in such meetings without the right to vote. Rule 7 of the rules of procedure states that meetings of the Parties will be open to members of the public, unless the Meeting of the Parties in exceptional circumstances decides otherwise. Rule 7 also provides for practical arrangements for the participation of the public in meetings of the Convention.

ARTICLE 11

RIGHT TO VOTE

- 1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.**
- 2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.**

Paragraph 1 confirms the rule that each Party receives one vote. It is a traditional rule of international law derived from the principle of sovereign equality. Votes are not weighted and each Party has the same right to participate.

Both regional economic integration organizations and their member States can become Parties to the Convention. As a result, voting rights need to be clarified.

A regional economic integration organization is an organization constituted by sovereign States of a given region to which its member States have transferred competence in respect of a number of policy areas, as defined in the treaties constituting the organization. The EU is the best known example of a regional economic integration organization. Its member States have transferred competence in respect of matters governed by this Convention to the EU. In addition, the

EU is duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to international agreements like the Convention (see also [commentary to article 17](#)). Similar structures may emerge elsewhere in other parts of the world.

A member State of a regional economic integration organization that is also a Party to the Convention may not exercise its right to vote twice — i.e., as a Contracting Party and again as a member of the organization in question. This is why the Convention stipulates that a regional economic integration organization cannot exercise its right to vote if its member States exercise their rights to vote and vice versa. Whether it is the regional economic integration organization or the member States that exercise the right to vote depends on the respective competencies of the organization concerned and its member States, as established under the applicable treaty or otherwise by international law. It may vary according to the subject being voted on. In cases where the regional economic integration organization has competence to vote, it does so with the number of votes equivalent to the number of its member States that are Parties to the Convention. For example, the treaties of the EU authorize it to take on a variety of environmental policy issues at the regional level.

ARTICLE 12

SECRETARIAT

Secretariats are responsible for the day-to-day operations of a convention. A treaty's secretariat may be part of an existing institution. The Executive Secretary of the Economic Commission for Europe is responsible for certain secretariat functions under this article. Secretariats hire staff and have a budget for their tasks contributed by the Parties. Secretariats rely heavily on the cooperation of the Parties in monitoring compliance or gathering information under the treaty.

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The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

The precise functions of the secretariat vary from one treaty to the next. Among the more common functions are monitoring of and reporting on treaty implementation, assisting implementation when necessary, promoting research relevant to the treaty's objectives and contributing to the further development of law and policy. In addition, virtually all secretariats serve as channels for communication among the treaty's Parties.

(a) The convening and preparing of meetings of the Parties;

The Aarhus Convention's secretariat has the function of convening and preparing the meetings of the Parties. This is a routine but important function. The Meeting of the Parties requires staff to prepare, receive, translate and circulate its official documents, as well as manage the logistics of its meetings. Preparing or facilitating the preparation of the background papers for the Meeting of the Parties is particularly important for promoting the Convention's further development.

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

The secretariat also plays an important role in gathering, analysing and distributing information. Secretariats are the information clearing house for most conventions, whether for the formally required reports or for other types of relevant information. The Aarhus Convention specifically requires the secretariat to disseminate the reports required by article 10, paragraph 2, and to transmit proposed amendments under article 14, paragraph 2. However, the secretariat's reporting function has been considerably broadened through subsequent decisions adopted by the Meeting of the Parties. For example, decision I/8 on national reporting requests the secretariat to prepare a synthesis of the national implementation reports in advance of each session of the Meeting of the Parties. The secretariat is also often required to prepare synthesis reports and other analysis as an aid to assist the Convention's subsidiary bodies in their work. For example, to assist the Task Force on Public Participation in International Forums, the secretariat prepared a paper synthesising the responses received from international forums to the written consultation process on the Almaty Guidelines.

(c) Such other functions as may be determined by the Parties.

The Parties may determine additional tasks for the secretariat. Rule 25 of the rules of procedure provides that for all meetings of the Parties and for all meetings of subsidiary bodies, the secretariat will:

- (a) Prepare, in consultation with the Bureau, the documentation;
- (b) Arrange for the translation, reproduction and distribution of the documents;
- (c) Arrange for interpretation at the meeting;
- (d) Arrange for the custody and preservation of the documents in the archives of ECE.

Besides servicing the Convention's subsidiary bodies, two further areas in which the role of the secretariat has expanded is through supporting the Compliance Committee in its work and engaging in capacity-building activities. As well as assisting the Compliance Committee with the processing of submissions from Parties and communications from members of the public, decision I/7 on review of compliance envisages a role for the secretariat in making referrals of possible non-compliance to the Committee. Under paragraph 17 of decision I/7, if the secretariat becomes aware that a Party may not have complied with its obligations under the Convention, it may request the Party concerned to furnish necessary information about the matter. If the matter is not resolved within three months, or such longer period as the circumstances of the matter may require but in no case later than six months, the secretariat must bring the matter to the attention of the Committee. With respect to capacity-building, the secretariat has organized capacity-building events at the request of the Meeting of the Parties and its subsidiary bodies (e.g., workshops on the Convention for the judiciary conducted under the auspices of the Task Force on Access to Justice), as well as taking part in regional activities initiated by one or more Parties or by other international organizations.

A further task often delegated to the secretariat is coordination with other treaty regimes and secretariats. This is particularly important because environmental problems are interconnected in ways not reflected by the ad hoc manner in which international environmental law develops. For example, article 3, paragraph 7, of the Aarhus Convention requires Parties to promote the application of its principles in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

ARTICLE 13

ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

In accordance with customary international law, the annexes form an integral part of the Aarhus Convention. Annexes typically provide criteria, guidelines or other more detailed specifications for obligations in the Convention. As an integral part of the Convention, the annexes are binding in terms of setting the scope and path for implementing certain articles.

ARTICLE 14

AMENDMENTS TO THE CONVENTION

A treaty may be amended by the agreement of the Parties. Every Party to a treaty is entitled to participate in the amendment's negotiations and to become a Party to the new amendment. Parties are not required to adopt amendments. In fact, in accordance with the Vienna Convention (part IV), the pre-amendment terms remain binding for any Party that does not adopt the amendment, even in dealings with a Party that is bound by the amendment.

Article 14 concerns amendments to the Convention and to annexes: who can propose them (para. 1), the process for submission (para. 2), how they are to be adopted (para. 3) and how they enter into force (paras. 4, 5 and 6).

1. Any Party may propose amendments to this Convention.

This provision is self-explanatory, and provides that any Party to the Convention has the right to propose its amendment.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

Paragraph 2 provides the procedure for Parties to propose an amendment to the Convention. The Executive Secretary of ECE is responsible both for receiving the proposed amendment and for passing it on to all Parties in a timely fashion. In this way a proposed amendment can be reviewed and considered before the session of the Meeting of the Parties at which it is to be presented for adoption. Parties are obliged to submit proposed amendments in writing. This procedure is the accepted practice in international law.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

Parties are obliged to attempt to adopt amendments by consensus, i.e., without reservation or exception. Amendments alter the substance of the Convention. Although it is possible for Parties to refuse to accept obligations under amendments, attempts are made to avoid such a situation as it may lead to conflicting obligations for different Parties.

However, if consensus cannot be reached, amendments can still, as a last resort, be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. In conformity with the wish that amendments should be valid and legitimate, paragraph 7 below restricts the three-fourths majority to Parties present and voting affirmatively or negatively. This unusual requirement shows how important the Convention considers participation of the Parties in this area: in most other conventions Parties abstaining are also considered as “voting”.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

Once amendments are adopted by the Parties, they must still go through a process of ratification, approval or acceptance that may differ according to each Party's constitutional order. The Depositary of the Aarhus Convention is the Secretary-General of the United Nations (article 18). The Depositary is responsible for sending adopted amendments to each Party for ratification, acceptance or approval.

Amendments to the Convention other than to its annexes enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties.

In the light of the inherent ambiguity of “at least three fourths of these Parties”, the Meeting of the Parties, at its third session, adopted decision III/1 on the interpretation of article 14 to clarify the meaning of “these Parties”. Such a decision is in keeping with article 31, paragraph 3 (a), of the Vienna Convention, which provides that any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions must be taken into account.

Decision III/1 states that, desiring to bring about an early entry into force of the amendment adopted through decision II/1, and, in principle, any future amendments to the Convention, the Meeting of the Parties agrees to interpret the expression “by at least three fourths of these Parties” as meaning at least three fourths of the Parties to the Convention that were Parties at the time of the adoption of the amendment. Through the decision, the Meeting also decides that any State that becomes a Party to the Convention after the date of adoption of that decision is deemed to have agreed to the interpretation of article 14, paragraph 4, of the Convention set out above.

After the amendment enters into force, any Party wishing to ratify, accept or approve it may do so. The amendment enters into force for that Party on the ninetieth day after the receipt by the Depositary of its instrument of ratification, approval or acceptance.

Amendments to annexes must be communicated by the Depositary in the same way as other amendments. However, the procedure for entering into force differs (see paragraphs 5 and 6 below).

- 5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.**

The proposal and adoption of amendments to the annexes follow the general rule described in paragraphs 1 to 4 above. However, for their entry into force, the Convention — like many other international instruments — provides a simplified procedure. Paragraph 5 states that to reject an amendment to an annex, a Party must take action within 12 months after the amendment's adoption at a meeting of the Parties to notify the Depositary in writing that it is unable to accept the amendment to the annex. The Depositary must then notify all Parties that a notification of non-acceptance was received.

At any time, a Party can decide to accept amendments to annexes, even if it had originally been unable to accept them. Upon substituting an acceptance for a notification of non-acceptance, the amendments become immediately effective for that Party.

- 6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.**

Amendments to annexes enter into force under an expedited procedure in comparison to amendments to other parts of the Convention.

Parties do not need to ratify, approve or accept such amendments for them to come into effect. Only if more than one third of the Parties actually reject an amendment to an annex that was adopted at a meeting of the Parties will it not automatically enter into force. If the required number of notifications are not submitted within 12 months from the date of communication by the Depositary, then the amendment will enter into force for all the Parties that did not reject it according to the proper procedures.

- 7. For the purposes of this article, “Parties present and voting” means Parties present and casting an affirmative or negative vote.**

Paragraph 7 means that abstention or not voting on a proposed amendment will not be taken into consideration in determining whether or not the three-fourths majority has been met under paragraph 3.

ARTICLE 15

REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Background

The obligations in the Convention are binding on Parties, and its purposes and objectives will be met only when each Party complies with its obligations. While recognizing the different legal and political structures of the Parties, the intention behind the Convention is to set common minimum standards on access to information, public participation in decision-making and access to justice in environmental matters. Various systems and mechanisms are found in international treaties to promote proper implementation and adequate compliance. One such mechanism is the requirement for regular reporting on implementation under article 10, paragraph 2 (a). But the Convention also provides the basis for a more sophisticated arrangement to review and assist in compliance in keeping with the Convention's spirit of involving members of the public. However, rather than itself establishing a system for compliance review, the Convention obliges the Meeting of Parties to establish such an arrangement, along certain parameters.

In their 1998 resolution adopting the Convention, Signatories urged Parties to give priority to the development of a compliance review mechanism. After the adoption of the Convention, an expert group, later followed by a working group of the Parties, started drafting the structure and design of an appropriate compliance system, to be adopted by the Meeting of the Parties once the Convention had entered into force. An effective compliance strategy contains three elements: (a) clear primary rules; (b) a compliance information system; and (c) a non-compliance response procedure.⁴⁶⁸ Considering the character of the Aarhus Convention as an environmental convention that in many respects resembles human rights conventions, examples from both areas of international law were looked at. At that time, four MEAs had compliance regimes in operation, including the Montreal Protocol, the Convention on Long-range Transboundary Air Pollution, CITES and the Bern Convention. Later on, compliance regimes would play an important role also in other multilateral treaty arrangements, such as UNFCCC. In the area of human rights, various legal instruments that provide for the consideration of communications from members of the public were considered. One such instrument was the first Optional Protocol to the International Covenant on Civil and Political Rights. A provision of a rather similar approach can also be found in the constitution of the International Labour Organization (ILO), which allows certain members of the public to make a representation directly to the ILO that a Member has failed to comply with one of its conventions.⁴⁶⁹

Parameters for review of compliance in the Convention

Article 15 obliges the Meeting of the Parties to establish optional compliance review arrangements. Exceptionally, the compliance review arrangements must be established by consensus among all the Parties. Even though established by consensus, the arrangements are optional. This was intended to allow those Parties that wanted to move ahead with compliance arrangements to do so, while other Parties could join as their confidence with the arrangements grew.

The Convention requires that the arrangements be of a "non-confrontational, non-judicial and consultative nature". This phrase has several implications. The first is that the intention of compliance review is not to point the finger at Parties that are in violation of the Convention, but to recognize and assess the shortcomings of Parties and to work in a constructive atmosphere to assist

them in complying. Moreover, the Convention requires that the arrangements include “appropriate public involvement”. Thus, the public is involved in its “non-confrontational, non-judicial and consultative” activities in an appropriate manner.

Compared to the compliance regimes that existed at the time the Convention was adopted, one of the most innovative parts was the requirement for appropriate public involvement. Typically, compliance monitoring under a convention is carried out by the Parties, either through their meetings or their subsidiary bodies, or by international organizations, with several notable exceptions. The ILO constitution allows employers and trade union organizations to bring issues regarding a Member’s compliance with any ILO convention directly to the ILO.⁴⁷⁰ The NAFTA Environmental Side Agreement includes a citizen complaint mechanism that allows citizens to raise issues of non-compliance by any of the three Parties with the Environmental Side Agreement for settlement by a special body under the Agreement.⁴⁷¹

Compliance review tools can include reporting, fact-finding and research and complaint mechanisms. Reporting is meant to enable the Parties and the public to review and evaluate the treaty’s impact and monitor progress. Fact-finding and research allow the directed collection of information when needed. Complaint mechanisms give an opportunity to Parties and, in some cases, the public, to raise issues of non-compliance with a formal body that, in turn, can develop appropriate responses, including technical assistance.

International institutions are not confined to a passive role as recipients of information. In many cases the power they enjoy to undertake fact-finding or research provides the essential scientific basis for adopting measures and formulating policies. They may also offer a measure of independent verification of the information supplied by Parties.

Decision I/7 establishing the Compliance Committee

At its first session, the Meeting of the Parties established the Compliance Committee by its decision I/7 on Review of Compliance. With the exception that the number of members in the Compliance Committee was increased from eight to nine, by decision II/5, adopted by the Meeting of the Parties at its second session, decision I/7 is still in place.

This section is intended to give a brief overview of the Compliance Committee and its relevance for the implementation of the Convention. More detailed information about the Compliance Committee and its working methods, including communications and submissions to the Committee, can be found in the online publication, *Guidance Document on the Aarhus Convention Compliance Mechanism, available on the Convention’s website*.⁴⁷²

Composition, election and functions

As set out in decision I/7, the members of the Compliance Committee serve in their personal capacity, which is to say that the Committee functions as an independent body when reviewing compliance by the Parties. The Committee is to report and make recommendations to the Meeting of the Parties for it to decide upon and take appropriate action. In certain circumstances, the Committee itself may take certain actions on an interim basis, in consultation or in agreement with the Party concerned.

The Committee is composed of nine members with recognized competence in the field of the Convention. The Committee may not include more than one national from the same State.

The Compliance Committee members are elected by the Meeting of the Parties, based on nominations by the Parties, Signatories and NGOs falling within the scope of article 10, paragraph 5, of the Convention and promoting environmental protection. In order to ensure competence and experience in the Committee, the members are elected on a rotary scheme, meaning that at each ordinary session, the Meeting of the Parties elects four or five members, as appropriate.

Functions and powers of the Committee

According to decision I/7, the Compliance Committee has the function of:

- Considering any submission, referral or communication made in accordance with paragraphs 15 to 24 of decision I/7.
- Preparing, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention.
- Monitoring, assessing and facilitating the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention.

The Committee may examine compliance issues and make recommendations if and as appropriate.

The Committee reports on its activities at each ordinary session of the Meeting of the Parties and makes such recommendations, as it considers appropriate. Committee reports are available to the public.

The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide to take one or more of the following measures:

- Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention.
- Make recommendations to the Party concerned.
- Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy.
- In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.
- Issue declarations of non-compliance.
- Issue cautions.
- Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention.
- Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may, in consultation with the Parties concerned, provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention.

Subject to agreement with the Party concerned, the Compliance Committee may:

- Make recommendations to the Party concerned.
- Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of that strategy.
- In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public.

Triggers

Reviews by the Compliance Committee can be triggered in four ways:

- (a) A Party may make a **submission about compliance by another Party**;
- (b) A Party may make a **submission concerning its own compliance**;
- (c) The secretariat may make a **referral** to the Committee;
- (d) Members of the public may make **communications** concerning a Party's compliance with the Convention.

Thus far, all cases have been brought to the Compliance Committee by means of communications from members of the public. One of these cases was also subsequently the subject of a submission by one Party against another; the communication and the submission in that case were heard together.⁴⁷³

Compliance Committee and implementation

Although the Compliance Committee cannot make decisions on compliance that are legally binding for the Parties, its findings and recommendations are relevant for compliance with and implementation of the Convention. All adopted findings and recommendations are forwarded to the Meeting of the Parties for endorsement. To date, all findings of non-compliance by the Compliance Committee have been endorsed by the Meeting of the Parties. The findings and recommendations of the Compliance Committee are carefully drafted. Its findings can be used as an indication of what

is required by the Convention, and its recommendations provide useful information for Parties on how to implement the Convention, not only for the Party concerned in the specific case.

According to decision I/7, communications from members of the public may be brought to the Committee on the expiry of 12 months from the date of the entry into force of the Convention with respect to the Party concerned, unless the Party has notified the Depositary in writing by the end of that time frame that it is unable to accept, for a period of not more than four years, the consideration by the Committee of such communications. During that four-year period, a Party may revoke its notification so that thereafter communications may be brought to the Committee in respect of that Party's compliance. Thus far, no Party to the Convention has made use of the possibility to notify its inability to accept communications from members of the public.

ARTICLE 16

SETTLEMENT OF DISPUTES

Article 16 provides for the means of resolving disputes between Parties to the Convention. It does not provide mechanisms for resolving disputes among members of the public or NGOs and Parties. Any dispute arising under the Convention has to be settled according to its provisions. The means provided are common in international law and include both binding and non-binding procedures. Article 16, like similar provisions in other environmental conventions, does not provide for compulsory settlement of disputes unless the Party explicitly agrees to be bound by the process.

- 1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.**

Paragraph 1 is in accordance with accepted international practice for dispute settlement. Parties must first try non-confrontational procedures, such as negotiation, mediation or conciliation. This concept is also found in article 15 concerning procedures for reviewing compliance with the provisions of the Convention.

- 2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:**

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in annex II.

If the dispute is not settled under paragraph 1, a Party can make a written declaration to the Secretary-General of the United Nations accepting a compulsory dispute settlement by arbitration or by the ICJ. The results of the compulsory dispute settlement will be binding on any Parties that accept the means of dispute settlement.

A Party may seek to establish an arbitration tribunal or to submit its dispute to the ICJ, or both. The procedures for arbitration

are laid down in annex II to the Convention and discussed below. The procedures for cases before the ICJ are laid down in the Statute of the ICJ, as elaborated by its own practice.

Parties may wish to consider a range of practical aspects when deciding whether to choose the ICJ or an arbitration tribunal to resolve disputes. In general, the ICJ represents a highly formalized procedure and an immutable system, while parties to arbitration set their own rules of procedure (which in the case of the Aarhus Convention are the rules found in annex II) that can be modified to meet the needs of the case and the international law applicable.

