

ECONOMIC COMMISSION FOR EUROPE

THE AARHUS CONVENTION



... securing citizens' rights through

- access to information
- public participation
- access to justice

for a healthy environment ...

AN IMPLEMENTATION GUIDE



UNITED NATIONS

ECONOMIC COMMISSION FOR EUROPE
Geneva



**UN/ECE Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters**

**THE AARHUS CONVENTION:
AN IMPLEMENTATION GUIDE**

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for
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CONTENTS

	<i>Page</i>
FOREWORD BY THE SECRETARY-GENERAL OF THE UNITED NATIONS	v
PREFACE	vii
HOW TO USE THIS GUIDE.....	ix
INTRODUCTION	1
CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS.....	9
Preamble.....	11
GENERAL PART.....	27
<i>Article 1.</i> Objective	29
<i>Article 2.</i> Definitions	30
<i>Article 3.</i> General provisions.....	41
PILLAR I. ACCESS TO INFORMATION	49
<i>Article 4.</i> Access to environmental information	53
<i>Article 5.</i> Collection and dissemination of environmental information.....	66
PILLAR II. PUBLIC PARTICIPATION IN DECISION-MAKING	85
<i>Article 6.</i> Public participation in decisions on specific activities.....	89
<i>Article 7.</i> Public participation concerning plans, programmes and policies relating to the environment.....	113
<i>Article 8.</i> Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments.....	123
PILLAR III. ACCESS TO JUSTICE.....	125
<i>Article 9.</i> Access to justice	137
FINAL PROVISIONS	139
<i>Article 10.</i> Meeting of the Parties	144
<i>Article 11.</i> Right to vote	144
<i>Article 12.</i> Secretariat.....	145
<i>Article 13.</i> Annexes	146
<i>Article 14.</i> Amendments to the Convention.....	148
<i>Article 15.</i> Review of compliance.....	150
<i>Article 16.</i> Settlement of disputes	151
<i>Article 17.</i> Signature.....	152
<i>Article 18.</i> Depositary	152
<i>Article 19.</i> Ratification, acceptance, approval and accession	154
<i>Article 20.</i> Entry into force.....	155
<i>Article 21.</i> Withdrawal	156
<i>Article 22.</i> Authentic texts.....	157
THE ANNEXES.....	159
<i>Annex I.</i> List of activities referred to in article 6, paragraph 1 (a).....	166
<i>Annex II.</i> Arbitration	171
NOTES.....	179
ANNEXES	
ANNEX I. <i>Resolution on Access to Information, Public Participation in Decision- making and Access to Justice in Environmental Matters</i>	179
ANNEX II. <i>Declarations made upon signature</i>	181
BIBLIOGRAPHY	183

FOREWORD

The arrival of a new millennium gives us all cause for reflection on the achievements and failings of humankind over the past thousand years and the challenges which will face us in a new and more interdependent era in human history. While many of our current preoccupations may seem trivial in such a long-term perspective, the goal of sustainable, equitable and environmentally sound development takes on even greater importance, as it concerns the very survival of life on Earth.

A key element in that quest is the strengthening of citizens' environmental rights so that members of the public and their representative organizations can play a full and active role in bringing about the changes in consumption and production patterns which are so urgently needed. The active engagement of civil society, both in the formulation of policies and in their implementation, is a prerequisite for meaningful progress towards sustainability.

The adoption of the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters—the Aarhus Convention—was a giant step forward in the development of international law in this field. I welcome the fact that so many countries have signed the Convention and made a commitment to strive for its early entry into force.

Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations. Furthermore, the Convention will be open to accession by non-ECE countries, giving it the potential to serve as a global framework for strengthening citizens' environmental rights. The 2002 Special Session of the United Nations General Assembly marking the 10th anniversary of the Earth Summit would be a timely occasion to examine the relevance of the Aarhus Convention as a possible model for strengthening the application of principle 10 in other regions of the world.

Although many difficulties had to be overcome in the negotiation of the Convention, its implementation will undoubtedly be an even greater challenge. Amending national laws to bring them into compliance with the sometimes abstract provisions of the Convention will be a major task. While this Guide does not purport to be an official interpretation of the Convention, it can serve as an invaluable tool in the hands of governments and parliaments engaged in that task. Public authority officials involved in the day-to-day task of applying the provisions arising from the Convention will find important guidance on how to use such discretion as is available to them. Environmental citizens' organizations, which played an unprecedented role in the negotiation of the Convention and can be expected to play an equally significant role in its implementation, will likewise find the Guide a useful reference point.

