
UN ECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS: TOWARDS MORE EFFECTIVE PUBLIC INVOLVEMENT IN MONITORING COMPLIANCE AND ENFORCEMENT IN EUROPE

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SUMMARY

This paper discusses the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the so-called "Aarhus Convention"). It draws on the experience of the author who served as Vice-Chair of the Working Group negotiating the Aarhus Convention on Public Access and provides a brief overview of recent developments in international instruments related to access to information and public participation in environmental matters. It presents basic features of the entire Convention aiming at regulation in detail of all relevant issues.

1 INTRODUCTION

Cooperation with the public is commonly considered around the world as a prerequisite for efficient implementation of environmental policy by environmental authorities. In particular, as evidenced by the results of the previous International Conferences on Environmental Compliance and Enforcement, there is a growing recognition that public involvement contributes largely to effective compliance monitoring and enforcement. Bearing in mind the limited monitoring capacities of the government organizations responsible for administering environmental law, granting the public access to information is considered the best guarantee of the accuracy of data supplied by companies. Public control, enhanced by transparency, is not only considered important, it is, in relative terms, the least expensive of all instruments for implementing environmental policies and enforcing environmental legislation. Similarly, there are clearly recognized benefits from transparency of decision-making processes and openness of administration to public participation, not only in concrete decisions whether to authorize certain facilities or operations, but also in developing draft laws, rules, policies, etc. Broad public participation in the preparation of such documents also advances educational goals and mitigates negative attitudes toward decisions in controversial matters. Often it also prevents significant mistakes in decision-making that might cause problems with implementation, or later, with enforcement.

Countries that have decided to grant the public broad access to information and participation rights have benefitted a lot from voluntary activities by citizens willing to protect the environment. These positive experiences have no doubt had a big influence even in countries which, due to their legal and administrative traditions, have been rather reluctant to accept as a rule the concepts of participatory democracy, open government and transparency of decision-making.

There are various ways of exchanging experience and disseminating good practices between countries, with big international conferences being among the most effective. However, the most formal way of getting the message across is by using international legal instruments. And here the issues of public participation and access to information concerning environmental protection and sustainable development have been present for years.

2 ACCESS TO INFORMATION AND PUBLIC PARTICIPATION IN INTERNATIONAL ENVIRONMENTAL LAW

The need for legal guarantees for public involvement is increasingly reflected in international environmental law. Virtually all recent instruments mention the necessity of assuring access to information and public participation in environmental decision-making. More developed provisions to this effect, recommending, *e.g.*, creation of mechanisms and procedures for cooperation with - and support for - the public, can be found in documents from the United Nations Conference in Rio de Janeiro (in particular in Agenda 21) and in the Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making (herein after referred to as "ECE Guidelines"). Such attempts to regulate public involvement in a complex way so far have been limited to the instruments of so called "soft law," *i.e.*, having no binding legal nature but only a form of recommendation or political declaration. However, there are a number of international instruments that address some public participation issues without attempting comprehensive coverage.

2.1 Access to information

The right of access to information recently may be regarded as a binding standard in the international environmental law. A number of conventions (signed in the 90's) include relevant provisions in this field, including the following: The Lugano Convention on Civil Liability (1993), a new Helsinki Convention on the Protection of The Baltic Sea (1992), The Convention on Industrial Accidents (1993) and The Convention on Transboundary Watercourses (1992). The obligation to ensure access to environmental information also is repeatedly referred to in a number of "soft law" instruments, including the Rio Conference documents (Agenda 21) and the Organization for Economic Cooperation and Development (OECD) Guidance Manual on Pollutant Release and Transfer Registers.

In most countries the public enjoys access to information via so-called Freedom of Information (FOI) laws, which provide everyone, without having to state any interest, access to all information (except for few clearly statutory exemptions) about both the state of the environment and its protection, including information about individual permits, emissions or enforcement actions. On the international level the most comprehensive of such laws is European Commission (EC) Directive 313/90.