The ICJ has 15 judges, specialized in public international law, some with environmental expertise. An arbitration tribunal is selected specifically for a particular case: the arbitrators can be specialized in the subject matter, as well as in the cultural and legal issues of the countries involved in the case. The ICJ typically has a heavy docket of cases before it, so new cases take their place in line. Cases can take four years or more to reach a conclusion. Parties to a dispute can consult the registrar of the Court to gain an impression of how long it might be before their case would be heard — but they will have a greater degree of control over the timing of arbitration. Arbitration tribunals are set up case by case. Under the Convention, the timing is determined by the limits set in annex II and the needs of the case itself. The costs of the ICJ will be lower than those of arbitration, since in arbitration parties must pay the arbitrators, including travel costs and other expenses. The ICJ sits in its own offices and has salaried judges.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

If both parties have accepted both options for compulsory settlement dispute, i.e., arbitration and the ICJ, in writing, the ICJ has priority. If the parties to the dispute nevertheless wish to submit it to arbitration, they must explicitly agree to do so.

ARTICLE 17 SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 17 establishes the procedure for prospective Parties to the Convention to sign it. Signing a convention has, *inter alia*, a role in authenticating the negotiated text ([see commentary to article 22](#)). The signing is done by duly authorized representatives of a State or regional economic integration organization. A regional economic integration organization is an organization constituted by sovereign States of a given region. For such an organization to become a Party to the

Convention, its member States must have transferred competence in respect of matters governed by this Convention to it, and the organization must have been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the Convention. Article 2, paragraph 2 (d), of the Convention explicitly includes institutions of regional economic integration organizations referred to in article 17 as being included in the definition of public authority. The EU is the best known example of a regional economic integration organization, but similar structures are emerging in other parts of the world as well. When it signed the Convention, the EU, then known as the European Community, made a statement in the same manner as that required under article 19, paragraph 5, for ratification, acceptance, approval or accession (see annex II).

Signing a convention does not have a binding effect on the prospective Party concerned if the convention requires ratification. However, in accordance with the Vienna Convention (article 18), after a country signs a convention, it is obliged to refrain from acts which could defeat the object and purpose of the convention. The object and purpose of the Aarhus Convention are set out, in particular, in its preamble and in article 1.

Upon adoption of the Convention in Aarhus on 25 June 1998, 36 prospective Parties signed it. By the closure of the period for signature on 21 December 1998, 40 prospective Parties (39 States and one regional economic integration organization) had signed it. Since the closure of the period for signature, prospective Parties can no longer sign the Convention but must rather deposit instruments of accession (see article 19, para. 2).

ARTICLE 18

DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

The depositary of a convention has important formal functions. In particular, it serves as the repository and source of information on the Convention and its status (signatures, deposit of instruments of ratification, acceptance, approval or accession, entry into force, etc.).

The Aarhus Convention, like many other treaties, names the Secretary-General of the United Nations as Depositary. The Convention gives the Secretary-General tasks concerning, inter alia:

- Adoption and acceptance of amendments (article 14).
- Dispute settlement (article 16).
- Entry into and withdrawal from the Convention (articles 19 and 21).
- Custody of the Convention (article 22).

Today, the usual practice is to designate as depositary the competent organ either of the international organization or of the State under whose auspices the negotiations take place. In this case, negotiations took place under ECE, so it was logical to name the United Nations Secretary-General as the Depositary.

The treaty itself outlines the functions of the depositary. The rules of customary international law, as codified in articles 76 to 80 of the Vienna Convention, fill in any gaps. Typically, the functions of the depositary are international in character and the depositary is under an obligation to act impartially in performing them. In addition, the depositary takes custody of the original text of a treaty and the documents relating to it (signatures, ratifications, accessions, reservations, notifications and other communications). The tasks may include control and supervisory functions, when the depositary examines whether the documents presented are in proper form or whether the conditions required for the entry into force of an instrument have been met. The certification of copies of original texts, the preparation of any translation of the text and the correction of errors in the relevant documents are further activities codified in the Vienna Convention. If a Party and the depositary are in disagreement as to the performance of the latter's functions, the depositary must bring the issue to the attention of the other Parties.

ARTICLE 19

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

A State will be bound by the terms of a treaty only if it takes steps to demonstrate its consent to be bound. Ratification, acceptance, approval and accession are the authoritative acts whereby a prospective Party declares to the international community that it considers itself bound by a treaty. Article 19 sets out certain criteria and procedures for States and regional economic integration organizations to become Party to the Convention.

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

Prospective Parties typically show their intention to be bound by MEAs by depositing an instrument of ratification, acceptance or approval with the depositary. The terms “ratification”, “acceptance” and “approval” represent processes that are used in various countries to reach the same result: a legal commitment by a country to abide by the requirements of an international treaty. At the national level, a treaty must pass through domestic processes as defined by its constitutional traditions before it can be ratified, accepted or approved, depending on that country’s process. With respect to the Aarhus Convention, the ratification, acceptance or approval process is typically the responsibility of the Ministry of Foreign Affairs, in consultation with the Environment Ministry. The Environment Ministry is usually responsible for the preparation of the assessment of any required changes to domestic law needed to implement the Convention.

In most countries, a treaty can be ratified, accepted or approved only after parliamentary agreement. The procedure for receiving this agreement is typically laid down in the constitution. In some cases the parliament must pass a law explicitly ratifying, accepting or approving the treaty. In others the parliament can give “tacit consent”. In the case of a tacit consent, the government merely informs the parliament that an agreement has been reached on a certain issue and a special law of approval is not needed. In other cases the domestic legislation of a prospective Party must be brought into conformity with a treaty at the time it is ratified, accepted or approved by the parliament.

The decision to ratify, accept or approve implies that the country is prepared to implement the convention in question. Preparation can be done by assessing the changes to domestic law that the convention requires. In a few countries, such as the Czech Republic, official working groups were established to assess the impact of ratification of the Aarhus Convention on domestic law and policy. The Czech working group included ministry officials, representatives of environmental agencies, municipalities, NGOs and academics. In Slovenia and Estonia, a number of officials were designated within the Environment Ministry and the Ministry of Foreign Affairs to lead the ratification process. In several countries, representatives from municipalities, the office of the ombudsman, members of parliament and members of the business community have added their voice to the ratification process.

Under the Vienna Convention, a State which has signed a treaty but has not yet ratified it is obliged to refrain from acts that would defeat the object and purpose of a treaty, unless it makes clear its intention not to become a party to the treaty.⁴⁷⁴

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

When the Convention was closed for signature (22 December 1998), it became open for accession by the States and regional economic integration organizations that could otherwise have signed — specifically, those that are member States or have consultative status with ECE, or regional economic integration organizations made up of member States, as described in

article 17. Accession is a process similar to ratification where prospective Parties that did not meet the deadline for signature may become bound by the Convention. As with ratification, the exact process depends on their constitutional order.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

The Aarhus Convention is not limited to the ECE region. Paragraph 3 makes it clear that any other State from any other region of the world may accede to the Convention, as long as it is a Member of the United Nations and as long as the Meeting of the Parties approves.

The Meeting of the Parties, at its second session, adopted decision II/9 on the accession of non-ECE member States to the Convention and advancement of the principles of the Convention in other regions and at the global level. The decision reiterates the Meeting's invitation in the Lucca Declaration to States outside the ECE region to accede to the Convention if it suits their particular circumstances. It also makes clear that the approval by Meeting of the Parties referred to in article 19, paragraph 3, should not be interpreted as implying a substantive review of the national legal system and administrative practices of any State wishing to accede to the Convention.

At its third session, the Meeting of the Parties adopted a strategic plan for 2009–2014 (decision III/8). Objective II.4 of the strategic plan is that: "States in other regions of the world effectively exercise their right to accede to the Convention. Parties actively encourage accession to the Convention by States of other regions of the world with the aim of, by 2011, having Parties which are not member States of the ECE".

At its fourth session, the Meeting of the Parties adopted decision IV/5 on accession to the Convention by non-ECE member States.⁴⁷⁵ That decision once again encourages States outside the region to accede to the Convention and welcomes any expression of interest to do so. It also reiterates that approval of the Meeting of the Parties should not be interpreted as implying a substantive review by the Meeting of the Parties of that State's national legal system and administrative practices. It notes, however, that the minimum legal and other appropriate measures required to implement the Convention should be in place, so as to ensure that the State concerned is in a position to comply with its obligations at the time of the entry into force of the Convention for that State. The decision also establishes the procedural steps for approval of accession by non-ECE States, as follows:

- (a) The non-ECE State concerned, through the head of its competent authority, including, inter alia, its ministry responsible for environmental matters or for foreign affairs or another duly authorized representative, notifies the Convention secretariat in writing of its interest in acceding to the Convention;
- (b) The Convention secretariat:
 - (i) Informs the Bureau, the Working Group of the Parties and the Meeting of the Parties about the notification received and about any relevant information as it deems necessary;
 - (ii) Maintains regular communication, in oral and written form, as appropriate, with the State concerned in relation to the State's progress towards accession;
 - (iii) Provides advisory support to the State concerned, if requested and as appropriate, subject to availability of resources; and
 - (iv) Reports to the Bureau and the Working Group of the Parties on such communication and advisory support on a regular basis;
- (c) Upon completion of the internal decision-making process, the State concerned, through the ministry responsible for foreign affairs, submits its formal written expression of intention to accede to the Convention to the Meeting of the Parties, through the Executive Secretary of ECE, at least eight months in advance of the next session of the Meeting of the Parties. This written expression should be accompanied by a description of activities already undertaken or planned to be undertaken by the State concerned relating to the accession to the Convention and to the implementation of its provisions;

(d) The secretariat then prepares a note reflecting the information provided by the State concerned for consideration by the Working Group of the Parties;

(e) The Meeting of the Parties, at its next session, in the presence of the representative of the State concerned, considers the expression of intention to accede to the Convention and decide whether to give approval to the State concerned to accede to the Convention.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.



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The rights and obligations of regional economic integration organizations, such as the EU, which become a Party to the Convention, is determined by paragraph 4. Most importantly, the organization and its member States that are also Parties must decide on their respective responsibilities regarding the Convention's obligations. The provision preserves the notion of sovereign equality by preventing concurrent rights and obligations between the respective organizations and their member States. (See also [article 11, paragraph 2](#), on how the right to vote is divided among regional economic integration organizations and their members.)

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

In addition, the respective competencies of the regional economic integration organization and its member States must be declared in the instrument of ratification, acceptance, approval or accession submitted to the Depositary by the organization. If there is a substantial change in the respective competencies, for example, due to a change in the constitutional treaty forming the organization, the organization must inform the Secretary-General of the United Nations.

ARTICLE 20

ENTRY INTO FORCE

- 1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.**

The Aarhus Convention entered into force on 30 October 2001, 90 days after the sixteenth instrument of ratification, acceptance, approval or accession was deposited with the Secretary-General of the United Nations.

The Convention does not enter into force for any specific State until that State has ratified, accepted, approved or acceded to it and deposited its instrument with the Secretary-General (see article 19). It should be emphasized that the ratification, acceptance, approval or accession alone of a prospective Party to a treaty is not enough — the instruments must also be deposited with the Depositary. Whereas ratification is a domestic process that legally commits a State to abide by the requirements of the Convention, it is only through actually depositing the instrument of ratification, acceptance, approval or accession with the Depositary designated by the Convention that these actions will have effect in international law and the State will become party to the Convention.

- 2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.**

Paragraph 2 ensures that the process for determining when the Convention entered into force did not count a regional economic integration organization, unless its member States do not become Parties. However, where the member States of a regional economic integration organization have not transferred full competence over all matters relating to the Convention, the effect of the deposit of such an instrument is not clear. (See also the [commentary to article 19, paragraph 4](#).)

- 3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.**

When a prospective Party submits its instrument after the deposit of the sixteenth instrument, the Convention enters into force for that prospective Party 90 days after deposit. For example, if a State submitted the seventeenth instrument 10 days after the submission of the sixteenth instrument, the Convention became binding for that State 10 days after the Convention entered into force for the other sixteen.

ARTICLE 21

WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

Under international law, a Party may withdraw from a treaty either (a) in conformity with the provisions of the treaty or (b) at any time by consent of all the Parties after consultation with the other contracting States.⁴⁷⁶ This means that a Party wishing to withdraw from the Aarhus Convention either has to obtain the consent of all the other Parties to its withdrawal (after which the Party can withdraw at any time) or otherwise it must wait until three years after the Convention entered into force for that Party and withdraw in accordance with article 21. After the expiry of the three years, it may withdraw at any time by giving written notice to the Depositary and its withdrawal will take effect 90 days later. This means that, unless the Party obtains the consent of all the other Parties to its withdrawal, it will be bound for a minimum of three years and 90 days.

The constitutional order of a Party determines its internal procedure for arriving at a decision to withdraw. The effect of withdrawal is to release the former Party from any future international obligations arising from the Convention, and to exclude it from any future international benefits arising from the Convention.

ARTICLE 22

AUTHENTIC TEXTS

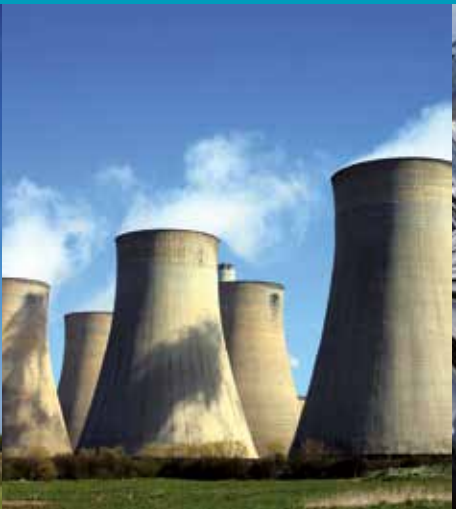
The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

When the final draft of a treaty has been adopted, it must be “authenticated” by a representative of each prospective Party, generally by signing the treaty. Authentication identifies the treaty’s text as the actual text the negotiators agreed to, and establishes that each prospective Party signing agrees in principle to its terms.

Article 22 provides that the Aarhus Convention has three equally authentic texts, in English, French and Russian. All authentic texts of a convention are equally authoritative, and the terms of the treaty are presumed to have the same meaning in each. Cases of discrepancies between authentic language versions, however, may happen. They can be resolved only by negotiation and the amendment of one or more versions. The addition of an authentic version (for example, a version in a fourth language under this Convention) would necessitate the amendment of the relevant article (here article 22) of the Convention.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.



ANNEXES

The Aarhus Convention has two annexes. Annex I contains the list of activities referred to in article 6, paragraph 1 (a), to which the Convention requires Parties to apply public participation in decision-making. Annex II contains mandatory arbitration procedures that will govern Parties if they submit a dispute over the interpretation or application of the Convention to arbitration pursuant to article 16, paragraph 2.

ANNEX I LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:

- Mineral oil and gas refineries;
- Installations for gasification and liquefaction;
- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
- Coke ovens;
- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors¹ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
- Installations for the reprocessing of irradiated nuclear fuel;
- Installations designed:
 - For the production or enrichment of nuclear fuel;
 - For the processing of irradiated nuclear fuel or high-level radioactive waste;
 - For the final disposal of irradiated nuclear fuel;
 - Solely for the final disposal of radioactive waste;
 - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:

- Metal ore (including sulphide ore) roasting or sintering installations;
- Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
- Installations for the processing of ferrous metals:
 - (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;



- (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
 - (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
 - Ferrous metal foundries with a production capacity exceeding 20 tons per day;
 - Installations:
 - (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
 - (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
 - Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m³.
3. Mineral industry:
- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
 - Installations for the production of asbestos and the manufacture of asbestos-based products;
 - Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
 - Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
 - Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m³ and with a setting density per kiln exceeding 300 kg/m³.
4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):
- (a) Chemical installations for the production of basic organic chemicals, such as:
- (i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
 - (ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
 - (iii) Sulphurous hydrocarbons;
 - (iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
 - (v) Phosphorus-containing hydrocarbons;
 - (vi) Halogenic hydrocarbons;
 - (vii) Organometallic compounds;
 - (viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
 - (ix) Synthetic rubbers;
 - (x) Dyes and pigments;
 - (xi) Surface-active agents and surfactants;

- (b) **Chemical installations for the production of basic inorganic chemicals, such as:**
 - (i) **Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;**
 - (ii) **Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;**
 - (iii) **Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;**
 - (iv) **Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;**
 - (v) **Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;**
 - (c) **Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);**
 - (d) **Chemical installations for the production of basic plant health products and of biocides;**
 - (e) **Installations using a chemical or biological process for the production of basic pharmaceutical products;**
 - (f) **Chemical installations for the production of explosives;**
 - (g) **Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances**
5. **Waste management:**
- **Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;**
 - **Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;**
 - **Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;**
 - **Landfills receiving more than 10 tons per day or with a total capacity exceeding 25,000 tons, excluding landfills of inert waste.**
6. **Waste-water treatment plants with a capacity exceeding 150,000 population equivalent.**
7. **Industrial plants for the:**
- (a) **Production of pulp from timber or similar fibrous materials;**
 - (b) **Production of paper and board with a production capacity exceeding 20 tons per day**
8. (a) **Construction of lines for long-distance railway traffic and of airports² with a basic runway length of 2,100 m or more;**
- (b) **Construction of motorways and express roads;³**
 - (c) **Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.**
9. (a) **Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tons;**
- (b) **Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tons.**
10. **Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.**

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;
- (b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2,000 million cubic metres/year and where the amount of water transferred exceeds 5 per cent of this flow.
In both cases transfers of piped drinking water are excluded.
12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas.
13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.
14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.
15. Installations for the intensive rearing of poultry or pigs with more than:
 - (a) 40,000 places for poultry;
 - (b) 2,000 places for production pigs (over 30 kg); or
 - (c) 750 places for sows.
16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.
17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.
18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more.
19. Other activities:
 - Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;
 - Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;
 - (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;
 - (b) Treatment and processing intended for the production of food products from:
 - (i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;
 - (ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);
 - (c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);
 - Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;

- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
 - Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.
- 20. Any activity not covered by paragraphs 1–19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.**
- 21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.**
- 22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.**

NOTES

- ¹ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.
- ² For the purposes of this Convention, “airport” means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (annex 14).
- ³ For the purposes of this Convention, “express road” means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

Annex I lists activities subject to the public participation provisions of article 6. These provisions, by virtue of article 6, paragraph 1 (a), apply “with respect to decisions on whether to permit proposed activities listed in annex I”.

Annex I was based on the annexes relating to similar provisions in the EIA Directive, as amended by Directive 97/11/EEC, the Espoo Convention and the original IPPC Directive 96/61/EC. The last of these was subsequently superseded by Directive 2008/1/EC concerning integrated pollution prevention and control (codified version),⁴⁷⁷ which in turn has since been superseded by Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control).⁴⁷⁸

Annex I to the Aarhus Convention has 20 sections: 1. Energy sector; 2. Production and processing of metals; 3. Mineral industry; 4. Chemical industry; 5. Waste management; 6. Waste-water treatment plants; 7. Specific industrial plants; 8. Railway and airports; 9. Inland waterways and ports; 10. Groundwater abstraction or recharge schemes; 11. Works for the transfer of water resources; 12. Extraction of petroleum and natural gas; 13. Dams; 14. Pipelines; 15. Installations for the intensive rearing of poultry or pigs; 16. Quarries and opencast mining; 17. Construction of overhead electrical power lines; 18. Installations for the storage of petroleum; 19. Other activities; and 20. Any activity not covered by paragraphs 1–19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

It also includes two further qualifying paragraphs and three notes that define the terms “nuclear power stations and other nuclear reactors”, “airport” and “express road”.

Many of the listed activities specify thresholds above which the provisions on article 6 will, by virtue of article 6, paragraph 1 (a), apply. For example, the requirements of article 6, paragraph 1 (a), will apply to thermal power stations and other combustion installations with a heat input of 50 megawatts or more (activity 1. Energy sector, third bullet point). Similarly, the requirements of article 6, paragraph 1 (a), will apply to installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day (activity 5. Waste management, third bullet point). To avoid doubt, “per day” means per 24-hour period starting at midnight and concluding the following midnight.