It is therefore a pleasure for me to commend this Guide to all those with an interest in this Convention—policy makers and legislators, officials at all levels of government, academics, NGOs and others—in the hope that it will shed light on the Convention and thereby help to involve citizens more effectively in our crucial collective search for sustainable development.



KOFI A. ANNAN

Secretary-General of the United Nations

PREFACE

This Guide to the Aarhus Convention is the result of a collaborative project between the United Nations Economic Commission for Europe (UN/ECE), the Regional Environmental Center for Central and Eastern Europe (REC) and the Danish Environmental Protection Agency. It is aimed simultaneously at policy makers and politicians responsible for transposing the Convention into national systems, as well as at public authorities and their advisers faced with carrying out the Convention's obligations.

The project took shape under the guidance of a Steering Committee made up of Kaj Bärlund (UN/ECE), Jesper Hermansen (Denmark), John Hontelez (EEB/European ECO Forum), Jernej Stritih (project director, REC) and Jeremy Wates (then EEB/European ECO Forum and now UN/ECE), all of whom served in a personal capacity.

At the first meeting of the Signatories to the Convention, in Chisinau in 1999, a Resource Group was formed to contribute to the project. It was made up of some of those involved in drafting the Convention and other experts: Mark Berman (United Nations Environment Programme (UNEP)), John Bonine (University of Oregon, United States), Katy Brady (Australia), Arcadie Capcelea (Republic of Moldova), Marta Cerna (Czech Republic), Drita Dade (Albania), Jonas Ebbesson (Stockholm University, Sweden), Sofie Flensburg (Denmark), Sandor Fulop (Environmental Management and Law Association (EMLA), Hungary), Lyle Glowka (World Conservation Union (IUCN)), Ralph Hallo (Stichting Natuur en Milieu (SNM), Netherlands), Guri Hestflatt (Norway), Krisztina Horvath (Netherlands), Eva Juul Jensen (Denmark), Willem Kakebeeke (Netherlands), Veit Koester (Denmark), Svitlana Kravchenko (Ecopravo, Ukraine), Karin Krchnak (American Bar Association Central and East European Law Initiative (ABA/CEELI)), Tuomas Kuokkanen (Finland), Francesco La Camera (Italy), Bo Leth-Espensen (Danish Nature Conservation Society (DN), Denmark), Alistair McGlone (United Kingdom), Kliment Mindjov (Borrowed Nature, Bulgaria), Marc Pallemarts (Belgium), Olga Razbash (Jureco, Russian Federation); Philippe Sands (Foundation for International Environmental Law and Development (FIELD), United Kingdom), Nicolas Tavitian (Global Legislators' Organisation for a Balanced Environment (GLOBE-Europe)), Magda Toth Nagy (REC) and Ondrej Velek (Czech Republic), Gerry Cunningham (UNEP), Jiri Dusik (REC), Ole Kristian Fauchald (Norway), the Hon. Howard M. Holtzmann (United States), Peter Jorgensen (Denmark), Anne O'Malley (ABA/CEELI), Aniko Radai (Hungary) and Mary Taylor (Friends of the Earth (FOE)/European ECO Forum) provided valuable input and commented on the draft. Marianna Bolshakova, James Caldwell, Jeff Thomas and Patrick Voller of the REC, and Jay Austin, Alicia Cate, Brian Rohan and Jill van Berg of the Environmental Law Institute also contributed their time and research.

HOW TO USE THIS GUIDE

The Implementation Guide to the Aarhus Convention provides both a general overview and a detailed article-by-article analysis of the Convention.

Readers can find an overview of the Convention's origins and its obligations in the main Introduction and the introductions to the different sections. These introductions give the policy background and describe the Convention's structure, its main obligations, and options for implementation. This "snapshot" view introduces the reader to the Convention and to what it can mean in practice.

Policy makers and public authorities involved in the intensive task of transposing the Convention into national legislation, or in developing mechanisms for its implementation in the context of varying national legal systems will need a more detailed analysis of it. Therefore, the Guide also analyses each provision of the Convention to help the reader understand both the fixed obligations, the obligations that allow some flexibility, and the options for implementation in each case.

Finally, the public authority or adviser faced with a specific problem of implementation or interpretation can use the Guide as a reference.

While the Guide has been written with policy makers and public authorities in mind, it may also be useful to others, including the various stakeholders who may wish to use the rights found in the Convention to participate actively in environmental protection.

A note on the use of certain terminology may be necessary. 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 has taken the term to apply to any internal law of a Party, whether a State or a regional economic integration organization. The Guide has sometimes followed the terminology used in the Convention, but also sometimes used the term "domestic" to refer to such internal law.