In some countries the right of access to governmental information is supplemented by far reaching mechanisms concerning collecting, maintaining and making public some information held by governmental authorities, including such mechanisms as public registers or publicly accessible databases. At the international level obligations to this effect may be found, *e.g.*, in OECD Guidelines on Pollutant Release and Transfer Registers.

2.2 Public participation

Public participation in environmental decision-making may presently be considered a well-established concept in international law. A number of instruments can be quoted here, but in particular Agenda 21 devotes Chapter 8 entirely to this issue. One has to distinguish here between public participation in policy- or rule-making and public participation in concrete decision-making.

In international environmental law, the issue of public participation in policy- and rule-making gradually gets certain recognition, though it is far from being sufficiently regulated. In this respect Agenda 21 gives certain guidance while recommending on many occasions (particularly in provisions referring to the environmental protection against factors which may have a significant adverse impact on the environment) the need for active public participation at all different levels of environmental decision-making. Similar provisions can be found in binding instruments. The Desertification Convention of 1994, for example, requires participation of Non-Governmental Organizations (NGOs) and local people in policy-making and public participation in concrete decision-making as is currently required by a number of international instruments. The key idea is to provide the opportunities for the public to participate early in the environmental decision-making process. This means that the public should be consulted before the actual decision has been taken. This issue is particularly well regulated in all instruments related to Environmental Impact Assessment (EIA). Obligations related to public participation in the Environmental Impact Assessment context can be found in the regional (but covering almost the whole northern hemisphere) 1991 Espoo Convention on Environmental Impact Assessment in Transboundary Context, as well as in a number of global international agreements (such as the Biological Diversity Convention and the Framework Convention on Climate Change). A new regional Helsinki Convention on Transboundary Effects of Industrial Accidents (1992) has similar provisions.

As far as participation in compliance monitoring is concerned, there is hardly any international law provision dealing with this issue specifically. It has to be noted, however, that so-called "post-monitoring," which is an element of the Environmental Impact Assessment Procedure requiring participation, is required under the Espoo Convention.

2.3 Access to justice

Another important issue is public participation in enforcement, often referred to as "access to justice." It usually means the right to be heard and to appeal the decisions, as it is guaranteed by the Human Rights Convention.

As far as environmental protection is concerned, the most important in "access to justice" is to have standing without having to state an individual interest. Some provisions to this effect may be found in the Rio documents and in the Lugano Convention.

The Lugano Convention reads: "*Any association and foundation which according to its statutes aims at the protection of the environment may, at any time, request: a) prohibition of a dangerous activity which is unlawful and poses a grave threat of damage to the environment, b) that the operator be ordered to take measures to prevent an accident or damage, c) that the operator be ordered to take measures, after an accident, to prevent damage, or d) that the operator be ordered to take measures of reinstatement.*"

2.4 Need for a comprehensive approach

All the above mentioned international instruments have contributed to common recognition of the need for access to environmental information and public participation. Simultaneously, most administrative systems in Europe are in the process of transformation towards open government and participatory democracy. It has been widely recognized,

however, that general obligations concerning access to environmental information and public participation, as well as good practices in this respect, will be standardized throughout Europe by a way of adopting an international instrument specifically and exclusively devoted to these issues. Significant breakthroughs in this respect were brought about in the III Pan-European Conference of Environmental Ministers held in Sofia in 1995 within the "Environment for Europe" Process.

3 TOWARDS A BINDING COMPREHENSIVE REGULATION OF CITIZENS PROCEDURAL RIGHTS IN ENVIRONMENTAL MATTERS

3.1 Roots of the Convention

The III Pan-European Conference of Environmental Ministers held in Sofia in 1995 within the "Environment for Europe" Process adopted the ECE Guidelines, which reflected the political will of Ministers to make standard rules concerning these issues throughout Europe. The Guidelines, however, have only the nonbinding nature of a "soft law." Therefore, adoption of the Guidelines was paralleled by a mandate given to a Working Group to adopt an international legally binding instrument in the form of a UN ECE Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making (herein after referred to as "the Convention"), a draft of which the Ministers requested to be ready at their IV "Environment for Europe" Conference held in June 1998 in Aarhus, Denmark.