During its negotiation, the main reference sources for annex I of the Convention were the annexes to the EIA Directive listing categories of projects. The EIA Directive contains two such annexes: annexes I and II together can be compared with the content of annex I to the Aarhus Convention. Projects within the scope of annex I to the EIA Directive “shall be made subject to an assessment in accordance with articles 5 to 10”.⁴⁷⁹ Annex I does not group the projects into systematic sections but mentions crude-oil refineries, power stations, disposal of radioactive waste, melting of cast-iron

and steel, extraction of asbestos, integrated chemical installations, motorways and express roads, ports and waste-disposal installations. Annex II to the EIA Directive lists projects that “shall be made subject to an assessment, in accordance with articles 5 to 10, where Member States consider that their characteristics so require”.⁴⁸⁰ Annex II lists the following groups of activities: 1. Agriculture; 2. Extractive industry; 3. Energy industry; 4. Processing of metals; 5. Manufacturing of glass; 6. Chemical industry; 7. Food industry; 8. Textile, leather, wood and paper industries; 9. Rubber industry; 10. Infrastructure projects; and 11. Other projects. Some of the groups of activities listed in annex I of the Convention are the same or similar to those listed in annex II of the Directive. For example, “energy industry” and “energy sector”; “processing of metals” and “production and processing of metals”. Other groups are missing in annex I to the Aarhus Convention, such as the “food industry” group. Otherwise, the characteristics of the projects are very similar in annexes I and II to the EIA Directive and in annex I to the Aarhus Convention.

Appendix I to the Espoo Convention (List of activities) can also be compared with annex I to the Aarhus Convention. For instance, article 2 (General provisions), paragraph 3, of the Espoo Convention refers to appendix I. The appendix lists: 1. Crude oil refineries; 2. Thermal power stations; 3. Installations for the production of nuclear fuels; 4. Smelting of cast-iron and steel; 5. Extraction of asbestos; 6. Integrated chemical installations; 7. construction of motorways, express roads, railways and airports; 8. Oil and gas pipelines; 9. Ports and inland waterways; 10. Waste-disposal installations; 11. Dams and reservoirs; 12. Groundwater abstraction; 13. Pulp and paper manufacturing; 14. Mining, on-site extraction and processing of metal ores and coal; 15. Offshore hydrocarbon production; 16. Storage of petroleum and chemicals; and 17. Deforestation.

In addition, the Industrial Emissions Directive’s annex I (Categories of industrial activities referred to in article 10) can be compared with annex I to the Aarhus Convention. The Industrial Emissions Directive’s annex I consists of six groups of activities. The first five groups, 1. Energy industries; 2. Production and processing of metals; 3. Mineral industry; 4. Chemical industry; and 5. Waste management, are the same as in annex I to the Aarhus Convention. Paragraphs 2 “Production and processing of metals” and 3 “Mineral industry” are almost identical in both annexes. Paragraph 4 “Chemical industry” is also very similar, but the Aarhus Convention has, in addition to the installations listed in the Industrial Emissions Directive, subparagraph (g), which regulates “Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances”. Though there are some differences, paragraph 6 of annex I to the Industrial Emissions Directive shares many common points with paragraph 19 “Other activities” of annex I to the Aarhus Convention.

Three paragraphs of annex I to the Aarhus Convention bear special mention — paragraphs 20–22.

Paragraph 20 of annex I includes any activity not otherwise listed which requires public participation under an EIA procedure in accordance with national legislation. In its findings on communication ACCC/C/2008/35 (Georgia), the Compliance Committee observed that the determination of whether an activity falls within the ambit of paragraph 20 of annex I depends on three elements, namely: (a) public participation; (b) an EIA procedure in the context of which public participation takes place; and (c) domestic legislation providing for an EIA procedure.⁴⁸¹ It further noted that even if paragraph 20 of annex I to the Convention refers to the taking place of an EIA, the domestic legislator may provide for a process that includes all basic elements for an EIA, without naming the process by the term “EIA”. Such a de facto EIA process should also fall within the ambit of annex I, paragraph 20. It is critical, however, to define the extent to which the de facto EIA process qualifies as an EIA process, even if it is not termed as such.⁴⁸² Thus, according to the Committee it is not the name but particular features of the given procedure that decide whether the procedure should be considered as an EIA procedure. One such characteristic feature is public participation. Furthermore, the national legislator must intend to subject the activity to such a procedure, including public participation.⁴⁸³ In this regard, it should be noted that in its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee found that the OVOS and the expertiza shall be considered jointly as a decision-making process constituting a form of EIA procedure.⁴⁸⁴

With respect to paragraph 21 of annex I, under very special circumstances the authorities may avoid public participation if their decision concerns activities listed in annex I that are performed within various kinds of research. Research must be the primary goal of the activity and the period of the project may not exceed two years. If the research project may cause a significant adverse effect on the environment or health, article 6 automatically applies. In this context, it seems that such a provision shall be implemented in line with the general obligation set out in article 6, paragraph 1 (b), except that this provision specifically mentions health in addition to the environment. That is, the significant effect need not be an effect on the environment, as in article 6, paragraph 1 (b), but may be solely an effect on health. The scheme is similar to that applied by the EIA Directive regarding research projects.

Under paragraph 22 of annex I, where a change or extension of an activity listed in annex I itself meets the criteria or threshold set out in the annex for that activity, article 6, paragraph 1 (a), will apply. If the change or extension does not meet the threshold criteria set in the annex, it is subject to article 6, paragraph 1 (b), of the Convention. This approach is modelled on the EIA Directive and effectively means that the changes or extensions will be subject to screening.

ANNEX II

ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.
2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.
4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.
5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.
6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.
7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.
8. The tribunal may take all appropriate measures to establish the facts.
9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:
 - (a) Provide it with all relevant documents, facilities and information;
 - (b) Enable it, where necessary, to call witnesses or experts and receive their evidence.
10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.
11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.
12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

- 13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.**
- 14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.**
- 15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.**
- 16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.**
- 17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.**
- 18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.**

There are alternative mechanisms available, such as negotiation or mediation, that parties sometimes look into before, or instead of, arbitration. Arbitration is, thus, a process that is used when parties cannot reach an agreement independently and require an impartial decision-making body to intervene.

Arbitration is a process of dispute settlement, based on the determination of facts and law by an independent third person or persons, that results in a binding decision. As discussed above, article 16 names arbitration as one of several dispute settlement methods available under this Convention. Specifically, article 16, paragraph 2, gives parties the ability to choose between arbitration and adjudication by the ICJ when non-binding methods such as negotiation and mediation are not sufficient to resolve the dispute. To date, there have been no disputes taken to arbitration under the Convention.

Arbitration is a form of dispute resolution used to resolve many different types of disputes at both the national and international levels, including commercial disputes. It has been used extensively throughout the twentieth century to resolve disputes between States, international organizations and non-State parties of different nationalities because of its ability to consider and reconcile multiple systems of law. This capacity is achieved primarily through the use of a panel structure whereby multiple arbitrators are selected, in part because of their familiarity with one or more of the legal systems of parties to the dispute. The arbitrators, functioning much like a traditional judicial body, then work together to decide the facts of the case, determine the applicable laws and reach a decision. Parties entering into arbitration agree to abide by the procedures selected and the awards granted, and in practice most tend to honour this commitment.

Annex II establishes the framework under which parties can use arbitration to resolve disputes arising under the Convention. The terms of the annex are almost identical to those of several other ECE conventions, including the Industrial Accidents Convention and the Espoo Convention. In practice, the point at which parties enter into arbitration is comparable to when they would seek judicial remedies.

The scope of annex II is limited to disputes between Parties to the Convention, so arbitration with third parties, such as NGOs, is not covered. This does not mean, however, that Parties are prevented from engaging in arbitration with third parties to resolve disputes arising under the Convention. Agreement by a Party to arbitrate with a third party would not violate the terms of the Convention — in this case, the terms of annex II simply would not apply. The Permanent Court of Arbitration, an independent international organization established in 1899 by the Convention for the Pacific Settlement of International Disputes, regularly settles disputes between States and private parties and therefore has a special set of procedural rules that govern such cases. There are also a number of other sets of arbitration rules that might be used in such an arbitration, albeit not specifically designed for disputes between States and private parties, e.g., the arbitration rules of the United Nations Commission on International Trade Law. Alternatively, Parties participating in other international

treaties that do not recognize third parties in the context of arbitration have extended diplomatic protection to NGOs and citizens by espousing their claims and arbitrating on their behalf.

Pursuant to paragraph 1 of annex II, once parties have decided to use arbitration, the first step in constituting a tribunal is notifying the secretariat to the Convention. Parties must indicate the subject matter of the desired arbitration and the articles of the Convention that form the basis of the dispute. In keeping with the Convention's emphasis on the active dissemination of information, the secretariat will then forward the information received to all Parties to the Convention.

Paragraphs 2, 3 and 4 stipulate the manner in which the arbitral tribunal will be formed. Pursuant to paragraph 2, a total of three arbitrators will constitute the tribunal. If there are only two parties to the dispute, each has authority to appoint one arbitrator. The third, who will serve as president of the tribunal, is to be agreed upon by the two arbitrators selected. If there are more than two parties to the dispute, parties sharing a common position appoint one arbitrator. Arbitrators selected by the parties are expected to be impartial and independent. They are not supposed to represent the interests of those parties; rather, they are usually chosen on the basis of their familiarity with the legal and cultural systems of those parties and their expertise in the subject of the dispute. The president of the tribunal is also expected to be impartial and independent. To avoid any appearance of partiality he or she may not be a national of one of the parties to the dispute, reside in any of their territories, or have prior affiliations with the parties or the case.

To ensure that arbitration is not prevented by failure to appoint the requisite arbitrators, paragraphs 3 and 4 establish several specific time frames by which arbitrators must be chosen. Those paragraphs also outline procedures to be followed when one or more of the arbitrators is not promptly selected. If the two arbitrators selected by the parties fail to appoint a president, the Executive Secretary of the Economic Commission for Europe is authorized to designate one. If one of the parties does not appoint an arbitrator, the Executive Secretary is authorized to designate the president, who will then encourage the party to select an arbitrator or appoint one unilaterally if the party does not comply. In practice, many arbitral tribunals are established more promptly than required by law in order to expedite dispute settlement, making such intervention unnecessary.

The annex outlines some guiding principles that govern the conduct of the tribunal, although considerable discretion is left to the arbitrators to determine both the procedural and the substantive elements of the arbitral process. For example, paragraph 5 instructs tribunals to render their decisions in accordance with international law and the provisions of this Convention. But the arbitrators determine what will constitute the applicable body of international law in this context. Ostensibly, this means that the body of international law to be applied in any arbitration brought under the Convention will be determined by arbitrators on a case-by-case basis; however, arbitrators of international disputes generally adhere to the approach of the Permanent Court of Arbitration and the ICJ. The Permanent Court of Arbitration's rules for disputes between States provide that international law consists of: international conventions, international custom, general principles of law "recognized by civilized nations," and judicial and arbitral decisions, which shall be used as a subsidiary means to aid in determining the rule of law. This is based on a similar provision in the Statute of the ICJ.

Pursuant to paragraph 6, the arbitral tribunal will draw up its own rules of procedure. In practice, many tribunals choose to adopt or copy by reference existing rules of procedure, such as those available through the Permanent Court of Arbitration, to the extent that those rules are consistent with the terms of the convention in question. Where necessary, tribunals then modify existing rules to comply with the terms of the particular convention. Should arbitrations begin to take place under this Convention, potential models for procedural rules will likely emerge. Such models may be of considerable use to future arbitrators, as they will have determined mechanisms for accommodating the terms of annex II and, more specifically, the requirement that decisions should be rendered in accordance with the entire Convention. The Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment adopted by the Permanent Court of Arbitration in June 2001 may provide additional guidance.

Paragraph 7 of the annex specifies that the decisions of the tribunal will be made by majority vote of the arbitrators. The president's role is, thus, limited to presiding over the arbitral hearing and casting a vote equal in weight to those of the other two members. This type of voting structure is similar to that used in other conventions, such as the CBD, but differs from some arbitration rules that make the president sole arbitrator when the other two arbitrators cannot agree on a decision.

Paragraph 8 instructs the tribunal to take all appropriate measures to establish the facts of the case. In practice, this usually includes gathering evidence and calling witnesses. Pursuant to paragraph 9, parties to the dispute are required to facilitate this work of the tribunal using all means at their disposal, including provision of relevant documents and assistance in obtaining witnesses and expert testimony. In the past, tribunals have found it useful to allow for presentation of views or evidence by third parties such as NGOs. The Iran-United States Claims Tribunal, for example, permitted submission of oral or written statements by any person that was not a party to a particular case if that information was likely to assist the

Tribunal in carrying out its task.

Paragraph 10 requires the arbitrators to protect the confidentiality of any information received in confidence during the proceedings of the tribunal. This provision does not cover all information received; rather, it is limited to information expressly agreed upon as confidential in nature by the parties and the arbitrators. Unless such an agreement is made in advance of submission, the right to access information used in an arbitral proceeding is protected by the terms of this Convention. In keeping with the spirit of the Convention, disputing parties should make all pleadings and documents and all orders and awards by the tribunal publicly available during and after the proceeding, subject to that information expressly agreed between the parties and the arbitrators to be confidential.

Under paragraph 11, the arbitral tribunal may recommend interim protection measures at the request of one of the parties. Interim protection measures include mechanisms, such as injunctions, that require or restrict a certain behaviour on the part of one or more parties to the dispute until a final remedy is selected. Since the Convention provides that arbitrators can only recommend such mechanisms at the request of one of the parties, responsibility for conceiving of and advancing interim measures falls on that party. The tribunal is also limited in its capacity to guarantee adherence to interim measures selected. Since it has no enforcement mechanism, it may only recommend that parties implement interim measures. But, in practice, parties tend to comply, possibly out of consideration for how their cooperation could influence the final award.

Pursuant to paragraph 12, failure on the part of a party to appear before the tribunal or to defend its case does not prevent the tribunal from conducting the proceedings. A party may request that the tribunal proceed with arbitration and render its final decision without the input of the other party. As such, it would be possible for the appointment of arbitrators and the adjudication of the dispute to proceed from beginning to end without a party ever responding to another party's initial notification of the secretariat or otherwise participating.

If a responding party wishes to file a counterclaim against one or more parties initiating arbitration, such action is governed by paragraph 13. The only restriction is that counterclaims must be directly relevant to the subject matter of the original dispute being arbitrated. When parties do have a claim that meets this requirement, filing a counterclaim would presumably expedite resolution of the matter, whereas initiating a separate claim would necessitate the formation of a new tribunal and the development of new procedural rules.

The costs of arbitration are discussed in paragraph 14, which stipulates that all the expenses of the tribunal should be divided equally among parties to the dispute unless the arbitrators determine that some other payment scheme is appropriate given the specific circumstances of the case. Aside from compensation for the arbitrators, the annex does not specify what types of costs may be included. In practice, costs often include the fees of the arbitrators, including travel and other expenses; the cost of expert advice required by the tribunal; the travel and other expenses of witnesses; rental of a space in which to conduct the arbitral hearing; fees for secretarial assistance; and any fees or expenses of the secretariat or the appointing authority (under the Aarhus Convention, the Executive Secretary of the Economic Commission for Europe). The tribunal is required to keep a record of all its expenses and provide a final list of charges to the parties. It is quite common in international arbitration for tribunals to apportion costs disproportionately among parties, with losing parties covering some or all of the costs of the prevailing parties.

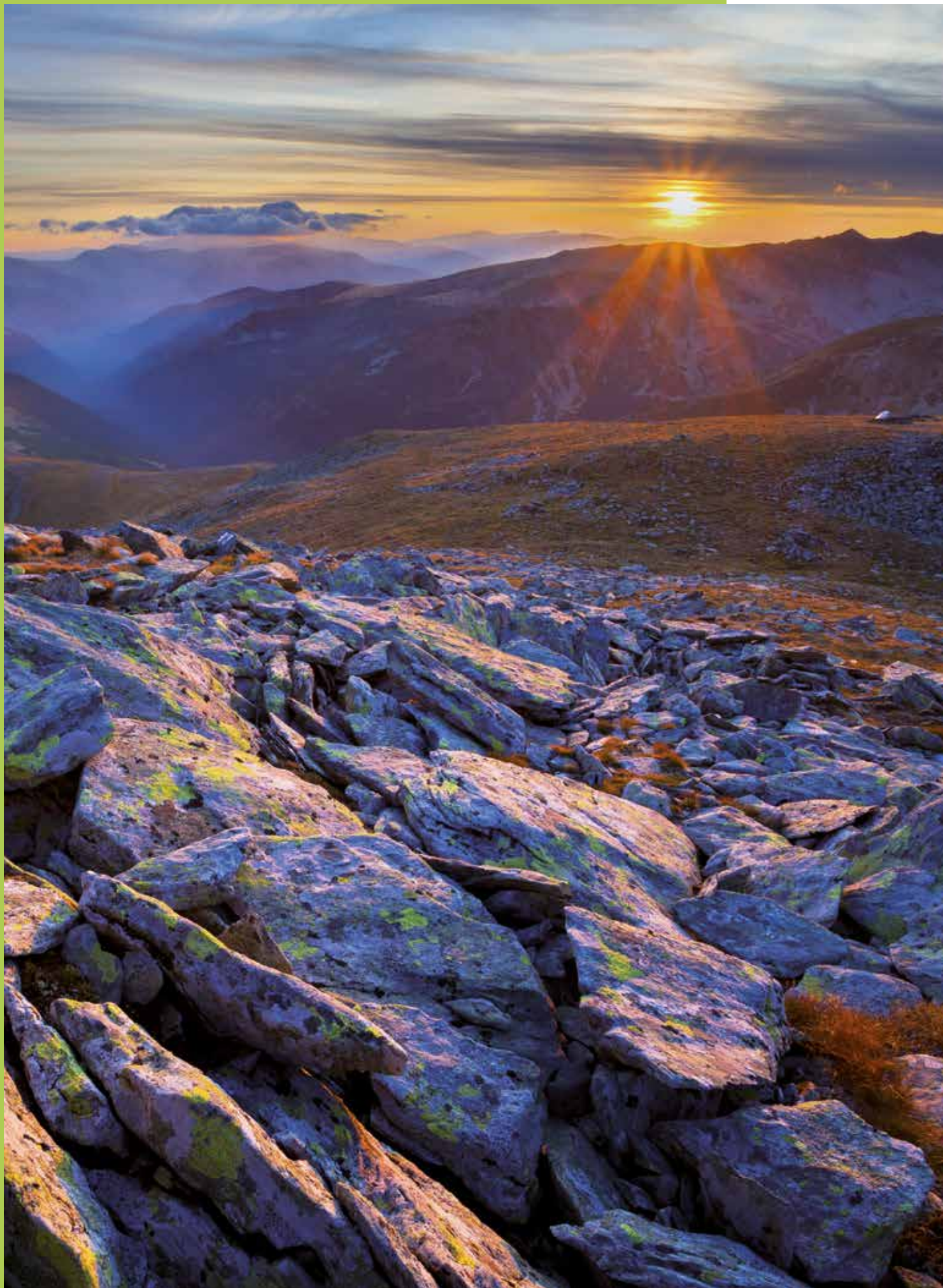
Paragraph 15 provides a mechanism for additional parties with a compelling interest in a dispute to become involved in the arbitral process. Specifically, it allows any Party to the Convention to intervene in the proceedings, thereby becoming a party to the case, provided that it has a legal interest in the subject matter of the dispute and may be affected by the decision rendered. While the Convention does not specify what constitutes a legal interest, it is typically interpreted as one that could form the basis of judicial proceedings. When parties intervene after a hearing has already begun, the business of the tribunal proceeds as normal. Intervening parties are not permitted to appoint additional arbitrators.