The authors have chosen an integrated interpretation inspired by the fundamental principles that underlie the Aarhus Convention. There may, of course, be other interpretations, and the specific language of the Convention will take on a life of its own. Where there are ambiguities in the text, the authors have tried to provide guidance on the basis of the principles and objectives of the Convention as found in the preamble and article 1, and on the basis of good examples from existing State practice. The participation of one of the authors in the negotiation of the Convention and frequent consultations with the Resource Group in the writing of the Guide have helped to ensure that the "spirit" of the Convention is not lost in the retelling. The Ministerial Declaration from Aarhus and the Resolution on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, of the Signatories to the Aarhus Convention (hereinafter, "Resolution of the Signatories", see annex I below), have also provided some insight into the intention of the drafters. In their Resolution, the Signatories pledged to apply the Convention to the maximum extent possible pending its entry into force, and to work towards its entry into force at the earliest possible time. This Guide is intended to assist Signatories and potential Parties to the Aarhus Convention in implementing the Convention, and in understanding its implications so as to facilitate its ratification and entry into force.

Finally, readers may notice several references to the legislation of the European Community (EC). While EC legislation is directly relevant to only a portion of the UN/ECE region, it is referred to at times for two reasons. First, it informed the negotiations of the Convention for a large number of countries that are either member States of the European Community or countries that have accession agreements and in-

tend to join. Secondly, EC standardization has resulted in a developed regional, if not international, practice in many of the subject areas of the Convention. Any references made to EC legislation and practice in the text are meant to convey practical information and not to indicate any particular status of EC law with respect to the UN/ECE region.

The authors would be very grateful for any comments aimed at improving the text or its application over time.

INTRODUCTION

A. 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 Ministerial Conference “Environment for Europe” in Aarhus, Denmark, on 25 June 1998. Thirty-nine countries and the European Community have since signed it.

The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It 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 it 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 a Convention 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. In fact, the preamble immediately links environmental protection to human rights norms and raises environmental rights to the level of other human rights.

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 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.

The Aarhus Convention negotiations were themselves an exercise in participation. The idea for a convention emerged from the “Environment for Europe” process—a process that had already included the public. It was a short step from there for forward-looking countries and non-governmental organizations to put their efforts and energy into the Aarhus Convention negotiations. The result can be seen in the Resolution of the Signatories. The Resolution commends the international organizations and non-governmental organizations, in particular environmental organizations, for their active and constructive participation in the development of the Convention and recommends that they should be allowed to participate in the same spirit in the Meeting of the Signatories and its activities.

B. The road to Aarhus

The Aarhus Convention was developed during two years of negotiations with input from countries and non-governmental organizations from throughout the UN/ECE region. Yet 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.

International declarations and resolutions as well as international legal instruments such as conventions played a decisive role in the creation of the 1998 Aarhus Convention (see box). A significant early initiative in UN/ECE was the draft charter of environmental rights and obligations of 1990 (ENVWA/R.38, annex I). 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 UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (“Guidelines” or “Sofia Guidelines”). The idea of the Guidelines originated at the Second 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 UN/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 UN/ECE Guidelines were developed and by May 1995 accepted by the Working Group of Senior Government Officials responsible for the preparation of the Sofia Conference. The UN/ECE Guidelines were endorsed at the Third Ministerial Conference “Environment for Europe” held in Sofia, in October 1995. The same Conference decided 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 UN/ECE Guidelines.¹ 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. These 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 1966.² Article 19 deals with the “freedom to seek, receive and impart information”.

1972 *Stockholm Declaration on the Human Environment*: 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 *Salzburg Declaration 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 1980.³

1981 *African Charter of Human and Peoples’ Rights*, adopted at Algiers on 26 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:⁴ 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 Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Its practice on public participation in EIA informed many of the Aarhus Convention negotiating parties.

1986 Council of Europe resolution No. 171 of the Standing Conference of local and regional authorities of Europe on regions, environment and participation, adopted at Strasbourg on 14 October 1986.

1987 Our Common Future:⁵ *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.

1988 Additional Protocol to the American Convention on Human Rights, 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 CSCE Environment Conference, Sofia. All countries present except Romania endorsed proposed 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 UN/ECE *draft charter of environmental rights and obligations*, adopted by the qualified intergovernmental meeting at Oslo on 31 October 1990. These early drafts had an influence on later instruments.

1990 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 many of the Aarhus Convention negotiating parties.

1991 UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo (Finland) on 25 February 1991. The Espoo Convention shows the link between public participation and environmental impact assessments. Its article 4, paragraph 2, is especially relevant for public participation.

1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents, adopted at Helsinki on 17 March 1992. Its article 9 deals with “information to, and participation of the public”.