3.2 Negotiating the Convention

About 40 of the 55 UN ECE member countries actively participated in negotiations. Worth mentioning is that both the U.S. and Canada did not participate, while - on the other hand - the European Commission participated actively with a view to consenting eventually to make the Commission institutions subject to provisions of the Convention on the same footing as any national public authority.

Beginning with the process of its creation, the Convention was arguably unprecedented in the history of international law as far as the degree of public participation in the drafting process. NGOs had taken part in this process right from the outset when a small group assisted the UN ECE Secretariat in preparing the Draft Elements for the Convention which served as the main basis for discussions for the first four sessions until a consolidated revised draft text of the Convention emerged. Ever since, NGO representatives have taken part in each small drafting group or advisory group that has been created by the Working Group to assist it in dealing with certain issues. Apart from this, NGOs have taken part in plenary discussions on a more or less equal basis. NGOs are being principally represented by an NGO Coalition, consisting of 4 persons representing NGOs from both Western and Eastern Europe with a mandate given by the Pan-European Conference of NGOs held in Brussels.

Apart from the NGO Coalition, the Regional Environmental Center for Central and Eastern Europe (REC) and the GLOBE (Global Legislators Organization for a Balanced Environment) also participated actively in the drafting process under their own flags.

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

4.1 The Convention and its 3 pillars

The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice (as it eventually was termed) was endorsed unanimously by the Committee on Environmental Policy at its meeting on March 16-17 1998 and submitted for adoption and signature at the Pan-European Ministerial Conference 23-25 June 1998 at Aarhus, Denmark.

The Convention, as well as being the first binding international instrument attempting to address comprehensively and exclusively the issue of Citizens Environmental Rights, also features a couple of specific provisions that might be considered precedential. First of all, Article 1 makes it clear that the objective of the Convention is to contribute to the protection of the right of every person of this and future generations to live in an environment adequate to his or her health and well-being (which is the first acknowledgment of such a human right in an international binding instrument). Another novelty is an obligation (Article 3 paragraph 7) to promote the application of the principles of the Convention in other international environmental decision-making processes.

The core of the Convention covers three main issues (sometimes referred to as the "three pillars of the Convention"): 1) access to, and dissemination of, environmental information, 2) public participation in environmental decision-making, and 3) access to environmental justice. These are addressed in Articles 4-9, while Article 2 (Definitions) and Article 3 (General Provisions) provide a background to all three pillars,

4.2 Access to - and dissemination of - environmental information

The Convention regulates the issue of access to environmental information in two separate Articles: Article 4 regulates so called "passive" disclosure of information while Article 5 addresses so called "active" disclosure of information.

Article 4 is designed in a similar way to other so called Freedom of Information Laws that precisely regulate rights to require information from the authorities, categories of information that might be exempted from disclosure, and the procedure for disclosing the information. The Convention takes into account, in particular, experience gained with the implementation of EC Directive 313/90 on access to environmental information.

The definition of environmental information is much broader in the Convention than it is in the Directive. According to Article 2 paragraph 2, it covers:

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

- 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;*
- b) factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, 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;*

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”.

According to the Convention, any natural or legal person may request, without an interest having to be stated, the environmental information that is held by any public authority. Public authorities, meaning basically government at national, regional and local levels (with the exemption of bodies acting in a judicial or legislative capacity) shall provide and make available such environmental information. The Convention applies accordingly to natural and legal persons (organizations and non-administrative bodies) with public responsibilities for the environment. In accordance with Article 4 paragraph 3 of the Convention, a request for information may be refused if:

- a) the public authority to which the request is addressed does not hold the environmental information requested;
- b) the request is manifestly unreasonable or formulated in too general a manner; or
- 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.