According to paragraph 16, once a tribunal has been established, it has five months to render its decision. If the tribunal finds it necessary, however, it may extend the time limit by another five months. Grounds for granting such an extension are not specified in the annex, and the tribunal has sole authority to determine when a delay is appropriate. In practice, extensions may be granted for a variety of reasons ranging from the personal circumstances of one or more arbitrators to the inability to obtain a majority vote. But whenever possible, tribunals are expected to render their decisions within the first five-month period and reserve the use of the extension for unusual or uncontrollable circumstances.

Pursuant to paragraph 17, the award granted by the tribunal is final and binding on all parties to the dispute. The decision must be accompanied by a statement of reasons, which typically addresses both factual and legal explanations for the

outcome of the case. Once the decision is rendered, it must be transmitted by the tribunal to all of the parties to the dispute and the secretariat of the Convention. The secretariat then forwards the information received to all the Parties to the Convention. Although the award is only binding on the parties to the dispute, this dissemination structure allows the Parties to keep abreast of issues involving implementation of the Convention, to track the role of arbitration in resolving disputes, to see how arbitrators interpret specific provisions of the Convention, and to develop a sense of how arbitrators might react to similar issues in the future.

Paragraph 18 addresses the possibility that a further dispute may arise over the interpretation or implementation of the award granted. In such cases, the parties to the original dispute may call upon the tribunal that made the award for further assistance. If, for whatever reason, the original tribunal cannot be reconstituted at that time, parties can seek the establishment of a new tribunal.





APPENDICES

APPENDIX I DECLARATIONS AND RESERVATIONS UPON SIGNATURE OR RATIFICATION

AUSTRIA

Declaration upon ratification:

The Republic of Austria declares in accordance with article 16 (2) of the Convention that it accepts both of the means of dispute settlement mentioned in paragraph 2 as compulsory in relation to any party accepting an obligation concerning one or both of these means of dispute settlement.

DENMARK

Declaration upon signature:

Both the Faroe Islands and Greenland are self-governing under Home Rule Acts, which implies *inter alia* that environmental affairs in general and the areas covered by the Convention are governed by the right of self-determination. In both the Faroe and the Greenland Home Rule Governments there is great political interest in promoting the fundamental ideas and principles embodied in the Convention to the extent possible. However, as the Convention is prepared with a view to European countries with relatively large populations and corresponding administrative and social structures, it is not a matter of course that the Convention is in all respects suitable for the scarcely populated and far less diverse societies of the Faroe Islands and of Greenland. Thus, full implementation of the Convention in these areas may imply needless and inadequate bureaucratization. The authorities of the Faroe Islands and of Greenland will analyse this question thoroughly.

Signing by Denmark of the Convention, therefore, not necessarily means that Danish ratification will in due course include the Faroe Islands and Greenland.

EUROPEAN UNION

Declaration upon signature:

The European Community wishes to express its great satisfaction with the present Convention as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN/ECE region, in accordance with the principle of sustainable development.

Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The Community will consider whether any further declarations will be necessary when ratifying the Convention for the purpose of its application to Community institutions.

Declarations upon approval:

Declaration by the European Community in accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters

The European Community declares that, in accordance with the Treaty establishing the European Community, and in particular Article 175 (1) thereof, it is competent for entering into international agreements, and for implementing the obligations resulting there from, which contribute to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or world-wide environmental problems.

Moreover, the European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10 (2) and Article 19 (5) of the Convention. In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2 (2) (d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.

Finally, the Community reiterates its declaration made upon signing the Convention that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.

The exercise of Community competence is, by its nature, subject to continuous development.

Declaration by the European Community concerning certain specific provisions under directive 2003/4/EC

In relation to Article 9 of the Aarhus Convention, the European Community invites Parties to the Convention to take note of Article 2 (2) and Article 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2 (2) and Article 6 of Directive 2003/4/EC.

FINLAND

Declarations upon acceptance:

1. Finland considers that provisions of Article 9, paragraph 2 on access to a review procedure do not require those provisions to be applied at a stage of the decision-making of an activity in which a decision in principle is made by the Government and which then is endorsed or rejected by the national Parliament, provided that provisions of Article 9, paragraph 2 are applicable at a subsequent decision-making stage of the activity.

2. Some activities in Annex I to the Convention may require consecutive decisions by a public authority or public authorities on whether to permit the activity in question. Finland considers that each party shall, within the framework of its national legislation, determine at what stage the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 may be challenged pursuant to Article 9, paragraph 2.

FRANCE

Declaration upon approval:

Interpretative declaration concerning articles 4, 5 and 6 of the Convention:

The French Government will see to the dissemination of relevant information for the protection of the environment while, at the same time, ensuring protection of industrial and commercial secrets, with reference to established legal practice applicable in France.

GERMANY

Declaration upon signature:

The text of the Convention raises a number of difficult questions regarding its practical implementation in the German legal system which it was not possible to finally resolve during the period provided for the signing of the Convention. These questions require careful consideration, including a consideration of the legislative consequences, before the Convention becomes binding under international law.

The Federal Republic of Germany assumes that implementing the Convention through German administrative enforcement will not lead to developments which counteract efforts towards deregulation and speeding up procedures.

NETHERLANDS

Declaration, 17 February 2010:

The Kingdom of the Netherlands declares, in accordance with paragraph 2 of Article 16 of the United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, that it accepts both means of dispute settlement referred to in that paragraph as compulsory in relation to any Party accepting one or both means of dispute settlement.

NORWAY

Declaration upon ratification:

In accordance with article 16, paragraph 2 (a) of the Convention, Norway hereby declares that it will submit the dispute to the International Court of Justice.

SWEDEN

Reservations upon ratification:

Sweden lodges a reservation in relation to Article 9.1 with regard to access to a review procedure before a court of law of decisions taken by the Parliament, the Government and Ministers on issues involving the release of official documents.

A reservation is also lodged in relation to Article 9.2 with regard to access by environmental organisations to a review procedure before a court of law concerning such decisions on local plans that require environmental impact assessments. This also applies to decisions regarding issuing permits that are taken by the Government as the first instance, under, for example the Natural Gas Act (2000:599) and after appeal under Chapter 18 of the Swedish Environmental Code. It is the Government's ambition that Sweden will shortly comply with Article 9.2 in its entirety.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Declaration made upon signature and confirmed upon ratification:

The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person "to live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

APPENDIX II

RESOLUTIONS AND DECLARATIONS BY THE MEETING OF THE PARTIES

AARHUS RESOLUTION

RESOLUTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Adopted at the fourth Ministerial Conference “Environment for Europe”

Held in Aarhus, Denmark, on 23–25 June 1998

We, the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,

Resolve to strive for the entry into force of the Convention as soon as possible and to seek to apply the Convention to the maximum extent possible pending its entry into force, and to continue to cooperate in gradually developing policies and strategies related to matters within the scope of this Convention;

Recommend that the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed at the Third Ministerial Conference “Environment for Europe” in Sofia, Bulgaria, on 25 October 1995, should be taken into account in the application of the Convention pending its entry into force;

Emphasize that, besides Governments, parliaments, regional and local authorities and non-governmental organizations also have a key role to play at the national, regional and local level in the implementation of the Convention;

Acknowledge that the Convention is an important element in the regional implementation of Agenda 21 and that its ratification will further the convergence of environmental legislation and strengthen the process of democratization in the region of the United Nations Economic Commission for Europe (ECE);

Emphasize the importance of capacity building to maximize the effectiveness of officials, authorities and non-governmental organizations in implementing the provisions of this Convention;

Call upon each Government to promote environmental education and environmental awareness among the public, particularly in relation to the opportunities that this Convention provides;

Call upon public, private and international fund providers to give high priority to projects that aim to further the objectives of this Convention;

Call for close cooperation between ECE, other bodies involved in the “Environment for Europe” process and other relevant international governmental and non-governmental organizations on the issues of this Convention, for example in the implementation of national environmental action plans and national environmental health action plans;

Recognize that the successful application of the Convention is linked to adequate administrative and additional financial resources being made available to support and maintain the initiatives necessary to achieve this goal and call upon Governments to make voluntary financial contributions to this process so that sufficient financial means are available to carry out the programme of activities of the ECE Committee on Environmental Policy related to the Convention;

Request the ECE Committee on Environmental Policy actively to promote and keep under review the process of ratification of the Convention pending its entry into force by, *inter alia*:

(a) Establishing the Meeting of the Signatories to the Convention, open to all members of ECE and to observers, to identify activities that need to be undertaken pending the entry into force of the Convention, to report to the Committee on progress made in respect of the ratification of the Convention; and to prepare for the first meeting of the Parties;

(b) Giving full recognition to the activities identified by the Meeting of the Signatories within the Committee's work programme and when the Committee considers the allocation of ECE resources provided for the environment;

(c) Encouraging Governments to make voluntary contributions to ensure that sufficient resources are available to support these activities;

Consider that, pending the entry into force of the Convention, the necessary authority should be given to ECE and its Executive Secretary to provide for a sufficient secretariat and, in the framework of the existing budgetary structure, for appropriate financial means;

Urge the Parties at their first meeting or as soon as possible thereafter to establish effective compliance arrangements in accordance with article 15 of the Convention, and call upon the Parties to comply with such arrangements;

Commend the international organizations and non-governmental organizations, in particular environmental organizations, for their active and constructive participation in the development of the Convention and recommend that they should be allowed to participate in the same spirit in the Meeting of the Signatories and its activities to the extent possible, based on a provisional application of the provisions of article 10, paragraphs 2 (c), 4 and 5, of the Convention;

Recommend that non-governmental organizations should be allowed to participate effectively in the preparation of instruments on environmental protection by other intergovernmental organizations;

Recognize the importance of the application of the provisions of the Convention to deliberate releases of genetically modified organisms into the environment, and request the Parties, at their first meeting, to further develop the application of the Convention by means of *inter alia* more precise provisions, taking into account the work done under the Convention on Biological Diversity which is developing a protocol on biosafety;

Invite the other member States of ECE and any other State that is a Member of the United Nations and/or of other regional commissions to accede to this Convention;

Encourage other international organizations, including other United Nations regional commissions and bodies, to develop appropriate arrangements relating to access to information, public participation in decision-making and access to justice in environmental matters, drawing, as appropriate, on the Convention and to take such other action as may be appropriate to further its objectives.

LUCCA DECLARATION

adopted at the first meeting of the Parties
held in Lucca, Italy, on 21–23 October 2002

We, Ministers and heads of delegation of Parties, Signatories and other States, parliamentarians, representatives of civil society, and in particular non-governmental organizations promoting environmental protection from throughout the ECE region and beyond, gathered at the first meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), affirm the following:

I. CREATING PARTNERSHIPS FOR SUSTAINABLE DEVELOPMENT

1. The engagement of the public is vital for creating an environmentally sustainable future. Governments alone cannot solve the major ecological problems of our time. Only through building partnerships with and within a well-informed and empowered civil society, within the framework of good governance and respect for human rights, can this challenge be met.
2. Access to information, public participation and access to justice are fundamental elements of **good governance** at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy.

3. We note that the World Summit on Sustainable Development recognized the importance of principle 10 of the Rio Declaration on Environment and Development, but we also note the need to further promote concrete actions. We will continue to contribute to development of initiatives around the world. Such assistance could be political, financial or technical, and could include sharing experiences of the Aarhus Convention process and of best practices developed in the UNECE region.

II. THE AARHUS CONVENTION

A BREAKTHROUGH IN PARTICIPATORY DEMOCRACY

4. The Aarhus Convention is, as stated by the United Nations Secretary-General Kofi Annan, the most ambitious venture in **environmental democracy** undertaken under the auspices of the United Nations. It represents a major step forward in international law. We express our satisfaction that the Convention has entered into force within a relatively short period of time, and at the same time acknowledge the considerable challenges that lie ahead in achieving its full and widespread implementation. We note that, among others, non-governmental organizations promoting environmental protection have expressed their wish to further improve and develop the Convention.

5. The Aarhus Convention is **a new kind of environmental agreement**. It acknowledges our obligation to present and future generations. It confers rights on individual members of the public, without regard to their nationality, citizenship or domicile. It recognizes the key role of an active and well-informed public in ensuring sustainable and environmentally sound development. Through seeking to guarantee public rights to information, to participation and to access to justice in the environmental sphere, it addresses, in a tangible and concrete way, the relationship between governments and individuals. It is thus more than an environmental agreement; it is an agreement that addresses fundamental aspects of human rights and democracy, including government transparency, responsiveness and accountability to society.

6. We recognize the close relationship between **human rights** and environmental protection. Through its goal of contributing to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, the Convention reflects this link.

III. STRENGTHENING THE IMPLEMENTATION OF THE CONVENTION

7. We welcome the rapid progress in ratification of the Convention, which has brought about its early entry into force, and express our determination that this momentum should be maintained in its implementation and further development.

8. We recognize that implementation and compliance by the Parties with their obligations under the Convention is the very heart of the matter in relation to the success of the Convention.

9. We urge all **Signatories** to the Convention which have not yet ratified it to do so as soon as possible, to put in place the full set of implementing legislation as well as procedures and mechanisms for implementing the specific provisions of the Convention and, in the interim, to seek to apply the provisions of the Convention to the maximum extent possible.

10. We call on other countries to further the principles of the Convention with a view to establishing equivalent participation rights for the public and to the extent possible to participate in its processes.

11. We encourage all member States of UNECE that are neither Signatories nor Parties who wish to accede to the Convention to do so as soon as possible.

12. We believe that the Convention should be implemented in such a way that the public is able to effectively **exercise the rights** that the Convention seeks to guarantee, including by removing practical obstacles, such as cost barriers and lengthy procedures.

13. We encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than required under the Convention, noting that the Convention provides for **minimum requirements**.

14. We underline the importance of developing effective means of providing public access to information and actively disseminating it to the public, and call upon Parties to make information progressively available in electronic form.

15. **Civil society** and its actors, including non-governmental organizations, the private sector and the media all have a crucial role to play in the implementation, promotion and further development of the Aarhus Convention. Their expertise is needed to 'make Aarhus work'.

16. We warmly welcome the active involvement of non-governmental organizations, in particular **environmental organizations**, in supporting the implementation of the Convention at both the national and international levels and urge donors to support the continuation of this engagement with adequate finance.

17. We also welcome the active involvement of intergovernmental organizations as well as those of international character facilitating the implementation of the Convention.

18. There is a need to raise wider **public awareness** of the Convention, to encourage the public to exercise the rights that the Convention confers and to reach out to individual members of the public, including those who are not members of any organization.

19. Public authorities and decision makers at all levels and in all sectors, as well as the judiciary and legislators, need to be fully aware of the obligations arising under the Convention.

20. Effective implementation of the provisions of the Convention is a significant challenge for many Parties. We encourage Parties to draw as necessary upon available assistance mechanisms, such as the **capacity-building service and clearing-house mechanism**, to overcome obstacles to the full application of the Convention.

21. The successful implementation of the Convention can be facilitated by the availability of adequate financial resources in all countries. While the primary responsibility for implementation lies with national governments themselves, it is important to provide **financial and technical assistance to countries with economies in transition**, in particular in the early stages, to help them fulfil their obligations under the Convention. We therefore call upon public, private and international donors to give high priority to financing activities to implement the Convention.

22. We believe that the financial base for the Convention should be broadened and that **stable and predictable funding** for the activities under the Convention should be secured. We welcome the establishment of the financial arrangements based on shares as a first step to meet this need and urge Parties and others in a position to do so to contribute financially to the Convention in accordance with the arrangements.

23. In order to secure effective and timely implementation, we agree on the need to establish an adequate **reporting system** and an effective **compliance mechanism**, including the involvement of the public.

IV. FURTHER WORK ON KEY TOPICS

24. We believe that **pollutant release and transfer registers** provide an important mechanism to increase corporate accountability, reduce pollution and promote sustainable development. We will therefore work towards the adoption of an effective protocol at the Kiev Ministerial Conference and its implementation and, as appropriate, its further development with a view to promoting effective PRTR systems.

25. We recognize that the Signatories have identified the need for, inter alia, more precise provisions with respect to **genetically modified organisms**. As a first step towards addressing this need, the Parties intend to adopt and implement guidelines. They also intend to undertake further work, including on options for a legally binding approach, to develop the Convention in this area, with a result to be considered for adoption, if appropriate, at the second meeting of the Parties.

26. **Access to justice** as provided for under the Convention is indispensable both to underpin the rights of access to information and public participation set out in the Convention, and, more generally, to protect the legitimate interests of the public and to enable it to play a fuller role in supporting the enforcement of environmental law. Further work is required to support Parties in overcoming practical barriers to effective access to justice, including through the examination of good practices, the sharing of experience and the development of information and guidance materials for relevant target groups.

27. In the light of the ongoing revolution in **electronic information technology**, the area of electronic information tools and publishing should be kept under active review, to ensure that activities under the Convention remain abreast of the latest developments and to contribute to bridging the 'digital divide'. We will provide input, as appropriate, to the World Summit on the Information Society.

28. We recognize the need to integrate appropriately the Aarhus Convention's principles in the draft protocol on strategic environmental assessment to the Espoo Convention, expected to be adopted at the Kiev Ministerial Conference. We also recognize the need to consider, in the light of the content of the new protocol, if further work is needed under the Aarhus Convention on the issue of **public participation in strategic decision-making**.

V. STRENGTHENING INTERNATIONAL COOPERATION

29. The Aarhus Convention emerged out of the “**Environment for Europe**” process. We recognize the need to maintain strong links with that process and look forward to making an appropriate contribution to the fifth Ministerial Conference “Environment for Europe” (Kiev, May 2003).

30. Cooperation between the bodies of the Aarhus Convention and those of other **multilateral environmental agreements**, including ECE environmental instruments, should be strengthened on an ongoing basis in order to promote the principles of the Convention in all areas of environmental policy.

31. We recognize the need for guidance to the Parties on promoting the application of the principles of the Convention in **international environmental decision-making processes** and within the framework of **international organizations in matters relating to the environment** and we therefore recommend that consideration be given to the possibility of developing guidelines on this topic for adoption, as appropriate, at a future meeting of the Parties.

32. We encourage **other regions and international organizations** to develop appropriate arrangements and action relating to access to information, public participation in decision-making and access to justice in environmental matters. Where requested, we will endeavour to support initiatives aimed at applying the principles contained in the Aarhus Convention, including the development of global and/or regional guidelines or other instruments promoting access to information, public participation and access to justice.

33. We note that, where it suits their particular circumstances, **States outside the ECE region** may wish to accede to the Convention. We believe that the involvement of such States could be of mutual benefit and could enrich the processes under the Convention, and would, therefore, be broadly supportive of their accession. We also note that the Plan of Implementation agreed upon at the World Summit for Sustainable Development contains a commitment to ensure access to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making.

VI. CONCLUSION

34. We celebrate the **constructive spirit** and close cooperation among stakeholders which have characterized the processes associated with the Aarhus Convention, and express our firm hope that this will continue.

ALMATY DECLARATION

adopted at the second meeting of the Parties
held in Almaty, Kazakhstan, on 25–27 May 2005

We, Ministers and heads of delegation of Parties, Signatories and other States, parliamentarians and representatives of civil society, in particular non-governmental organizations promoting environmental protection from throughout the UNECE region and beyond, gathered at the second meeting of the Parties to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, affirm the following:

1. Since our first meeting in Lucca, Italy, the Aarhus Convention has taken firmer hold in the UNECE region. The number of Parties, which now include the European Community, has more than doubled since it entered into force in 2001. More States are preparing to ratify or accede to it and a growing number of States, whether or not Signatories, are making efforts to give effect to its principles and provisions in their internal law, thereby strengthening the protection of citizens' environmental rights and environmental democracy throughout the region.