1992 UN/ECE Convention on the Protection and Use of the Transboundary Watercourses and International Lakes, adopted at Helsinki on 17 March 1992, includes provisions on public information.

1992 Rio Declaration: its principle 10 laid the groundwork for all three pillars of the Aarhus Convention.

1993 Declaration of the Second Pan-European Conference “Environment for Europe”, adopted at Lucerne on 30 April 1993,⁶ declared public participation in environmental decision-making to be a priority in its further work.

(Continued on next page.)

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1993 Council of Europe Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment: The Lugano Convention was the first international agreement seeking to create rules concerning access to allow enforcement proceedings before national courts.⁷

1993 North American Free Trade Agreement (NAFTA), Side Agreement on Environmental Cooperation, established recommendatory bodies for access to information, public participation in decision-making and access to justice.⁸

1994 draft principles on human rights and the environment.⁹ Document of the Economic and Social Council of the United Nations published on 6 July 1994. Part III pertains to all three Aarhus pillars.

1995 Sofia Guidelines: The UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making were endorsed at the Third Ministerial Conference “Environment for Europe” at Sofia on 25 October 1995. The 26 articles deal with all three pillars of the Aarhus Convention.

1996 IUCN Resolution No. CGR1.25-rev1 on public participation and right to know, adopted by the World Conservation Congress of IUCN at Montreal (Canada) on 23 October 1996.

C. 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 Con-

vention, 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). In addition to national government bodies, “public authority” can also refer to institutions of regional economic integration organizations, such as the European Community, although it explicitly 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, as well as organizations) and “the public concerned” (those who are affected or likely to be affected by or having an interest in the environmental decision-making). Non-governmental organizations need only promote environmental protection and meet requirements under national law 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 not only environmental quality and emissions data, but also information from decision-making processes and analyses.

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 compatibility among its elements, guidance to the public in taking advantage of it, environmental education and awareness-building, and support to groups promoting environmental protection.

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 protection 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.

3. The three “pillars”

The Aarhus Convention stands on three “pillars”: access to information, public participation and access to justice, 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 the first in time, since effective public participation in decision-making depends on full, accurate, up-to-date information. It can also stand alone, 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 participation by 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. It enforces both the information and the participation pillars in domestic legal systems, and strengthens enforcement of domestic environmental law. It is covered by article 9. Specific provisions in article 9 enforce the provisions of the Convention that convey rights onto members of the public. These are article 4, on passive information, article 6, on public participation in decisions on specific activities, and whatever other provisions of the Convention Parties choose to enforce in this manner. The 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 requires institutions and formal mechanisms (for example, secretariat, committees and other subsidiary bodies) to allow the Parties to confer and work together on implementation. The Aarhus Convention includes numerous 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, secretariat, compliance review and resolution of disputes.

While a UN/ECE convention, the Aarhus Convention is also open to Member States of the United Nations from outside the UN/ECE region following its entry into force. The Aarhus Convention therefore has global ambitions, justifiably so, as the rights are universal in nature. A number of other regions of the world show a strong interest in the Aarhus Convention and are discussing the development of similar obligations.

5. Annexes

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

D. Implementation and further development of the Convention

Several special issues are worth mentioning in the context of the Convention, because at the time of its adoption they were pressing issues. The Convention took them into account, but as is the case with matters in the early stages of development under international law, it did so preliminarily. At the same time these issues were to some extent flagged as issues for further development by the Meeting of the Parties.

The first of these is genetically modified organisms (GMOs). In the case of decision-making on such organisms, the Convention made reference to them, for example in article 6, paragraph 11, which applies public participation provisions to certain decisions concerning GMOs, but left the door open to future deliberations. Considering that the negotiation of a biosafety protocol under the Convention on Biological Diversity has proven to be difficult, with sharp divisions among various groups of nations, the approach taken in the Convention is understandable. The Resolution of the Signatories called for the issue to be addressed at the first meeting of the Parties. NGOs meeting parallel to the first meeting of the Signatories to the Aarhus Convention in April 1999, in Chisinau, Republic of Moldova, issued a statement calling for attention to GMOs.

The second issue specially mentioned in the Convention is the development of systems of pollution inventories or registers. These mechanisms for information gathering have been highly successful where they have been tried and are covered by article 5, paragraph 9. The Convention takes an affirmative approach to the development of such systems of inventories or registers. It goes so far as to establish the development of a possible instrument on pollution inventories or registers as one of the priorities for the first meeting of the Parties when the Convention comes into force.