A request may also be refused (paragraph 4) if the disclosure would adversely affect:

- a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
- b) international relations, national defense or public security;
- 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 inquiry of a criminal or disciplinary nature;
- d) the confidentiality of commercial and industrial information, where law protects such confidentiality orders of a legitimate economic interest. Within this framework, information on emissions, which is relevant for the protection of the environment, shall be disclosed;
- e) intellectual property rights;
- 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;
- g) the interest 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
- h) the environment to which the information relates, such as the breeding sites of rare species. 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.

Where only part of the information requested falls within one of the exempt categories, the remainder of the information should be separated out and supplied to the person making the request.

Public authorities should respond to a requesting person at the latest within one month unless the volume and complexity of the information justify extension of this period to up to two months after the request. The written refusal to comply with a request for information shall include reasons for the refusal and information on access to review procedures under Article 9. Public authorities are allowed to make a reasonable charge for supplying information.

Article 5 attempts to address the somewhat neglected issue of duties of authorities to actively collect and disseminate environmental information, in particular, by identifying various forms of doing so. For example, it requires authorities to regularly publish up-to-date information on the state of the environment, *e.g.*, in written reports or periodicals. It also requires that environmental information becomes progressively available in electronic databases, which are easily accessible to the public through public telecommunications networks.

In article 5 paragraph 9, the Convention introduces the concept of Pollution Release and Transfer Registers (PRTR) - though without mentioning this term- by requiring Parties to take steps to progressively establish a coherent, nationwide systems of pollution inventories.

4.3 Public participation in environmental decision-making

The Convention addresses the issue of public participation by distinguishing between public participation in concrete decision-making and public participation in policy- and rule-making.

As far as concrete decision-making is concerned, the Convention establishes in Article 6 quite an elaborated set of procedural rules to be followed by environmental authorities while taking decisions to authorize certain activities, categories of which are listed in the Annex to the Convention. The Annex is generally based on the list of activities subjected to EIA requirements under the Espoo Convention (combined with the list of activities subject to Integrated Pollution Prevention and Control Directive). The Convention also requires public participation in permitting deliberate releases of Genetically Modified Organisms.

As far as public participation in policy- and rule-making is concerned, the extent of relevant obligations resulting from the Convention is rather limited, in particular, leaving it up to the Parties to the Convention to determine the scope of the public to be consulted.

4.4 Access to environmental justice

The scope of this pillar of the Convention addresses basically two issues: the right to legal remedies in relation to access to information and the public participation provisions of the Convention in regard to *actio popularis* (citizen's suits) in environmental matters, *i.e.*, the right to file genuinely public interests lawsuits.

The second issue of primary importance for public involvement in environmental enforcement, was hotly debated. The outcome of the debate may be found in paragraph 3 which reads: *"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."*

It is worth mentioning that the Convention also requires, in paragraph 5, that Parties ensure that information is provided to the public about review procedures and consider the establishment of appropriate assistance mechanisms to remove financial and other barriers to access to justice.

5 CONCLUSIONS

The negotiations on the Convention have proved that all countries in Europe have made a huge step towards accepting the idea of open government and participatory democracy, though there are still different views as to the ways of achieving these concepts. It is also clear that, contrary to initial expectations of some participants to the negotiations, the Convention is not about "Eastern Europe" keeping up with the "Western Europe" in relation to access to information and public participation because, in many instances, some of the "Eastern" countries are more advanced than those in the "West." Altogether the Convention will promote progress for all European countries and encourage Europe to keep up with the best "world" standards and practices in relation to access to information and public participation. Despite the fact that the Convention does not specifically mention public participation in monitoring compliance activities, it will no doubt improve the effectiveness of monitoring compliance and enforcement of environmental laws and thus improve environmental conditions in Europe.