I. ADVANCING ENVIRONMENTAL PROTECTION AND DEMOCRATIC GOVERNANCE

2. The Convention is an unprecedented instrument of international environmental law, representing a significant step forward both for the environment and for the consolidation of democracy. Today, gathered in Almaty, we reiterate our pledge to continue to advance both environmental protection and democratic governance by adhering to, implementing and possibly, where appropriate, further developing the Aarhus Convention as an instrument to enable public authorities and citizens to assume their individual and collective responsibility to protect and improve the environment for the welfare and well-being of present and future generations.

3. The Convention reflects the important link between human rights and environmental protection. This link has been recognized not only in the UNECE region but also in other regions of the world, in the work of certain international organizations and the practice of human rights bodies. We welcome these developments and encourage the Council of Europe and the United Nations Commission on Human Rights to pursue their ongoing work on the relationship between environmental protection and human rights. Consolidating democracy, the rule of law and the protection of human rights is paramount, as was recently reiterated by the Heads of State and Government of the member States of the Council of Europe in their Warsaw Declaration and Action Plan (16–17 May 2005). We welcome in particular their encouragement of cooperation between the Council of Europe and the United Nations in order to achieve everyone's entitlement to live in a healthy environment.

4. Our long-term strategic vision is to secure the enjoyment of the rights of environmental democracy in order to improve the state of the environment and promote sustainable development throughout the pan-European region and beyond. We see it as our mission to strengthen the rights of the public to have access to information, participate in decision-making and obtain access to justice in environmental matters, throughout the UNECE region, by promoting more effective implementation of the Convention by a larger number of Parties, by encouraging States which are not yet in a position to become Parties to take steps to participate in the Aarhus process and give effect to the principles of the Convention, and by further developing the Convention to the extent necessary, where doing so may usefully contribute to the achievement of its objective.

5. We encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than the minimum required under the Convention. We also urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision-making and access to justice in environmental matters even where such measures would not necessarily involve any breach of the Convention.

II. FROM LUCCA TO ALMATY: PROGRESS IN DEVELOPING THE CONVENTION

6. In Lucca, we mandated the Convention's bodies to undertake further work on a number of topics. We welcome the results achieved on most of those topics, which reflect important progress.

7. The adoption of the Kiev Protocol on Pollutant Release and Transfer Registers two years ago was a particularly important step forward. Once the Protocol enters into force, it is likely to contribute to increasing corporate accountability, reducing pollution and promoting sustainable development. We urge all Signatories to speed up their internal processes with a view to ratification of the Protocol by the end of 2007 and to put in place implementing legislation as well as administrative procedures and mechanisms for establishing operational pollutant release and transfer registers in accordance with the provisions of the Protocol.

8. With respect to genetically modified organisms, the adoption of the Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms was a first step towards addressing the need to develop more precise provisions identified by the Signatories when the Convention was adopted in Aarhus, Denmark. The adoption of the Almaty amendment represents another significant step forward. We consider this amendment, which further develops the Convention, to be a crucially important result of this meeting. We call upon the Parties to ratify the amendment without delay and to start implementing it as soon as possible without awaiting its formal entry into force.

9. The Almaty Guidelines are another milestone resulting from this meeting. They will guide us in implementing the Aarhus principles in international decision-making. We recognize the importance of further consultation on the Guidelines and hope that they will inspire other environmental governance processes within forums at the regional and global levels.

10. We welcome the successful launch of the Aarhus Clearing House for Environmental Democracy and the adoption of a set of practical recommendations to further promote the wider use of electronic information tools as an effective instrument for the implementation of the Convention's provisions on the dissemination of environmental information. We encourage all Parties, Signatories and other States, as well as international, regional and non-governmental organizations, academic and other research institutions and other members of the public, to submit relevant information for inclusion in the Clearing House, to make use of this important information resource and to contribute to the implementation of our recommendations on electronic information tools.

11. In Lucca, we agreed that further work was required to support Parties in ensuring effective access to justice. We have identified the main obstacles and taken the first steps to overcome them. We welcome the establishment of a task force with the involvement of legal professions and other stakeholders.

III. IMPLEMENTATION AND COMPLIANCE AS A PRIORITY

12. Promoting the Aarhus Convention and the Kiev Protocol, their implementation and compliance with them, are our immediate priority.

13. We urge all Signatories to the Convention which have not yet ratified it to do so as soon as possible and all UNECE member States which have not signed the Convention to cooperate with us and consider acceding to it. We call upon those States to put in place the necessary legislation, procedures and mechanisms for implementing the various provisions of the Convention and, in the interim, to seek to apply them to the maximum extent possible.

14. Implementation and compliance by the Parties with their obligations under the Convention continue to be crucial to its success. In this regard, we welcome the fact that the unique system for compliance review, which was established by the Meeting of the Parties in its decision I/7, has now become fully operational. We commend the work of the Compliance Committee, undertake to give full consideration to its recommendations and encourage the Parties involved to give full effect to the measures decided on the basis of these recommendations.

15. Implementation needs to be continuously and effectively monitored. To this end, we aim to review and, if necessary, further develop the reporting regime under the Convention, based on the experience gained; to develop an adequate reporting system for the Protocol; to use the clearing house to make available other sources of information on implementation; and to review methodologies for assessing the state of implementation, including where appropriate relevant indicators.

16. Problems of non-compliance need to be further addressed through information, support and guidance; through applying the existing mechanism for compliance review, while promoting wider awareness of its existence; and through developing a suitable compliance mechanism for the Protocol, drawing on the experience with the compliance mechanism gained under the Convention and other compliance mechanisms.

17. Promoting implementation will require further capacity-building efforts aimed at addressing the identified needs of specific countries or groups of countries or addressing specific topics or professional target groups and providing guidance and support for implementation. We expect the reporting regime and compliance mechanism to provide a rich source of information, which should be used as a basis for identifying specific priorities for capacity-building, having regard to the respective needs and possibilities of public authorities, legal professionals and civil society in the countries or groups of countries in question.

18. We recognize the important tasks to be performed by public authorities in implementing the Convention and the need to provide them with a proportionate level of resources to enable them to effectively fulfil their obligations. We welcome the initiatives of those countries that have prepared and adopted national profiles, strategies and action plans to assess and strengthen their capacities related to the Convention. We also welcome the activities carried out by international and regional organizations to strengthen the capacities of national authorities and other stakeholders to implement the Convention, and invite donors to further support these activities. We recognize the importance of democratic processes with regard to decision-making relating to the Convention, in particular for countries with economies in transition, and sub-regional cooperation, including on transboundary issues. We welcome and support initiatives and proposals for strengthening sub-regional cooperation for implementation of the Convention, for example in Central Asia.

19. We encourage the public to make full use of its rights under the Convention and recognize the role that all partners in civil society have to play in its effective implementation. In particular, we welcome the important contribution non-governmental organizations can make to the successful pursuit of the Convention's objectives, and call upon Governments and others in a position to do so to give appropriate support, including financial support, to such organizations.

20. Promoting environmental education and strengthening civil society mechanisms will be crucial for the effective implementation of the Convention and its Protocol. Measures taken to implement the UNECE Strategy for Education for Sustainable Development and the United Nations Decade on Education for Sustainable Development (2005-2014), as well as efforts of public authorities and civil society organizations aimed at raising environmental awareness generally, will help the public to exercise its rights under the Convention more effectively.

IV. OUR VISION FOR THE FUTURE

21. As regards future activities under the Convention, we underline the importance of the declaration of Environment Ministers at their fifth "Environment for Europe" Conference in Kiev in May 2003 that greater emphasis should be placed on compliance and national implementation of legally binding instruments for environmental protection within the UNECE

region, and that a larger concentration of effort on the East European, Caucasian and Central Asian countries is needed. While we recognize that further work remains to be done on specific topics regarding the application of the principles of the Convention, we reiterate that promoting the implementation of and compliance with the Aarhus Convention and the Kiev Protocol is our immediate priority. In this respect, we stress the paramount importance of sharing and transferring knowledge and experience on the matters covered by the Convention, and of finding synergies and areas of cooperation in relation to the practical application of the Convention, both within the UNECE region and in the wider global context.

22. It gives us great encouragement that the Convention has attracted considerable interest and support from a variety of organizations and institutions in the UNECE region and beyond. The promotion of networking and capacity-building among all interested partners, to which the regional environmental centres are making a key contribution, can produce significant synergies and provide important resources for implementation. Sharing experiences and finding synergies and areas of cooperation with the other UNECE conventions, as well as with other regional, subregional and global multilateral environmental agreements, such as the Cartagena Protocol on Biosafety, in order to maximize their combined effectiveness in our region, will also be one of our priorities during the next few years.

23. With the adoption of the Protocol on Strategic Environmental Assessment to the Espoo Convention, a contribution has been made to the implementation of article 7 of the Aarhus Convention. However, we recognize the need for further work to clarify how public participation in decision-making on plans, programmes and, to the extent appropriate, policies is to be organized in other contexts relating to the environment.

24. We reiterate our invitation to interested States, including those outside the UNECE region, to accede to the Convention and/or the Protocol. We believe that the involvement of such States could be of mutual benefit, by enriching the processes under the Convention and its Protocol and affirming the global relevance of their standards, while at the same time strengthening support for the implementation of principle 10 of the Rio Declaration on Environment and Development worldwide. In this regard, we also encourage the United Nations Environment Programme to continue its work on access to information, public participation in decision-making and access to justice in environmental matters. Where requested and within available resources, we are prepared to support initiatives in other regions and forums aimed at applying the principles contained in the Aarhus Convention and at making clear the links between various initiatives focused on strengthening environmental democracy throughout the world.

25. Securing adequate funding of activities under the Convention remains paramount. We therefore call upon Parties, Signatories and other interested States, as well as other potential donors, to make voluntary financial contributions to support the implementation of the work programme under the Convention and related activities. At the same time, we will continue to explore and develop as appropriate one or several options for establishing stable and predictable financial arrangements based on appropriate scales.

26. At our third meeting, we intend to adopt a long-term strategic plan covering the following five-year period and translating our collective aspirations and priorities into operational terms.

27. We express our appreciation and gratitude to the Government of Kazakhstan for having undertaken to host the second meeting of the Parties.

RIGA DECLARATION

adopted at the third meeting of the Parties
held from 11 to 13 June 2008 in Riga

We, the Ministers and heads of delegation from Parties and Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), together with representatives of other States, international, regional and non-governmental organizations, parliamentarians and other representatives of civil society from throughout the UNECE region and beyond, gathered here in Riga at the third session of the Meeting of the Parties,

Have resolved as follows:

1. We affirm our belief in the importance of the Aarhus Convention as a uniquely effective international legal instrument promoting environmental democracy; strengthening the link between the protection, preservation and improvement of the environment and human rights; and thereby contributing to sustainable and environmentally sound development.
2. We welcome the increase in the number of States that have ratified, approved, accepted or acceded to the Convention since our last meeting and encourage other States, both within and outside the UNECE region, to ratify, approve, accept or accede to it at the earliest opportunity.
3. We welcome furthermore the real and tangible progress made by many Parties to implement the Convention, as reflected in particular in the national implementation reports. In many countries throughout Europe and Central Asia, Governments have adapted their laws and are improving practices to bring them into line with the requirements of the Convention. We consider this as a major achievement.
4. We note, however, that in a significant number of countries, major challenges remain with regard to the task of fully implementing the Convention. The national implementation reports, the findings of the Compliance Committee and the outcomes of various workshops, seminars and surveys indicate that these challenges include but are not limited to the following:
 - (a) The need to establish adequate legislative, regulatory or administrative frameworks and develop detailed procedures;
 - (b) The need to reduce gaps between the legal, regulatory and administrative requirements and the actual practice;
 - (c) The need to implement the provisions of the Convention effectively in transboundary contexts;
 - (d) The need for public authorities to take responsibility for the quality and level of public participation, including where developers are mandated to organize the public participation process;
 - (e) The need to provide for appropriate levels of discussion and feedback in the course of public participation, including where consultation is organized through electronic means;
 - (f) The need to ensure that members of the public, including non-governmental organizations, are afforded appropriate opportunities to participate effectively in decision-making processes, inter alia by providing for a sufficiently broad interpretation of the public concerned and establishing sufficiently broad standing criteria in the context of appeals procedures;
 - (g) The need to remove or reduce practical barriers to access to justice, such as financial barriers, access to legal services and lack of awareness among the judiciary.
5. We therefore commit ourselves, within our own jurisdictions or spheres of activity, to facing those challenges. In doing so, we recognize that the Convention, as an international treaty, establishes a set of standards that are designed to be achievable across a large and politically diverse region, and that achieving basic compliance with those standards, while essential, should not set a limit on our efforts. In this regard, we encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than the minimum required under the Convention.
6. We also urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision making and access to justice in environmental matters even where such measures would not necessarily involve any breach of the Convention.
7. We note that a small number of Parties have problems of compliance. Taking into account the non-confrontational and consultative nature of the compliance mechanism, we express the hope that the facilitation and support provided through the compliance mechanism will help those Parties to achieve full compliance. At the same time, we recognize the need to take firm action with respect to Parties that persistently fail to comply with the Convention and do not make efforts to achieve compliance.
8. The adoption of a strategic plan marks an important milestone for the Convention. Through this plan, we commit ourselves to prioritizing more effective implementation of the Convention, including through capacity-building activities, while recognizing the need to encourage more countries to become Parties to the Convention as well as the need for

further work on particular themes under the Convention. Furthermore, we are convinced that the experience gained in implementing the Convention serves as a basis for further strengthening environmental democracy in sustainable development policy formulation and implementation.

9. Public access to information, as well as being a right in itself, is essential for meaningful public participation and access to justice. When properly implemented, the right to information leads on the one hand to more transparent, accountable government and on the other to a more informed, environmentally aware public. We resolve to strengthen our efforts to streamline the flow of environmental information to the public and to ensure that any use of exemptions to the release of information is kept to a minimum and is always strictly justified.

10. Electronic tools have dramatically increased the possibilities for putting environmental information in the public domain, but their potential has yet to be fully realized. Whereas increasing volumes of environmental information may be obtained through the Internet, greater use of electronic tools to facilitate public participation processes could and should be made.

11. Pollutant release and transfer registers are effective tools contributing to the prevention and reduction of pollution of the environment, promoting corporate accountability and enabling the public to know about immediate sources of pollution in their neighbourhood. We welcome the increasing number of States that have established such registers. We note the progress towards entry into force of the Kiev Protocol on Pollutant Release and Transfer Registers and call upon all Signatories to the Protocol and other interested States to ratify, approve, accept or accede to it at the earliest opportunity with a view to bringing about its entry into force by the end of 2008. We also encourage prospective Parties to the Protocol to apply its provisions to the maximum extent possible pending its entry into force.

12. The Aarhus Clearinghouse for Environmental Democracy has proven itself as a leading portal to a wide range of information relevant to the themes of the Convention. We welcome the growth in both its content and usage, and encourage the secretariat and the focal points for the national nodes to continue to work with this valuable resource.

13. We recognize that procedures enabling the public to participate effectively in decision-making, whether on specific activities or on more strategic levels, lie at the heart of the Convention. Despite this, significant challenges in creating the conditions for effective participation remain, such as failure to adequately notify the public concerned, lack of early opportunities for participation, unwillingness among public authorities to take due account of comments received, insufficient expertise among the public or public authorities, and difficulties in applying public participation procedures in transboundary contexts. We recognize that there is a need to increase our activities in this area in such a way as to address these challenges. We also consider it important to engage more fully with the experts responsible for designing and facilitating public participation procedures.

14. With respect to public participation in strategic decision-making, we note the mutually reinforcing character of parts of the Aarhus Convention and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), and call upon Parties and other interested States to ratify and implement the Protocol on Strategic Environmental Assessment at the earliest opportunity.

15. We acknowledge the important role that the public, and in particular environmental organizations and public interest lawyers, can play in supporting the enforcement of laws related to the environment when adequate opportunities to challenge decisions, acts and omissions through administrative or judicial review processes are provided. We encourage all Parties to create the conditions which can enhance that role, including through the establishment of sufficiently broad standing criteria, the implementation of measures aimed at overcoming financial or other obstacles, and support for public interest environmental law non-governmental organizations.

16. The emergence of genetic engineering is one of the major technological developments of the modern era, with significant implications for the environment. Given the high level of public interest in the topic and the need for rational and informed debate, establishing balanced procedures to facilitate effective public participation in decision-making in this field is of paramount importance. In this regard, we note the progress towards entry into force of the amendment on genetically modified organisms (GMOs) that was adopted by consensus at our second session in Almaty, Kazakhstan, and encourage all Parties that have not done so to ratify, approve or accept the amendment with a view to bringing about its entry into force by early 2009. We also encourage Parties to apply the provisions of the amendment to the maximum extent possible pending its entry into force. We recognize the value of further collaboration with the bodies of the Cartagena Protocol on Biosafety in activities aimed at supporting the application of the Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to GMOs and the implementation of the Almaty amendment on GMOs.

17. We welcome the work done to consult widely with international forums on the subject of the Almaty Guidelines on promoting the application of the principles of the Aarhus Convention in international forums, which has led to greater awareness of both the Convention and the Almaty Guidelines. We affirm our commitment to promoting and applying the Guidelines and recognize that more emphasis needs to be given to consultations within governments so as to ensure that the Guidelines are applied consistently by all branches of government. We also affirm that the processes under the Convention itself, as well as those under the Meeting of the Parties to the Kiev Protocol on Pollutant Release and Transfer Registers, once it is established, should be a model for the application of the Almaty Guidelines.
18. We recognize the importance of measures to raise awareness and build capacity both within public authorities and the judiciary and among those seeking to exercise their rights under the Convention, notably non-governmental organizations. We call on the donor community to increase its support for capacity-building programmes and projects aimed at strengthening the implementation of the Convention. We welcome the emergence of "Aarhus Centres" in several countries and encourage their development in more countries.
19. We welcome the constructive role that representatives of civil society and in particular environmental organizations continue to play in supporting the implementation of the Convention, including through awareness-raising and capacity-building, through providing input to the compliance and reporting mechanisms and through participation in the Bureau.
20. The support provided by international and regional organizations, including the regional environmental centres, has also been crucial to the successes achieved in promoting more effective implementation of the Convention and will remain crucial in facing the challenges ahead. We welcome the efforts of the secretariat to coordinate relevant capacity-building activities of international and regional organizations through the capacity-building coordination framework, and invite all those involved to continue to collaborate within this framework so as to achieve synergies and optimize the use of resources.
21. The Convention's compliance and reporting mechanisms have provided essential information on the extent to which the objective and principles of the Convention have become a reality on the ground and on the problems that remain. We note that the public involvement in those mechanisms has enriched them, increased the sense of broad ownership of the Convention and helped to expose problems with regard to implementation and compliance which would otherwise not necessarily have come to light.
22. The *Implementation Guide* to the Convention has provided a valuable source of guidance on the text of the Convention. Since it was published in 2000, experience with the implementation of the Convention has accumulated, both within the Parties and through the compliance and reporting mechanisms. In addition, the amendment on genetically modified organisms and various sets of recommendations and guidance have been adopted by the Meeting of the Parties. These combined factors point to the possible need for an updated version of the *Implementation Guide* to be produced during the coming intersessional period.
23. Recalling decision II/9, we reiterate the invitation to States outside the UNECE region to accede to the Convention where it suits their particular circumstances, and reaffirm our willingness to support the promotion of principle 10 of the Rio Declaration on Environment and Development at the global level and in countries outside the UNECE region.
24. While the Convention has promoted more democratic values and practices in the environmental field, it can and should serve as an inspiration for promoting greater transparency and accountability in all spheres of government. In this regard, we express our willingness to share the experiences gained with promoting access to information, public participation and access to justice in the environmental fields with those promoting these values in other fields as an essential contribution to sustainable development.
25. We commit ourselves to maintaining the open and participatory character of the processes under the Convention, working in partnership with a wide range of actors as we move forward to achieve our common goals.
26. We express our appreciation and gratitude to the Government of Latvia for having undertaken to host the third meeting of the Parties. We welcome and accept the offer of the Government of the Republic of Moldova to host the fourth meeting of the Parties in 2011.