The Convention also gives special attention to new forms of information, including electronic information. This is referred to in the preamble and in article 3 on the general provisions and in articles 4 and 5 on access to information. The Convention takes into account the changing information technology, which is moving towards electronic forms of information, and the ability to transfer information over the Internet and other systems.

Finally, in implementing any convention, Parties are concerned with ensuring compliance. The Aarhus Convention acknowledges that the Parties need to work together to establish compliance mechanisms specific to its needs. Its article 15 requires the Parties to establish a compliance regime at their first meeting, but the particular form such a regime will take is left to further discussion.

Three of the four issues mentioned above are covered by task forces established under the Meeting of the Signatories to the Aarhus Convention (see box at article 20, below).

Surely one of the impelling forces behind the pledge by the Signatories to the Aarhus Convention that they will seek to apply the Convention to the maximum extent possible even before it comes into force, was the recognition that the implementation of a convention covering matters so enmeshed in varying social and legal systems and traditions would be a huge endeavour. The prospective Parties are at different levels in terms of their capacity to implement the Convention. The Meeting of the Signatories and the various initiatives and task forces that are being carried out under it are important tools in promoting the goals and objectives of the Convention throughout the UN/ECE region. Donors and international organizations have a role to play in supporting early implementation of the Convention, and numerous initiatives are under way. Just as NGOs played a crucial role in the negotiation of the Convention, they can be expected to play an equally significant role in its implementation.

Ultimately the effective implementation of the Convention depends on the prospective Parties themselves, and their will to implement the terms of the Convention. The path towards full implementation promises to be an adventurous one, full of rewards and surprises as well as occasional obstacles. At the end of the trail, however, will be the framework for improved decision-making, a more active and engaged population, and greater availability of information. This Guide is intended to provide greater understanding of the Convention and greater uniformity in its application, assist prospective Parties in its early and effective implementation, and contribute to the Convention's coming into force.

The road from Aarhus

The Water and Health Protocol (London, 1999) to the UN/ECE Convention on the Protection and Use of International Watercourses and Transboundary Lakes 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 Committee on Environmental Policy of UN/ECE has decided to review the consistency of the existing UN/ECE Conventions in force with the Aarhus Convention.

Under the Aarhus Convention itself, the Meeting of the Signatories has been established to carry forward work to ensure its early implementation and entry into force. (See commentary to article 20.)

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

*done at Aarhus, Denmark,
on 25 June 1998*

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. The preambular paragraphs identify principles that may help in:

- Interpreting the text of the instrument itself (expressing the will of the Parties);
- Determining tasks for its implementation;
- Interpreting the text of national implementing legislation;
- Placing the instrument within the system of law, showing its relationship to other areas of law;
- Showing possibilities for further development of the law in the subject matter of the instrument and related areas.

A preamble is usually constructed as a sequence of secondary clauses setting forth the motives for the conclusion of the treaty by indicating the basis (shared principles) and describing the state of past, present and future relations between the Contracting Parties. The preamble serves to denote not only the motives, but also the objective and purpose of the treaty.¹⁰

The preamble may be relied upon for interpretation purposes. Article 31, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties¹¹ states that the preamble is part of the context and is the primary source of interpretation. Therefore, the preamble can be of great importance for establishing the meaning of treaty provisions and clarifying their purport.¹²

The implications of a preamble often go beyond the obligations in the substantive articles that follow. This is mainly because such paragraphs might not be ripe yet for specific obligations or because there is not yet a consensus among the contracting States. Nevertheless, they represent an important step in the development of customary international law and may later be relied on in the development of future agreements.¹³ The tendency of soft law provisions to develop into legally binding rules can be shown by principle 21 of the 1972 Stockholm Declaration, reaffirmed through principle 2 of the 1992 Rio Declaration, and enshrined in a binding instrument in article 3 of the Convention on Biological Diversity.¹⁴ This provision declared that States should be internationally responsible for the environmental consequences of activities under their jurisdiction or control. According to some scholars, this declaratory principle became legally binding through State practice and *opinio iuris* even before 1992.¹⁵ In any case, by 1997 it was possible for the International Court of Justice to state:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹⁶

The preamble to the Aarhus Convention establishes a structure within the first few paragraphs. 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 role of non-governmental associations as powerful forces in

society are all invoked. The preambular paragraphs emphasize the importance of education, capacity-building and the use of electronic media 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 under which society is governed.

The preamble also places the Convention in the context of ongoing international processes, such as “Environment for Europe”, “Environment and Health”, and the Conferences of the Parties of related international agreements, and link it with international organizations such as UN/ECE.