CHISINAU DECLARATION

adopted at the fourth meeting of the Parties
held from 29 June to 1 July 2011, Chisinau

Rio plus Aarhus — 20 years on: bearing fruit and looking forward

1. We, the Ministers and heads of delegation from Parties and Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), together with representatives of other States, international, regional and non-governmental organizations, parliamentarians and other representatives of civil society throughout the United Nations Economic Commission for Europe region and beyond, gathered at the fourth session of the Meeting of the Parties, are convinced that environmental rights and democracy are essential elements of good governance and informed decision-making and a prerequisite for achieving the objective of sustainable development. Since the adoption of the Rio Declaration in 1992, and continuing through the 2002 World Summit on Sustainable Development, we have seen a continued reinforcement of environmental democracy, including the adoption of the Aarhus Convention, its Protocol on Pollutant Release and Transfer Registers, as well as the United Nations Environment Programme Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters, which reflect the Aarhus principles at the global level.

2. The Convention has strongly contributed to putting Principle 10 of the Rio Declaration into practice and has proved an effective tool for promoting public participation in environmental decision-making and access to information and justice in environmental matters. It will continue to do so through, among other things, the compliance mechanism — a special instrument in the sense that it can be triggered directly by the public; the active and continuous participation of civil society representatives through all its processes; an effective clearinghouse mechanism, which showcases information on laws and practices throughout the UNECE region relevant to public rights; and the capability to address many sectoral environmental matters. We recognize there are still considerable obstacles to overcome in order to achieve a full and balanced application of Principle 10 in the Aarhus family. We remain committed to work for the full implementation of the Convention.

3. Openness, transparency, a wide participatory approach and accountability are key principles and objectives of the Aarhus Convention. Through the promotion of these principles in international environmental decision-making processes, the principles of the Aarhus Convention can be directly applied to the United Nations Conference on Sustainable Development (Rio+20) process. We underline the importance of promoting these principles in international forums and of continuing to promote them in the preparations for Rio+20 in 2012.

4. Worldwide, social, economic and environmental challenges are becoming increasingly complex and interrelated. This fact should not discourage the public from involvement in decision-making. Governments must provide the necessary stimulus, tools, information and assistance to enable transparent decision-making processes in order to ensure informed, balanced and effective public participation. Making decisions and decision-making processes fully accountable to the public whom they should serve should become essential and not only procedural.

I. AARHUS AND THE GREEN ECONOMY

5. The will and action of Governments and intergovernmental bodies to properly reflect public concerns should be matched by commitment and action from all stakeholders, including the wider business community, in order to achieve sustainable development. In this regard, corporate social and environmental responsibility, transparency and accountability could help to achieve this goal. Clear action should be further promoted among the wider business community.

6. The recent economic crisis and recovery programmes can provide both an incentive and an opportunity to take a more sustainable path. Innovation and technological progress can contribute to reducing our ecological footprint, but by themselves they will not lead to sustainability and a better quality of life. There has been progress in recognizing the economic benefits of sustainability as well as the potential opportunities it presents for society as a whole, including enterprise. The economic and social value of the environment and environmental impacts of today's actions should be fully reflected in all decisions at policy, strategic and project levels, particularly in the light of increasing pressure on resources for rapid global economic development and population growth. The social dimension of sustainable development — which includes key elements such as poverty eradication, employment, social inclusion, corporate responsibility and gender equality — is also closely linked to public participation in decision-making.

7. Similarly to the greening of the economy, public participation in decision-making is not a self-standing objective, but rather an instrument for achieving the sustainability and well-being of society. We consider that, in line with Principle 10, citizens should be invited to participate in defining and implementing green economy programmes and in choosing the most appropriate road maps to sustainability.

II. AARHUS AND ENVIRONMENTAL GOVERNANCE

8. Achieving good environmental decision-making at the national level is closely related to environmental governance at the global level. In this regard, we consider that the preparations for Rio+20 and its deliberations should serve as a model of how to implement Principle 10 of the Rio Declaration, with a high level of public participation, including a wide range of stakeholders being given an opportunity to present their visions for a sustainable future and to influence decision-making.

9. While the last two decades have witnessed the adoption or upgrading of a range of important multilateral environmental instruments, including the Aarhus Convention itself, the efficiency of international governance on environmental matters could still be significantly improved. The environmental part of international policies remains arguably the weakest of the three pillars of sustainable development.

10. Improved coordination, effectiveness and a synergistic implementation of multilateral environmental instruments must continue to be a priority. The Aarhus Convention provides an opportunity in this regard, through its engagement with other multilateral agreements, as has been the case already through work on the promotion of public participation in international forums and the regular exchange of information on activities among convention secretariats. Joint workshops, such as with the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, are also good examples of how Aarhus and other international conventions have succeeded in working together.

11. It is vital that the public has effective channels for input into international environmental processes as well as input at the national level. The process of deciding on priorities, mandates and financial contributions for the range of international agendas, by no means limited to environmental policy, should not only be more efficiently coordinated, but also transparent, inclusive and accountable. When defining positions in relation to their international agenda, Governments should strive to reflect the views of the public on sustainable development.

12. We request the Participants in the Rio+20 Conference to take into account the Aarhus Convention principles in their consideration of the institutional framework for sustainable development, including the options for broader institutional reform identified in the United Nations Environment Programme's Nairobi-Helsinki Outcome, as a contribution to strengthening the institutional framework for sustainable development by improving international environmental governance.

III. LOOKING AHEAD

13. We recognize there are still steps to be taken in order to achieve a full and balanced application of Principle 10 in the Aarhus family. Both on a global scale, by further introducing the Aarhus Principles in other environmental conventions, as well as within our Convention, the planned in-depth evaluation of the functioning of the Convention will help us in further improving its implementation, thus strengthening our contribution to putting Principle 10 into practice.

14. We are aware that we owe it to future generations to minimize the depletion of environmental resources that should remain available to them. The children and youth of today are watching our steps, which will determine the quality of life for them and their children. We have a duty to serve by example in making the right choices.

15. We consider that our work in implementing the Aarhus Convention is paving the way for a universal application of Principle 10. While recognizing that there are different ways to implement that principle, we offer to share our experience with all countries that wish to join the Aarhus family, to replicate its achievements or to be inspired by this most ambitious venture in environmental democracy undertaken under the auspices of the United Nations. In this regard, we draw their attention to the procedure for accession. We stand ready to contribute to the success and outcomes of Rio+20.

ENDNOTES

Disclaimer:

While care has been taken by the authors to ensure the substantive accuracy of the following endnotes, they have not been formally edited.

The internet links cited in these endnotes may change over time. If a listed link does not work, please check the online version of the Implementation Guide for updates.

- 1 Available from <http://www.unece.org/index.php?id=21437>.
- 2 ECE/MP.PP/2008/2/Add.17 (decision III/9), annex I, p. 3.
- 3 Jonas Ebbesson, "Public Participation", in *The Oxford Handbook of International Environmental Law* D. Bodansky, J. Brunnee and E. Hey, eds. (Oxford, Oxford University Press, 2007) pp. 681-703.
- 4 Jerzy Jendroška, "Aarhus Convention and Community Law: the Interplay", *Journal for European Environmental & Planning Law*, vol. 2, No. 1, 2005, p. 12.
- 5 ENVWA/R.38 (draft ECE Charter on Environmental Rights and Obligations), annex I.
- 6 Jeremy Wates, *Access to Environmental Information and Public Participation in Environmental Decision-making: UN ECE Guidelines: From Theory to Practice* (Brussels, European Environmental Bureau, 1996), p. 5.
- 7 General Assembly resolution 2200A (XXI), "Article 19 (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals."
- 8 The Conference was organized by the Institute for European Environmental Policy and the International Institute of Human Rights.
- 9 Now known as the Organization for Security and Cooperation in Europe (OSCE).
- 10 Philippe Sands, *Principles of international environmental law I: Frameworks, standards and implementation* (Manchester and New York, Manchester University Press, 1995), pp. 144-145.
- 11 Ibid.
- 12 E/CN.4/Sub.2/1994/9, annex I.
- 13 ECE/MP.PP/2/Add.1 (Lucca Declaration), paras. 32-33; ECE/MP.PP/2005/2/Add.13 (decision II/9); ECE/MP.PP/2008/2/Add.16 (decision III/8), objective II.4; ECE/MP.PP/2011/2/Add.1 (decision IV/5).
- 14 ECE/MP.PP/2003/3.
- 15 ECE/MP.PP/7.
- 16 ECE/MP.PP/2011/2/Add.1 (decision IV/4, annex).
- 17 ECE/MP.PP/WG.1/2007/L.4 (Guidance on reporting requirements prepared by the Compliance Committee).
- 18 *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 2, annex, para. 80.
- 19 *Tatar v. Romania*, Application No. 67021/01, ECHR, Judgement of 29 January 2009.
- 20 *Branduse v. Romania*, Application No. 6586/03, ECHR, Judgement of 7 April 2009.
- 21 Hans-Dietrich Treviranus, "Preamble", in *Encyclopedia of Public International Law*, Vol. III, R. Bernhardt ed., (Amsterdam, Elsevier, 1997), p.1097.
- 22 Ibid., p.1098.
- 23 Lyle Glowka and others, *A Guide to the Convention on Biological Diversity*, 2nd printing (1996) (IUCN, Gland and Cambridge, 1994), p. 9.
- 24 General Assembly resolution 2398 (XXIII).
- 25 General Assembly resolution 44/228.
- 26 Sands, *Principles of international environmental law*, p. 99.
- 27 General Assembly resolution 37/7, annex.
- 28 Sands, *Principles of international environmental law*, p. 42.

- 29 E/CN.4/Sub.2/1994/9 (Review of further developments in fields with which the sub-commission has been concerned: human rights and the environment).
- 30 In 2005, the Secretary-General prepared a follow-up report on human rights and the environment as part of sustainable development (E/CN.4/2005/96, para. 54). This noted that the Aarhus Convention continued to represent the most advanced example of the link between the environment and human rights at the regional level. In 2011, the Human Rights Council recalled the earlier reports and requested the Office of the High Commissioner for Human Rights to conduct a further detailed analytical study on the relationship between human rights and the environment (A/HRC/RES/16/11). The resulting "Analytical study on the relationship between human rights and the environment" (A/HRC/19/34, 16 Dec. 2011) found that, while much progress has been made in understanding the relationship between human rights and the environment, several important questions remained. These unsettled issues included the need for and potential content of a right to a healthy environment, the role and duties of private actors with respect to human rights and the environment, the extraterritorial reach of human rights and environment, and how to operationalize and monitor the implementation of international human rights obligations relating to the environment. The report suggested that the Human Rights Council consider paying special attention to the relationship between human rights and the environment through its appropriate mechanisms, including through the possibility of establishing a special procedure on human rights and the environment. In March 2012, the Human Rights Council welcomed the above report and decided to appoint for a period of three years, an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/19/L.8/Rev.1).
- 31 World Health Organization, European Conference on Environment and Health, *Environment and health: the European Charter and commentary / First European Conference on Environment and Health, Frankfurt, 7-8 December 1989* (World Health Organization, Regional Office for Europe, Copenhagen, 1990).
- 32 World Health Organization Regional Office for Europe, *Access to Information, Public Participation and Access to Justice in Environment and Health Matters, Report for the Third Ministerial Conference on Environment and Health, London, United Kingdom, 16-18 June 1999*, EUR/ICP/EHCO 02 02 05/12, p. 6.
- 33 World Health Organization European Centre for Environment and Health, *Concern for Europe's Tomorrow: Health and Environment in the WHO European Region* (Stuttgart, Wissenschaftliche Verlagsgesellschaft, 1995).
- 34 World Health Organization Regional Office for Europe, *Overview of the Environment and Health in Europe in the 1990s*, EUR/ICP/EHCO 02 02 05/6, 04229-29 March 1999, p. 3.
- 35 World Health Organization Regional Office for Europe, *Access to Information, Public Participation and Access to Justice in Environment and Health Matters, Report for the Third Ministerial Conference on Environment and Health, London, United Kingdom, 16-18 June 1999*, p. 5.
- 36 World Health Organization Regional Office for Europe, *Declaration of the Third Ministerial Conference on Environment and Health*, EUR/ICP/EHCO 02 02 05/18 Rev.5, 18 June 1999, para. 30.
- 37 Ibid.
- 38 A/42/427 (Report of the World Commission on Environment and Development: Our Common Future).
- 39 A/CONF.151/26 (Vol. I). Principle 2 of the Rio Declaration on Environment and Development states: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Principle 4 states: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". Other relevant provisions include the Rio Declaration's preamble which refers to the "integrity of the global environmental and developmental system" and principle 25, which states "Peace, development and environmental protection are interdependent and indivisible".
- 40 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7.
- 41 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 177.
- 42 For a discussion of its origins back to 1975, see Marc Pallemarts, "International law in the age of sustainable development: a critical assessment of the UNCED process", *Journal of Law and Commerce*, vol. 15, No. 36 (1996), p. 623.
- 43 *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 2, annex.
- 44 A/CONF.216/L.1.
- 45 Ibid., paras. 15 and 16.
- 46 Ibid., para. 43.
- 47 Para. 99. The importance of access to information, public participation and access to justice to achieving sustainable development are also reflected elsewhere in the document including, inter alia, paras. 44, 76 (h) and 135.
- 48 The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997. The Treaty of Amsterdam was superseded by the Treaty of Lisbon upon the latter's entry into force on 1 December 2009.
- 49 Articles 8 and 15, para. 2.
- 50 General Assembly resolution A/RES/44/228, preamble and paras. I.3, I.12, I.14 and I.15.
- 51 General Assembly resolution 2398 (XXIII), recognizing the relationship between the enjoyment of basic human rights and the quality of the human environment.

- 52 Article 11 (1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) states "Everyone shall have the right to live in a healthy environment". Article 24 of the African Charter on Human and Peoples' Rights (1981) declares that "All peoples shall have the right to a general satisfactory environment favourable to their development".
- 53 See, for instance, the World Charter for Nature, principle 1; the Stockholm Declaration, principle 1; and the draft principles on human rights and the environment (E/CN.4/Sub.2/1994/9, annex I), principle 21.
- 54 A/RES/61/295.
- 55 A/RES/64/292.
- 56 A/HRC/19/L.8/Rev.1 (resolution 19/4).
- 57 See E/CN.4/Sub.2/1994/9 (Review of further developments in fields with which the sub-commission has been concerned: human rights and the environment).
- 58 See, for instance, *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598, AIR 1991 SC 420; *M.C. Mehta v. Union of India*, (1998) 9 SCC 589.
- 59 See, for instance, *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum v. The Director, Industries and Mineral Development*, Punjab, Lahore 1994 SCMR 2061.
- 60 *Minors OPOSA v. Secretary of the Department of Environment and Natural Resources*, International Legal Materials, vol. 33 No. 168 (1994).
- 61 *Ibid.* This case is described in A.G. M. La Vina, "The right to a sound environment in the Philippines: the significance of the Minors Oposa case", *Review of European Community and International Environmental Law*, vol. 3, No. 4, pp. 246-252.
- 62 "Protected Forests Case", Decision of the Hungarian Constitutional Court, MK. 28/1994 (20 May 1994). See Stephen Stec, "Ecological rights advancing the rule of law in eastern Europe," *Journal of Environmental Law and Litigation*, vol. 13 (1998), pp. 275, 320-21. The case is described in Stephen Stec, "New phase in the legislative struggle for environmental protection in central and eastern Europe", *Ecodecision*, vol. 15 (winter 1995), pp. 22-23.
- 63 *Inter-Environment Wallonie v. Walloon Region*, Constitutional Court of Belgium, 14 Sep 2006, considering article 23 of the Belgian Constitution on the right of everyone to enjoy the protection of a healthy environment.
- 64 "*Sprendums Latvijas Republikas vārdā Rīgā 2008. gada 24. septembrī lietā Nr. 2008-03-03*", Constitutional Court of Latvia, 24 September 2008 and "*Sprendums Latvijas Republikas Rīgā 2009. gada 6. jūlijā lietā Nr. 2008-38-03*" Constitutional Court of Latvia, 6 July 2009. While concerning different facts, in both cases the Court considered article 115 of the Constitution of the Republic of Latvia, which requires the State to protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.
- 65 The Constitutional Court of Slovenia (Dec. No. U-I-30/95-26, 1/15-1996) recognized that the constitutional right to a healthy living environment in article 72 of Slovenia's constitution gave individuals a legal interest before the court "to prevent actions damaging the environment". See Milada Mirkovic, Legal and Institutional Practices of Public Participation: Slovenia, in *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe*, Regional Environmental Center For Central and Eastern Europe ed. (Szentendre, Hungary, REC, June 1998). Available from <http://archive.rec.org/REC/Publications/PPDoors/CEE/PPDoorsCEE.pdf>.
- 66 "*The GECEN-Castellón case*", STS 4460/2008, Supreme Court of Spain, 25 June 2008, considered article 45 of the Spain's constitution which provides that everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.
- 67 *Giacomelli v. Italy*, Application no. 59909/00, ECHR, Judgement of 2 November 2006, para. 76.
- 68 *Ibid.*, para. 78.
- 69 *Ibid.*, para. 77.
- 70 *Ibid.*, para. 82.
- 71 *Ibid.*, para. 83.
- 72 Edith Brown Weiss, "Our rights and obligations to future generations for the environment", *American Journal of International Law*, vol. 84 (1990), p. 198-199.
- 73 Sands, *Principles of international environmental law*, p. 199-200.
- 74 Glowka, *A Guide to the Convention on Biological Diversity*, p. 14.
- 75 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226.
- 76 *Minors OPOSA v. Secretary of the Department of Environment and Natural Resources*, International Legal Materials, vol. 33 No. 168 (1994).
- 77 For an examination of intergenerational standing in the context of the United States Endangered Species Act, see R.A. Just "Comment: intergenerational standing under the Endangered Species Act: giving back the right to biodiversity after *Lujan v. Defenders of Wildlife*", *Tulane Law Review*, vol. 71 No.2 (1996), pp. 529, 597-633.
- 78 *Minors OPOSA v. Secretary of the Department of Environment and Natural Resources*, International Legal Materials, vol. 33 No. 168 (1994).
- 79 See "Stockholm Statement on the draft convention on access to environmental information and public participation in environmental decision-making", *GLOBE Europe News*: Issue 1 (January 1998).
- 80 UNESCO-EPD-97/CONF.401/CLD.2.

- 81 The OVOS is a procedure used in a number of countries of the former Soviet Union, during which the developer collects all the necessary information concerning the potential impact on the environment of the proposed activity and compiles the relevant impact assessment documentation. It is discussed in further detail in the section on “Public participation in the OVOS/expertiza system”.
- 82 For more about particular problems in the implementation of EU environmental law in non-environmental fields, see Ludwig Kramer, “Right of Complaint and Access to Information at the Commission of the EC”, *Environmental Rights: Law, Litigation and Access to Justice* in Deimann, Sven and Bernard Dyssli eds., (London, Cameron May, 1995), pp. 53-69.
- 83 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.
- 84 See, for instance, *Guerra v. Italy*, Application no. 14967/89, ECHR, Judgement of 19 February 1998.
- 85 See *Official Journal of the European Communities*, L 099, 11/04/1992, p. 1–7.
- 86 ECE/MP.PP/2005/2/Add.2 (decision II/1).
- 87 The meeting, held in Sofia, on 3 November 1989, produced the mandate for the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.
- 88 Report on Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-Operation in Europe, Sofia, 16 October – 3 November 1989. Available from www.osce.org/eea/14075.
- 89 ECE/MP.PP/2/Add.1, para. 2 (Lucca Declaration).
- 90 ECE/MP.PP/2008/2/Add.1 (Riga Declaration), para 24.
- 91 ECE/MP.PP/2011/2/Add.1 (Chisinau Declaration), para. 1.
- 92 Jonas Ebbesson, “A Modest Promotion of Environmental Democracy and Justice in Transboundary Contexts: The Combined Impact of the Espoo Convention and Aarhus Convention”, *Review of International and European Community Environmental Law* vol. 20, No. 3, (November 2011), pp. 248-257.
- 93 Fourth Ministerial Conference “Environment for Europe” (Aarhus, 23-25 June 1998).
- 94 As of 1 December 2009, the European Union succeeded the European Community in its obligations arising from the Convention in accordance with the provisions of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.
- 95 See Declaration by the Ministers of Environment of the region of the United Nations Economic Commission for Europe, Fourth Ministerial Conference “Environment for Europe” (Aarhus, 23-25 June 1998) (ECE/CEP/41), p. 49.
- 96 ECE/MP.PP/2/Add.1 (Lucca Declaration), para. 2.
- 97 *Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002* (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), chap. I, resolution 2, annex.
- 98 For earlier formulations of the right to a healthy environment in international legal instruments, see the African Charter on Human and Peoples’ Rights, adopted at Algiers on 27 June 1981, and the Additional Protocol to the American Convention on Human Rights, adopted in San Salvador on 17 November 1988. According to a 1994 article, at that time more than 60 countries and several federal states of the United States had provisions in their constitutions concerning the right to a healthy environment. See A. Fabra Aguilar and N. Popovic, “Lawmaking in the United Nations: the UN Study on Human Rights and the Environment”, *Review of European Community & International Environmental Law*, vol. 3, No. 17 (1994), pp. 197, 199.
- 99 The United Nations Special Rapporteur, in her preliminary report on human rights and the environment to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (E/CN.4/Sub.2/1991/8, paras. 13-14), pointed out such a connection between article 3 of the Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights and article 25 of the International Covenant on Economic, Social and Cultural Rights. See A. Fabra Aguilar and N. Popovic, “Law Making in the United Nations”.
- 100 Thus, it addresses one of the shortcomings in the establishment of the right to a healthy environment—that is, the lack of effective implementation. See E/CN.4/Sub.2/1994/9 (Review of further developments in fields with which the sub-commission has been concerned: human rights and the environment).
- 101 ECE/MP.PP/C.1/2006/4/Add.2, para. 43.
- 102 ECE/MP.PP/2008/5/Add.4, para. 27.
- 103 ECE/MP.PP/C.1/2005/2/Add.1, para. 17.
- 104 ECE/MP.PP/C.1/2005/2/Add.1, para. 17.
- 105 Jonas Ebbesson, “Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention”, *Erasmus Law Review*, vol. 4, No. 2 (2011), p 71-89.
- 106 See “Stockholm Statement on the draft convention on access to environmental information and public participation in environmental decision-making”, *GLOBE Europe News: Issue 1* (January 1998).
- 107 *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, ECHR, Judgement of 14 April 2009.
- 108 ECE/MP.PP/C.1/2010/6/Add.3, para. 130.
- 109 Ibid.

- ¹¹⁰ ECE/MP.PP/C.1/2006/4/Add.2.
- ¹¹¹ Judgement of the Court of First Instance (Fourth Chamber) of 25 April 2007.
- ¹¹² For an analysis of *WWF-EPO v. Council of the European Union*, see Sofia de Abreu, Ferreira, "The Fundamental Right of Access to Environmental Information in the EC: A Critical Analysis of *WWF-EPO v. Council*", *Journal of Environmental Law*, vol. 19, No. 3 (2007), p. 399-408.
- ¹¹³ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, article 2, para. 1.
- ¹¹⁴ Convention on Biological Diversity, article 2.
- ¹¹⁵ Glowka, *A Guide to the Convention on Biological Diversity*, p. 16.
- ¹¹⁶ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, article 3.
- ¹¹⁷ Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.
- ¹¹⁸ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast).
- ¹¹⁹ See, for instance, S. Rose-Ackerman, "American administrative law under siege: is Germany a model?", *Harvard Law Review*, vol. 107, No. 6 (1994), pp. 1279, 1292-1293, 1300.
- ¹²⁰ ECE/MP.PP/C.1/2009/6/Add.3, para. 29.
- ¹²¹ ECE/MP.PP/C.1/2006/2/Add.1, para. 20.
- ¹²² ECE/MP.PP/C.1/2009/2/Add.1, para. 30 (b).
- ¹²³ ECE/MP.PP/C.1/2005/2/Add.1, para.18.
- ¹²⁴ *Office of Communications v. Information Commissioner and T-Mobile*, United Kingdom Information Tribunal EA/2006/0078, 4 September 2007.
- ¹²⁵ Article 1.
- ¹²⁶ ECE/MP.PP/C.1/2005/2/Add.3, para. 26.
- ¹²⁷ ECE/MP.PP/C.1/2005/2/Add.5, para.16.
- ¹²⁸ Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, Judgement of the Court (Second Chamber) of 15 October 2009. That such requirements would not be consistent with the Aarhus Convention was pointed out in the first edition of the Aarhus Convention Implementation Guide.
- ¹²⁹ ECE/MP.PP/C.1/2007/4/Add.1, para. 87.
- ¹³⁰ ECE/MP.PP/C.1/2005/2/Add.3, para. 40.
- ¹³¹ ECE/MP.PP/C.1/2006/4/Add.2.
- ¹³² ECE/MP.PP/C.1/2005/2/Add.5.
- ¹³³ *Ibid.*, para. 22.
- ¹³⁴ ECE/MP.PP/C.1/2006/4/Add.2, para. 43.
- ¹³⁵ *Ibid.*
- ¹³⁶ *Ibid.*, para. 41.
- ¹³⁷ ECE/MP/PP/2008/4 (Synthesis report on the status of implementation of the Convention), para. 27.
- ¹³⁸ Available from http://www.acpmeas.info/publications/Manual_on_Compliance_with_and_Enforcement_of_MEAs.pdf.
- ¹³⁹ Austria's 2011 Aarhus Convention National Implementation Report, para. 14. Available from http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/Austria_NIR_2011.pdf.
- ¹⁴⁰ Czech Republic's 2011 Aarhus Convention National Implementation Report. Available from http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/Czech_Republic_NIR_2011_e.pdf.
- ¹⁴¹ ECE/MP.PP/C.1/2009/6/Add.3, para. 39.
- ¹⁴² See www.ekoszkola.pl.
- ¹⁴³ For more information, see www.mos.gov.pl.
- ¹⁴⁴ This overview of the work of the Aarhus Centres is drawn from three publications produced by the OSCE: *Aarhus Centres – Focus South Caucasus* (2009). Available from <http://www.osce.org/eea/68494>; *Aarhus Centres – Focus Central Asia* (2009). Available from <http://www.osce.org/eea/68495>; and *The Aarhus Centres: A brief introduction* (2012). Available from <http://www.osce.org/eea/89067>.

- 145 Aarhus Centre, Osh, Kyrgyzstan.
- 146 Aarhus Centre, Baku.
- 147 Aarhus Centre, Georgia.
- 148 Aarhus Centre, Yerevan.
- 149 Aarhus Centre, Kazakhstan.
- 150 Aarhus Centre, Khujand, Tajikistan.
- 151 See Section 5, Administrative Procedure Code, 21.06.1993; RT I 1993, 50, 694; 15.09.1993 as amended, described in D. Galligan and D. Smilov, *Administrative Law in Central and Eastern Europe, 1996-1998*, (Budapest: Central European University Press, 1999) p. 85.
- 152 ECE/MP.PP/C.1/2005/2/Add.5, para. 21.
- 153 ECE/MP/PP/2008/4 (Synthesis report on the status of implementation of the Convention), para. 39.
- 154 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, article 2 (8), United Nations, *Treaty Series*, vol. 1936, p. 269.
- 155 S. Stec, "Access to information and public participation in environmental decisionmaking in the Commonwealth of Independent States", *Review of Central and East European Law*, vol. 23 (1997), pp. 355-529.
- 156 ECE/MP.PP/C.1/2005/2/Add.4, para. 18.
- 157 See, for instance, ECE/MP.PP/2005/2/Add.6 (decision II/5), para. 3.
- 158 The "Protected Forests" case is described in more detail in Stephen Stec, ed., *Handbook on Access to Justice under the Aarhus Convention* (Szentendre, Hungary, The Regional Environmental Center for Central and Eastern Europe, 2003) at pp. 235-236. Available from http://documents.rec.org/publications/accesstojustice_March2003_EN.pdf.
- 159 ECE/MP.PP/2005/2/Add.5 (decision II/4), annex.
- 160 *Ibid.*, para.1.
- 161 *Ibid.*, paras. 5 and 6.
- 162 *Ibid.*, paras. 4.
- 163 *Ibid.*, paras. 9.
- 164 This may be contrasted with the Protocol to the Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, which has good active information provisions but did not follow Aarhus principles on passive information.
- 165 Hungary, Act No. CLXVIII of 2009 on the Protection of Fair Procedure.
- 166 Hungary, Act IV of 1978 on the Criminal Code, section 257.
- 167 ECE/MP.PP/C.1/2010/4/Add.2, para. 64.
- 168 ECE/MP.PP/C.1/2010/6/Add.2, para. 47.
- 169 ECE/MP.PP/C.1/2010/6/Add.1, para. 53.
- 170 Online publication available from http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf.
- 171 Jonas Ebbesson, "A Modest Promotion of Environmental Democracy and Justice in Transboundary Contexts: The Combined Impact of the Espoo Convention and Aarhus Convention", *Review of International and European Community Environmental Law* vol. 20, No. 3, (November 2011), pp. 248-257.
- 172 *Ibid.*
- 173 E/CN.4/Sub.2/1994/9, annex I (draft principles on human rights and the environment), paragraph 3.
- 174 ECE/MP.PP/C.1/2005/2/Add.5, para. 16.
- 175 EIA/IC/INFO/4 (Belgium), see http://www.unece.org/env/eia/implementation/eia_ic_info_4.html.
- 176 Matthias Sauer, Chair of the Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context, letter to the Government of Belgium, 16 March 2010. Available from http://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/eia.ic.info/eia.ic.info.4/eia.ic.info.4_letter_to_Belgium_3.pdf.
- 177 *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, judgement of 19 September 2006 (merits, reparations and costs), Series C No. 151 (2006).
- 178 For the current status of ratifications of the Council of Europe Convention on Access to Official Documents, see: <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG>

- ¹⁷⁹ *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05, ECHR, Judgement of 14 April 2009; *Kenedi v. Hungary*, Application 31475/05, ECHR, Judgement of 26 May 2009.
- ¹⁸⁰ See, for instance, *Guerra v. Italy*, Application no. 14967/89, ECHR, Judgement of 19 February 1998.
- ¹⁸¹ CCPR/C/GC/34.
- ¹⁸² The compatibility of this provision with the Aarhus Convention has not yet been examined by the Aarhus Convention Compliance Committee or the Court of Justice of the European Union.
- ¹⁸³ The Task Force on Electronic Information Tools was established by the Meeting of the Parties at its first session (Lucca, 21-23 October 2002) through decision I/6 on promoting the use of electronic and other information tools (ECE/MP.PP/2/Add.7).
- ¹⁸⁴ ECE/MP.PP/2011/2/Add.1 (decision IV/1).
- ¹⁸⁵ See ECE/MP.PP/2005/2/Add.4 (decision II/3), annex.
- ¹⁸⁶ ECE/MP.PP/C.1/2009/2/Add.1, para. 34.
- ¹⁸⁷ ECE/MP.PP/C.1/2005/2/Add.1, para. 20.
- ¹⁸⁸ ECE/MP.PP/C.1/2009/8/Add.1.
- ¹⁸⁹ Belgium, Ordinance of the Brussels Region, article 5, para. 3.
- ¹⁹⁰ Norway, Act No. 16 of 19 May 2006 relating to the right of access to documents held by public authorities and public undertaking.
- ¹⁹¹ ECE/MP.PP/C.1/2005/2/Add.3, para. 33.
- ¹⁹² ECE/MP.PP/C.1/2012/12, para. 75.
- ¹⁹³ *Ibid.*, para. 77.
- ¹⁹⁴ Case C-266/09, *Commission of the European Communities v Kingdom of the Netherlands*, Judgement of the Court (Fourth Chamber) of 16 December 2010.
- ¹⁹⁵ ECE/MP.PP/C.1/2009/6/Add.3, para. 38.
- ¹⁹⁶ Russian Federation Law on State Secrets (1993).
- ¹⁹⁷ Hungary, Act LXV of 1995 on State and Official Secrets, article 3.
- ¹⁹⁸ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), article 3, para. 4.
- ¹⁹⁹ ECE/MP.PP/2008/5/Add.7, para. 28.
- ²⁰⁰ *Ibid.*, para. 29.
- ²⁰¹ ECE/MP.PP/C.1/2009/2/Add.1 (Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community), para. 31 (a).
- ²⁰² *Ibid.*, para. 31 (b).
- ²⁰³ ECE/MP.PP/C.1/2009/2/Add.1, para. 30 (c).
- ²⁰⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
- ²⁰⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.
- ²⁰⁶ Case T-264/04, *WWF-EPO v. Council of the European Union*, judgement of Court of First Instance, 25 April 2007.
- ²⁰⁷ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006, Article 6, para. 1.
- ²⁰⁸ ECE/MP.PP/2011/11/Add.2, para. 66.
- ²⁰⁹ *Ibid.*, para. 67.
- ²¹⁰ *Ibid.*, para. 69.
- ²¹¹ Armenia, Law on Procedures for Consideration of Suggestions, Applications and Grievances of Citizens (12 April 1990).
- ²¹² Hungary, Act CXL of 2004 on the General Rules of Administrative Procedures and Services, section 22, para. 2.
- ²¹³ Ralph Hallo, ed., *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC*, (London, Kluwer Law International, 1996), p.76.
- ²¹⁴ Norway, Act No. 16 of 19 May 2006 relating to the right of access to documents held by public authorities and public undertaking, section 32, para. 2.

- 215 Ibid., section 31, para. 1.
- 216 Ibid., section 31, para. 2.
- 217 Ibid., section 11.
- 218 ECE/MP.PP/C.1/2009/6/Add.3, para. 39.
- 219 Ibid., para. 40.
- 220 ECE/MP.PP/C.1/2009/8/Add.1, para. 79.
- 221 Case C-217/97, *Commission of the European Communities v. Federal Republic of Germany*, judgement of the Court (Sixth Chamber) of 9 September 1999, para. 47.
- 222 Information Tribunal of the United Kingdom, *David Markinson v. Information Commissioner* Appeal No. EA/2005/0014, Decision of 14 March 2006. Available from www.informationtribunal.gov.uk/DBFiles/Decision/i161/Markinson.pdf.
- 223 *Report of UNCED*, vol. I, annex.
- 224 ECE/MP.PP/2008/5/Add.7, para. 27.
- 225 Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances.
- 226 Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC.
- 227 *Guerra v. Italy*, Application no. 14967/89, ECHR, Judgement of 19 February 1998.
- 228 Ibid., para. 60.
- 229 *David Edwards and Lilian Pallikaropoulos v. The Environment Agency, The First Secretary of State, Secretary of State for the Environment Food and Rural Affairs - and - Cemex UK Cement Limited (formerly Rugby Limited) (Interested Party)*, 31 July 2006, 2006 EWCA Civ 877.
- 230 ECE/MP.PP/2011/2/Add.1 (decision IV/1).
- 231 See <http://www.eea.europa.eu/data-and-maps#tab-datasets>.
- 232 See www.ecolex.org.
- 233 For instance, the Netherlands.
- 234 For instance, the United Kingdom.
- 235 Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme.
- 236 See further, www.ec.europa.eu/environment/emas/index_en.htm.
- 237 Maastricht Treaty, article 129 (a). Since the entry into force of the Maastricht Treaty, consumer protection has been a full Community policy. While the Treaty's general principles state that the Community must contribute to the "strengthening of consumer protection", Article 129 (a) provides the legal framework for consumer policy.
- 238 ECE/MP.PP/2011/2/Add.1 (decision IV/1), paras. 7, 8, 11 (a) and (b).
- 239 Peter Coenen, "New developments in the Emission Inventory of the Netherlands", The Netherlands Organization for Applied Scientific Research. Available from www.epa.gov/ttn/chief/conference/ei17/session1/coenen.pdf.
- 240 United Nations publication, ECE/MP.PP/7. Available from www.unece.org/env/pp/prtr.guidancedev.htm.
- 241 OECD, *Pollutant Release and Transfer Registers (PRTs): A Tool for Environmental Policy and Sustainable Development—Guidance Manual for Governments*, OECD/GD(96)32 (Paris, OECD, 1996).
- 242 Barry Sadler, *Environmental Assessment in a Changing World: evaluating practice to improve performance*, (Ottawa, Canadian Environmental Assessment Agency, 1996).
- 243 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).
- 244 UNEP/CBD/COP/6/20.
- 245 ECE/MP.PP/C.1/2006/2/Add.1 (Findings and recommendations with regard to communication ACCC/C/2004/8 concerning compliance by Armenia), para. 28.
- 246 ECE/MP.PP/2008/5/Add.6 (Findings and recommendations with regard to communication ACCC/C/2006/16 concerning compliance by Lithuania), para. 57.
- 247 ECE/MP.PP/C.1/2006/4/Add.2 (Findings and recommendations with regard to communication ACCC/C/2005/11 concerning compliance by Belgium), para. 29.
- 248 ECE/MP.PP/2008/5/Add.6, para. 58.

- 249 ECE/MP.PP/C.1/2007/4/Add.1, para. 68.
- 250 *Ibid.*, para. 67.
- 251 Jerzy Jendroška, "Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention", *Journal for European Environmental & Planning Law*, vol. 6, No. 4 (December 2009), pp. 495-515.
- 252 ECE/MP.PP/C.1/2009/8/Add.1, para. 82.
- 253 *Ibid.*
- 254 ECE/MP.PP/C.1/2006/4/Add.2 (Findings and recommendations with regard to communication ACCC/C/2005/11 concerning compliance by Belgium), para. 29.
- 255 ECE/MP.PP/2011/11/Add.2, para. 74.
- 256 *Ibid.*, para 76.
- 257 ECE/MP.PP/2008/5, para. 57.
- 258 *Ibid.*, para. 58.
- 259 Case C–290/03, *The Queen, on the application of Diane Barker v. London Borough of Bromley*, 2006 E.C.R I–03949.
- 260 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast), article 4, para. 1, and article 24 and annex IV.
- 261 ECE/MP.PP/C.1/2009/4/Add.1, para. 32.
- 262 *Ibid.*, para. 33.
- 263 ECE/MP.PP/C.1/2009/2/Add.1, para. 36.
- 264 EC Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.
- 265 European Commission, *Guidance for EIA screening*, (Luxembourg, Office for Official Publications of the European Communities, June 2001). Available from <http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf>.
- 266 ECE/MP.PP/C.1/2005/2/Add.3, para. 28.
- 267 EC Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, article 6, para. 3.
- 268 ECE/MP.PP/2008/5, para. 56.
- 269 ECE/MP.PP/2011/11/Add.2, para. 86.
- 270 ECE/MP.PP/2011/11/Add.1, para. 70.
- 271 Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances. The directive was extended by Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances.
- 272 ECE/MP.PP/2008/5/Add.6, para. 67.
- 273 ECE/MP.PP/C.1/2009/4/Add.1, para. 41.
- 274 ECE/MP.PP/2008/5/Add.6, para. 66.
- 275 ECE/MP.PP/2011/11/Add.2, para. 89.
- 276 ECE/MP.PP/2011/11/Add.1, para. 67.
- 277 ECE/MP.PP/2011/11/Add.2, paras. 67 and 78.
- 278 ECE/MP.PP/2011/11/Add.2, para. 79.
- 279 ECE/MP.PP/2008/5/Add.6, para. 78.
- 280 Poland, Act on Access to the Information on the Environment, Public Participation and the Environmental Impact Assessment of 3 October 2008, article 33, para. 2.
- 281 For example, Czech Republic, Denmark, Estonia, Finland, Latvia, Netherlands, Spain and Sweden.
- 282 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010.
- 283 For an overview, see ECE, "Review of transboundary EIA provisions and initiatives in selected regional and multilateral environmental agreements", Information paper presented to the 9th meeting of the Espoo Convention's Working Group on Environmental Impact Assessment (Geneva, 3–6 April 2006). Available from http://www.unece.org/fileadmin/DAM/env/eia/documents/links_between_conventions/Transboundary%20EIA%20Review%20-%20Main.pdf.
- 284 ECE/MP.PP/2008/5, para. 60.