The Parties to this Convention,

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

The United Nations General Assembly first called for a conference on the human environment in December 1968.¹⁷ The Conference took place in Stockholm from 5 to 16 June 1972 and was attended by 114 States and a large number of international institutions and non-governmental 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 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 the concern for environmental matters at a multilateral level. The 1987 Report by the World Commission on Environment and Development, “Our Common Future” (the so-called Brundtland Report, named after the Norwegian Prime Minister Gro Harlem Brundtland, who chaired the Commission), was a further catalyst for the 1992 United Nations Conference on Environment and Development (UNCED).

In December 1989, the United Nations General Assembly¹⁸ set the agenda for UNCED. UNCED was held in Rio de Janeiro (Brazil) from 3 to 14 June 1992 and was attended by 178 States, more than 50 intergovernmental organizations and several hundred non-governmental organizations (NGOs). The European Union also attended the Conference. In addition to the signing by more than 150 States of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, the Conference adopted three non-binding instruments: the Rio Declaration, the UNCED Forest Principles and 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 was significant as a clear global expression of the developing concepts of public participation in relation to the environment. It provided an international benchmark against which the compatibility of national standards could be compared. It 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.¹⁹

Within principle 10 all three pillars of the Aarhus Convention are addressed internationally: access to information, public participation, and access to judicial and administrative proceedings.

[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.²⁰ 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 ten years earlier during the Stockholm process.²¹

The most relevant provisions for the Aarhus Convention can be found in chapter III of the Charter. With respect to the 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 of 14 December 1990, 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.²² This report is the most detailed official document to date on the link between environment and human rights and includes a draft declaration of principles. It contains a useful annex compiling national constitutional provisions relating to the environment.

[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 Charter recognized 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.²³ 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 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”.²⁴

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 included in the definition of “environment”. 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 commentary to art. 2, para. 3 (c)).²⁵

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

“an environment conducive to the highest attainable level of health and wellbeing;

“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 on 7-8 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 “Environment for Europe” process (see below, last preambular paragraph).

The Second European Conference on Environment and Health was held in Helsinki in June 1994. Working on a comprehensive assessment²⁶ 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 (EHAP). Furthermore, the ministers committed their respective health and environment departments to developing joint national environmental health action plans (NEHAPs) to tackle these problems.²⁷ 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 EHAP to the goal of strengthening the involvement of the public and NGOs in environmental health decision-making.²⁸

The linkage between “Environment for Europe” and the Environment and Health processes came to the forefront during the Third Ministerial Conference on Environment and Health, held in

London, 16-19 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.”²⁹

Furthermore, the parties endorsing the Declaration warmly welcomed the document *Access to information, public participation and access to justice in environment and health matters*³⁰ and recommended it for consideration, *inter alia*, by the Signatories to the Aarhus Convention, in further deliberations in this field.³¹

The Fourth Environment and Health Conference is scheduled to take place in Budapest in the year 2004.

The Resolution of the Signatories called for close cooperation between UN/ECE, other bodies involved in the “Environment for Europe” process (see commentary to the twenty-second preambular paragraph, below), and other relevant international and non-governmental organizations on, *inter alia*, implementation of national environmental health action plans (NEHAPs).

[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”³² 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 is “development that meets the needs of the present without com-

promising the ability of future generations to meet their own needs”.

The Rio Declaration’s principle 3 states “[t]he 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 (2 and 4 in particular)³³ sustainable development requires the integration of environmental and developmental policies. In the words of Nadendra Singh, “The right to development [has] certain limitations . . . The imperative of sustainability has to be recognized in relation to any right to development.”³⁴

The concept has steadily grown in scope and significance.³⁵ The debate over sustainable development and environmental protection generally has helped to promote a shift towards longer-term thinking in economics and other fields.

Sustainable development is now one of the main objectives of the Amsterdam Treaty for European Union. Part one, article 1(2) of the 1997 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, provides that the European Union nations shall take into account “the principle of sustainable development” while promoting economic and social progress for their peoples.³⁶

“Sustainable use” is defined in the Convention on Biological Diversity 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 Convention on Biological Diversity uses a special formulation of sustainable development by including the words “environmentally sound.” 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.” It can also be found in the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan, 1981). If the Brundtland 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,³⁷ by principle 1 of the Stockholm Declaration and 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, is nonetheless the first express recognition of the right to a healthy environment in an international instrument in the European region (see commentary to article 1).³⁸ It is coupled 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.³⁹ 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. The right to a healthy environment has increasingly been recognized at the national level. Many countries in the UN/ECE region, especially in central and eastern Europe and the newly independent States, have provisions recognizing the right in their constitutions or in domestic law.⁴⁰