- 285 ECE/MP.PP/2008/5/Add.6, para. 70.
- 286 ECE/MP.PP/C.1/2009/4/Add.1, para. 44.
- 287 ECE/MP.PP/C.1/2009/8/Add.1, para. 92.
- 288 ECE/MP.PP/2011/11/Add.2, para. 89.
- 289 Ibid., para. 90.
- 290 Ibid., para. 117 (a) (iii).
- 291 ECE/MP.PP/2008/5/Add.6, para. 71.
- 292 Ibid.
- 293 Ibid.
- 294 ECE/MP.PP/C.1/2007/4/Add.1, para. 79.
- 295 ECE/MP.PP/2008/5/Add.6, para.74.
- 296 “Scoping” is a procedural stage in the EIA procedure during which the scope of studies and information to be assessed (in particular those to be covered in the EIA report) is decided. Scoping is sometimes referred to as “designing the EIA programme”.
- 297 “Screening” is a procedural stage prior to an EIA procedure during which it is decided whether an activity is likely to have significant impact on the environment and therefore will require an EIA to be carried out.
- 298 European Commission, Directorate General for Environment, *Study concerning the report on the application and effectiveness of the EIA Directive*, Final report, June 2009. Available from http://ec.europa.eu/environment/eia/pdf/eia_study_june_09.pdf.
- 299 ECE/MP.PP/C.1/2005/2/Add.4, para. 11.
- 300 ECE/MP.PP/2008/5/Add.6, para. 73.
- 301 See the definition of “proposed activity”, Convention on Environmental Impact Assessment in a Transboundary Context, article 1 (v), United Nations, *Treaty Series*, vol. 1989, p. 309.
- 302 ECE/MP.PP/C.1/2009/4/Add.1, para.49.
- 303 ECE/MP.PP/2008/5/Add.6, para. 78.
- 304 Ibid.
- 305 ECE/MP.PP/2011/11/Add.2 (Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus), para. 81.
- 306 ECE/MP.PP/C.1/2009/8/Add.1, para. 95.
- 307 ECE/MP.PP/C.1/2009/8/Add.1, para 96.
- 308 ECE/MP.PP/C.1/2005/2/Add.3, para 32.
- 309 Ibid., para. 32.
- 310 ECE/MP.PP/2008/5, para. 55. The Compliance Committee’s report was noted with appreciation by the Meeting of the Parties at its third session through decision III/6 on general issues of compliance (ECE/MP.PP/2008/2/Add.6).
- 311 ECE/MP.PP/2008/5/Add.7, para. 29.
- 312 Ibid., para. 30.
- 313 Hungary, Decree No. 152 of 1995 of the Government regarding Environmental Impact Assessment procedures and the sphere of activities subject to such assessment, annex 3.
- 314 Hungary, Act LIII of 1995 on General Rules of Environmental Protection.
- 315 ECE/MP.PP/2008/5/Add.6, para 80.
- 316 ECE/MP.PP/2011/11/Add.2, para. 95.
- 317 ECE/MP.PP/2008/5/Add.6, para 80.
- 318 European Commission, *Access to information, public participation and access to justice in environmental matters at Community level – A Practical Guide*. Available from <http://ec.europa.eu/environment/aarhus/pdf/guide/AR%20Practical%20Guide%20EN.pdf>.
- 319 Austria, Standards of Public Participation, adopted by the Austrian Council of Ministers on 2 July 2008, p.13. Available from http://www.unece.org/env/pp/ppeg/Austria_pp_standards.pdf.
- 320 ECE/MP.PP/C.1/2009/4, para 29. See also ECE/MP.PP/C.1/2009/8/Add.1, para. 98.
- 321 ECE/MP.PP/C.1/2009/8/Add.1, paras. 99-100.

- 322 ECE/MP.PP/C.1/2009/4/Add.1, para. 38.
- 323 Task Force on Public Participation in Decision-making of the Aarhus Convention, "Recommendations on public participation in environmental decision-making", third draft, March 7 2013, paras. 113, 116. Available from <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppppdm/ppdm-recs.html>.
- 324 ECE/MP.PP/2008/5/Add.6, para. 81.
- 325 *Ibid.*, para. 82.
- 326 *Ibid.*, para. 84.
- 327 *Ibid.*, para. 84.
- 328 Bulgaria, Law on Proposals, Signals, Complaints and Requests, *Official Gazette* No. 54, (1988).
- 329 Constitutional Court of Croatia, Decision of 13 November 1996, *National Gazette* No. 103/96 (6 December 1996).
- 330 ECE/MP.PP/2008/5/Add.6, para. 81.
- 331 *Ibid.*, para. 84.
- 332 ECE/MP.PP/C.1/2009/8/Add.1, para. 100.
- 333 Based on J. M. Evans and others, *Administrative Law: Cases, Text, and Materials*, 3rd ed. (Toronto, Emond Montgomery Publications Ltd, 1989) pp. 309-344.
- 334 Bryan A. Garner ed., *Black's Law Dictionary*, 9th edition, (St Paul, Minnesota, West Thomson Reuters, 2009).
- 335 ECE/MP.PP/2011/11/Add.3, para. 55.
- 336 *Ibid.*, para. 56.
- 337 ECE/MP.PP/2003/3 (Lucca Guidelines).
- 338 ECE/MP.PP/2/Add.5 (decision I/4).
- 339 ECE/MP.PP/2005/5 (Report on the Implementation of the Guidelines on Access to Information, Public Participation and Access to Justice with respect to GMOs).
- 340 ECE/MP.PP/2005/2/Add.2 (decision II/1).
- 341 The relevant page of the United Nations Treaties Office website may be accessed at <http://www.unece.org/env/pp/ratification.html>.
- 342 Bulgaria's 2008 and 2011 Aarhus Convention National Implementation Reports. Available from http://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_ir_2008_BGR_e.pdf and http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/Bulgaria_NIR_2011_e.pdf.
- 343 France, Environmental Code, article L. 533-3. Available from <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074220&dateTexte=20080805>.
- 344 *Ibid.*, article L. 533-5.
- 345 For further information, see France's 2011 Aarhus Convention National Implementation Report, paras. 118 – 122. Available from http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/France_NIR_2011_e.pdf.
- 346 www.ogm.gouv.fr and www.anses.fr.
- 347 <http://gmoinfo.jrc.ec.europa.eu>.
- 348 MP.PP/2003/3 (Lucca Guidelines), para. 3.
- 349 *Ibid.*, annex I, para. 2 (d).
- 350 *Ibid.*, annex I, para. 2 (e).
- 351 *Ibid.*, annex I, para. 2 (f).
- 352 FAO, *Genetically Modified Organisms, Consumers, Food Safety and the Environment* (Rome, 2001), p. 14, available from ftp://ftp.fao.org/docrep/fao/003/x9602*/x9602*00.pdf.
- 353 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.
- 354 ECE/MP.PP/2008/2/Add.1 (Riga Declaration), para. 16.
- 355 See the Convention on Biological Diversity, article 8 (g) and article 19, para. 3; and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, article 3.
- 356 The text of the Protocol is available from http://bch.cbd.int/protocol/NKL_text.shtml. The Protocol opened for signature on 7 March 2011 and will enter into force 90 days after being ratified by at least 40 Parties to the Cartagena Protocol on Biosafety.

- 357 ECE/MP.PP/2005/2/Add.2 (decision II/1).
- 358 ECE/MP.PP/WG.1/2009/3 (Report of international expert meeting on access to information, public participation and access to justice with respect to GMOs (9 and 20 May 2008, Cologne, Germany)).
- 359 ECE/MP.PP/2011/3 (Report on the workshop on public awareness, access to information and public participation regarding living/genetically modified organisms (8 and 9 October, Nagoya, Japan)).
- 360 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, article 7, para. 2 (b).
- 361 Commission Decision 2002/623/EC of 24 July 2002 establishing guidance notes supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.
- 362 Council Decision 2002/811/EC of 3 October 2002 establishing guidance notes supplementing Annex VII to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.
- 363 Article 2, para. 2.
- 364 Article 9.
- 365 Article 24.
- 366 Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.
- 367 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, article 2(4).
- 368 Directive of the European Council of 23 April 1990 on the contained use of genetically modified micro-organisms.
- 369 Directive of the European Council of 26 October 1998 amending Directive 90/219/EEC on the contained use of genetically modified micro-organisms.
- 370 Council Decision 2002/812/EC of 3 October 2002 establishing pursuant to Directive 2001/18/EC of the European Parliament and of the Council the summary information format relating to the placing on the market of genetically modified organisms as or in products.
- 371 Council Decision 2002/813/EC of 3 October 2002 establishing, pursuant to Directive 2001/18/EC of the European Parliament and of the Council, the summary notification information format for notifications concerning the deliberate release into the environment of genetically modified organisms for purposes other than for placing on the market.
- 372 Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.
- 373 Case C-552/07, *Commune de Sausheim v. Pierre Azelvandre*, Judgement of the Court (Fourth Chamber) of 17 February 2009.
- 374 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC, Part A, annex VII.
- 375 Commission Decision 2002/623/EC of 24 July 2002 establishing guidance notes supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.
- 376 European Food Safety Authority (EFSA) Panel on Genetically Modified Organisms, "Guidance on the environmental risk assessment of genetically modified plants" EFSA Journal 2010, vol. 8, No.11, p.1879. Available from <http://www.efsa.europa.eu/en/efsajournal/pub/1879.htm>.
- 377 ECE/MP.PP/2008/5/Add.6.
- 378 Norway, Act of 2 April 1993 No. 38 Relating to the Production and Use of Genetically Modified Organisms, article 1.
- 379 ECE/MP.PP/2003/3 (Lucca Guidelines), para. 21.
- 380 The Netherlands, Decree No. 435 of 1993 on Genetically Modified Organisms Based on the Act Concerning Environmentally Harmful Substances.
- 381 For a more detailed account see for example Jerzy Jendrośka, Stephen Stec, "UN/ECE: The Kyiv Protocol on Strategic Environmental Assessment", *Environmental Policy and Law*, vol 33, No. 3-4, (2003), pp. 105-110.
- 382 For further information, see European Commission, "Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment", pp. 48-49. Available from http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf.
- 383 The eleven sectors are: agriculture; forestry; fisheries; energy; industry; transport; waste management; water management; telecommunications; tourism; town and country planning or land use.
- 384 For more about the concept of "public concerned" under the Aarhus Convention, see Jerzy Jendroska, "Public Participation in Environmental Decision-Making" in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Marc Pallemmaerts, ed. (Groningen, The Netherlands, Europa Law Publishing, 2011).
- 385 See http://vote.bluelink.net/ngovote_info.php.
- 386 Angus Stevenson, ed., *Oxford Dictionary of English* (Oxford, United Kingdom, Oxford University Press, 2010).

- 387 Hungary, Act XI of 1987 on Legislation, articles 27 and 29.
- 388 *Ibid.*, article 31.
- 389 Sandor Fulop, "Chapter 7: Hungary" in *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, The Regional Environmental Center in Central and Eastern Europe, June 1998), p. 214. Available from <http://archive.rec.org/REC/Publications/PPDoors/CEE/PPDoorsCEE.pdf>.
- 390 Slovenia, Act amending the Environmental Protection Act (Official Gazette RS, No.70/08; EPA-1B), article 34.
- 391 Slovenia, No. 0071-165/2008/2 (2008). Available from http://www.arhiv.mop.gov.si/fileadmin/mop.gov.si/pageuploads/zakonodaja/okolje/navodilo_okoljski_predpisi.pdf.
- 392 See <http://www.mop.gov.si>.
- 393 Commission Decision 97/150/EC of 24 February 1997.
- 394 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, article 6.
- 395 The Aarhus Convention was quoted, for instance, in *Tatar v. Romania*, Application No. 67021/01, ECHR, Judgement of 29 January 2009 and also mentioned in *Branduse v. Romania*, Application No. 6586/03, ECHR, Judgement of 7 April 2009. For other cases before the European Convention on Human Rights that concerned issues covered by the Aarhus Convention, see for instance, *Zander v. Sweden*, Application No. 14282/88, ECHR, Judgement of 25 November 1993; *Guerra v. Italy*, Application no. 14967/89, ECHR, Judgement of 19 February 1998; *Taskin et al v. Turkey*, Application No. 46117/99, ECHR, Judgement of 10 November 2004; *Giacomelli v. Italy*, Application No. 59909/00, ECHR, Judgement of 2 November 2006; *Okyay et al v. Turkey*, Application No. 36220/97, ECHR, Judgement of 12 July 2005; *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, ECHR, Judgement of 14 April 2009; *Kenedi v. Hungary*, Application 31475/05, ECHR, Judgement of 26 May 2009.
- 396 *Sramek v. Austria* Application No. 8790/79, ECHR, Judgement of 22 October 1984, para. 36; see also *Coëme and others v. Belgium*, Application Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, ECHR, Judgement of 22 June 2000.
- 397 *Campbell and Fell v. United Kingdom*, Application Nos. 7819/77 and 7878/77, ECHR, Judgement of 28 June 1984, para. 78.
- 398 *Langborger v. Sweden*, Application No. 11179/84, ECHR, Judgement of 22 June 1989.
- 399 *Zander v. Sweden*, Application No. 14282/88, ECHR, Judgement of 25 November 1993.
- 400 See for example Case C-205/08, *Umweltanwalt von Kärnten v. Kärntner Landesregierung*, Judgement of the Court (Second Chamber) of 10 December 2009, para. 39, where the CJEU considered that the Austrian Umweltsenat is a court according to European Union law.
- 401 ECE/MP.PP/C.1/2005/2/Add.1, para.26.
- 402 *Ibid.*
- 403 For more information, see <http://www.ico.gov.uk>.
- 404 For more information, see <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm>.
- 405 ECE/MP.PP/C.1/2009/6/Add.3, para. 35.
- 406 Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg (European Union)*, Judgement of the Court (Fourth Chamber) of 12 May 2011.
- 407 EC Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.
- 408 Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg (European Union)*, Judgement of the Court (Fourth Chamber) of 12 May 2011, para. 42.
- 409 *Ibid.*, para. 44.
- 410 *Ibid.*, para. 47.
- 411 *Ibid.*, para. 48.
- 412 *Ibid.*, para. 50.
- 413 ECE/MP.PP/C.1/2012/11, para. 76.
- 414 ECE/MP.PP/C.1/2006/4/Add.2.
- 415 *Ibid.*, para. 40.
- 416 *Ibid.*, para. 46.
- 417 Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun*, Judgement of the Court (Second Chamber) of 15 October 2009.
- 418 ECE/MP.PP/C.1/2012/11, para. 82.
- 419 *Ibid.*
- 420 ECE/MP.PP/2008/5/Add.10, para. 56.

- 421 ECE/MP.PP/2008/5/Add.4, para. 28.
- 422 Ibid., para. 30.
- 423 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
- 424 ECE/MP.PP/C.1/2006/4/Add.2.
- 425 ECE/MP.PP/C.1/2012/14, para. 83.
- 426 ECE/MP.PP/2008/5/Add.4, para. 27.
- 427 ECE/MP.PP/C.1/2006/4/Add.2, para. 35.
- 428 Ibid., para. 36.
- 429 ECE/MP.PP/2008/5/Add.4, paras. 31, 35 and 41.
- 430 ECE/MP.PP/C.1/2012/14, para. 65.
- 431 For further information, see http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/index.html. An example of a successful private prosecution in the United Kingdom regarding the environment is *Ron Hart v. Anglian Water* (Court of Appeal 21 July 2003), [2004] Env. L.R. 10, see also ENDS (326) March 2002, p. 54.
- 432 ECE/MP.PP/C.1/2006/4/Add.2, para. 40.
- 433 ECE/MP.PP/2008/5/Add.10, para. 56.
- 434 ECE/MP.PP/C.1/2009/8/Add.1, paras. 104-105.
- 435 Hungary, Act III of 1952 on the Code of Civil Procedure, article 156.
- 436 ECE/MP.PP/C.1/2006/4/Add.1, paras. 28-29.
- 437 ECE/MP.PP/C.1/2010/6/Add.1, para. 52.
- 438 ECE/MP.PP/C.1/2009/8/Add.1, para. 108.
- 439 Ibid., para. 110.
- 440 ECE/MP.PP/C.1/2010/6/Add.2, paras. 44-45.
- 441 ECE/MP.PP/C.1/2010/6/Add.3, para. 139.
- 442 Ibid., para. 138.
- 443 ECE/MP.PP/C.1/2010/4/Add.2, para. 66.
- 444 ECE/MP.PP/C.1/2009/8/Add.1, para. 112.
- 445 Ibid.
- 446 ECE/MP.PP/2008/5/Add.10, para. 56.
- 447 ECE/MP.PP/C.1/2009/8/Add.1, para.108.
- 448 ECE/MP.PP/C.1/2010/6/Add.2, para. 44.
- 449 ECE/MP.PP/C.1/2010/6/Add.3, para. 128.
- 450 Ibid, para. 129.
- 451 Ibid., para. 135.
- 452 Ibid., para. 136.
- 453 ECE/MP.PP/C.1/2012/7, paras. 51-52.
- 454 Case C-427/07, *Commission of the European Communities v. Ireland*, Judgement of the Court (Second Chamber) of 16 July 2009.
- 455 ECE/MP.PP/C.1/2010/4/Add.2, para. 66.
- 456 ECE/MP.PP/C.1/2010/6/Add.3, para. 136.
- 457 Article 13.
- 458 ECE/MP.PP/2/Add.9 (decision I/8), para. 1.
- 459 ECE/MP.PP/WG.1/2007/L.4 (Guidance on reporting requirements prepared by the Compliance Committee).
- 460 ECE/MP.PP/2/Add.2 (decision I/1), annex.

- 461 Ibid.
- 462 ECE/MP.PP/2/Add.14 (decision I/13).
- 463 ECE/MP.PP/2005/2/Add.10 (decision II/6).
- 464 ECE/MP.PP/2008/2/Add.15 (decision III/7).
- 465 ECE/MP.PP/2011/2/Add.1 (decision IV/7).
- 466 ECE/MP.PP/2/Add.2 (decision I/1), annex.
- 467 The UNFCCC rules of procedure being applied are contained in FCCC/CP/1996/2.
- 468 UNEP/GC.20/INF/16, Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and the Conclusions, p. 29.
- 469 International Labour Organisation, *Constitution of the International Labour Organisation*, 1 April 1919, article 24.
- 470 Ibid.
- 471 North American Agreement on Environmental Cooperation, 14 September 1993, articles 14 and 15.
- 472 See http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf.
- 473 ECE/MP.PP/C.1/2005/2/Add.3 (Ukraine).
- 474 United Nations, *Treaty Series*, vol. 1155, p. 331, article 18.
- 475 ECE/MP.PP/2011/2/Add.1 (decision IV/5).
- 476 United Nations, *Treaty Series*, vol. 1155, p. 331, article 54.
- 477 Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (codified version).
- 478 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control).
- 479 EC Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, article 4, para. 1.
- 480 Ibid., article 4 (2).
- 481 ECE/MP.PP/C.1/2010/4/Add.1, para. 43.
- 482 Ibid., para. 46.
- 483 Ibid., para. 47.
- 484 ECE/MP.PP/2011/11/Add.2, para. 74.

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