Furthermore, the recognition of such rights is not an empty aim. Related provisions have been successfully used in the courts to defend rights of particular members of the public to a particular level of environmental protection. Cases have arisen in India, Pakistan and the Philippines. But they have also arisen in the UN/ECE region, one of the most notable being the “Protected Forests” case⁴¹ of Hungary. This case was the first constitutional court case in eastern Europe to give interpretation to the right to a healthy environment. It and others give meaning to so-called third-generation rights, in which the obligations of the State to provide a certain level of protection can be found, and in proper cases can give rise to individual actions. 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.”⁴²

Other cases considering the existence of a right to a healthy environment can be found in Belgium⁴³ and Slovenia.⁴⁴ Similar cases have been brought under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁵ which has been interpreted by the European Court of Human Rights in a manner that approaches a right to a healthy environment. The Court has made it clear that it may scrutinize the manner in which authorities protect the environment, establishing a threshold in human rights law where the consequences of a failure to protect the environment may be held to significantly impair the conditions of life of individuals.⁴⁶ Authorities were found to have violated article 8 in cases where they failed to provide adequate environmental information⁴⁷ or to enforce domestic environmental law.⁴⁸ This article, by extension, applies to the consideration of environmental impacts before decision-making as a means of protecting basic rights.

The seventh preambular paragraph specifically recognizes the rights of “present and future generations.” This phrase is also found in article 1. 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”⁴⁹ is well-known in international law. It can be traced back to the nineteenth century (1893 Pacific Fur Seals Arbitration), even though the argument was rejected by the tribunal in that case.⁵⁰ 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*.⁵¹

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 International Court of Justice has used similar language in recognizing that the very health of generations yet unborn is represented by the environment.⁵² The Aarhus Convention takes this jurisprudential recognition a step further 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*.⁵³ 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.⁵⁴ 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.”⁵⁵

[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 also, no less important, of the possibility for individuals to fulfil their responsibilities towards others, including future generations.

Significantly, the paragraph goes further to state in direct terms that persons might need assistance in exercising their rights. Its intention is furthered in article 3, paragraphs 2 and 3.

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.

[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,

issues is a side benefit of particular procedures that results in an overall increasing sophistication of the public in terms of its involvement and in terms of its potential support for good decisions. The opportunity of the public to express its concerns is a matter of self-fulfilment that increases confidence in society generally. The sincere desire of the public authorities to come to good decisions taking the concerns of the public into account as far as possible is reflected in the last element mentioned.

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

ure of its effectiveness. Thus, 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 who have had to suffer a loss as a result of the final decision. In the absence of such confirmation, members of the public who may be adversely affected by a decision will think the worst, and assume that the public authority has been corrupted by special interests. As most decisions to be effective require some measure of support from the public at large, the situation just mentioned is bound to result in a high degree of failed projects.

Moreover, those members of the public who 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, are able to see the consideration of the interests at stake including environmental protection, and they can realize that the decision could be a justifiable one in the given situation, 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,

the executive branch in such law-making in article 8. The Resolution of the Signatories emphasized that parliaments also have a key role to play in the implementation of the Convention. Article 2, paragraph 2, reflects the principle of respect for other branches of power in its definition of “public authority”.

The ninth preambular paragraph takes a more practical approach to the interaction of the public participation pillars with the right to a healthy environment and the attainment of sustainable development. It sets forth one of the core values of public participation, from the point of view of the public authority. It lists four separate practical benefits of public participation. The first is 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. Members of the public will often have a 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 who are most 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. Contribution to public awareness of

This paragraph emphasizes the societal implications of the practical considerations discussed in the ninth preambular paragraph, and is echoed in the twenty-first. The elements in the eighth preambular paragraph include the concept that the public and authorities often have a common interest in achieving an optimal result for the good of society, although there might be disagreement as to the means or as to the balancing of interests. But if the public actively participates in the process of decision-making, then one key question—whether the public authority has carried out its duties to the best of its ability—is answered in the affirmative.⁵⁶ The level of participation may be a measure

This paragraph acknowledges that the general principles contained in the Aarhus Convention can help in developing public participation in other branches of power 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. Moreover, as the process of developing law may involve a collaboration between the legislative and executive branches of government, the Convention addresses the participation of

While many of the Convention's governmental negotiators were reluctant to interfere with the balance of powers by prescribing requirements for the legislative process, it should be noted that a certain group of parliamentarians did actively take part in the negotiations and made several proposals in this regard. 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".⁵⁷

[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,

The potential need for Parties to provide assistance to the public to make use of the rights and opportunities provided by the Convention has already been acknowledged. One of the first ways of doing so is for the Party to provide information about procedures for participation in environmental decision-making. This paragraph applies some of the principles concerning environmental education in the context of public participation, in particular to so-called meta-information or information about how to acquire and use information. Effective use of the tools of public participation requires a good foundation of knowledge. This is true not only of the information that will be relevant to a particular decision-making process, but also of information about the opportunities for using the tools of public 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 who wish to participate. The issue of costs is further developed in the Convention.

Finally, the negotiators have recognized the importance of knowledge about how to use opportunities for public participation. This goes beyond the simple knowledge that opportunities exist to a real understanding of the procedures, including possible methods and mechanisms for effective public participation, extending to the results that can be expected and how to use them.

[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 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 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. NGOs are the means to exercise the right of association of any group with a common purpose or common interests.

The Rio Declaration specifically mentioned the roles that various groups could play in the protection of the environment and the attainment of sustainable development. While it specifically mentioned women (principle 20), youth (principle 21), and indigenous people and other local communities (principle 22), the Rio Declaration did not mention how these groups might organize for participation. Agenda 21, in its section 3: Strengthening the role of major groups, went further to include workers, trade unions, business and industry, the scientific community, and farmers among the enumerated groups, and included among the activities aimed at strengthening their role, promoting freedom of association and strengthening participation and consultation.⁵⁸ In addition, Agenda 21 indirectly mentioned organizational capacities in the context of developing countries.⁵⁹ There is no specific reference in Agenda 21 to environmental NGOs. It comes closest in chapter 36, where NGOs, among other entities, are specifically encouraged to train people in environmental management.

While the Rio Declaration and Agenda 21 might have made an attempt to identify "major" groups, the foundation for the participation of major groups is through the possibility for individuals to exercise their right of association. Thus, the Convention builds on these two documents and specifically mentions NGOs and the important role that they can play for environmental protection.

The role of business and industry in environmental protection is increasingly being recognized. On the one hand, some sectors of industry may be subject to commercial pressures that put them in direct conflict with environmental protection objectives. On the other hand, industry, whether “green” or not, is a key player in the search for solutions. Furthermore, the notion of “corporate citizenship” is developing. Considering the environmental impact of the activities of business and industry, it is critical that they are engaged by all stakeholders in society and encouraged to meet their responsibilities for minimizing the adverse impacts of their activities. Business and industry also have an incentive to develop creative solutions to environmental problems, in order to minimize business losses. In this respect, at times they have the same practical interest in participation that motivates many other members of the public. Of course the scale of the environmental impact of their activities also means that irresponsible or negligent actors represent one of the biggest challenges for environmental protection and the attainment of sustainable development.

[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 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,*

tronic form), and in its article 5, paragraphs 3 (accessible electronic databases) and 9 (structured, computerized and publicly accessible database).

[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,*

ities in gathering high-quality information.

The fourteenth preambular paragraph is related to the twelfth in that it deals in part with meta-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, most recently the 1997 Thessaloniki Declaration of the UNESCO Conference on Environment and Society: Education and Public Awareness for Sustainability,⁶⁰ which built upon declarations made at the Belgrade Conference on Environmental Education (1975), the Tbilisi Intergovernmental Conference on Environmental Education (1977), the Moscow Conference on Environmental Education (1987), and

The importance of information to the whole edifice of public participation cannot be exaggerated. This paragraph indirectly takes note of the rapid advances made in information technology in recent years and declares their importance to the effective use of information in public participation. 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. The Convention makes reference to information technology, in its article 2, paragraph 3 (information in elec-

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 policy-making, which has been called “biosphere reflection”. Specific sets of procedures for biosphere reflection in different contexts may be called “environmental impact assessment”, “ecological expertise” or “strategic environmental assessment”. 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 about previous preambular paragraphs, one of the functions of public participation is to assist public author-

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 with some definite responsibilities for all public authorities, not only environmental ones, as was the assumption in the past.⁶¹ Agenda 21 provides some guidance, in chapter 40 on “Information for decision-making.”

[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, is an example of a preambular paragraph that 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 at large 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. It is therefore 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.

Other 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,

and the length of the process.

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 judgments 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

The next point in this paragraph is that judicial mechanisms for redress in the case of infringement of rights and for enforcement of the law 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 certain persons 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. Organizations are specifically mentioned. Negotiators hereby expressed their concern that organizations as well as individuals should have standing in representing their rights and interests in the courts. This relates to the standing requirements found 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 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,

of 23 March 1992 on a Community eco-label award scheme establishes such a programme and procedures for adopting the specific ecological criteria needed to be met before the eco-label may be awarded. Article 6 of the Regulation specifically provides that environmental organizations shall be consulted in defining the ecological criteria.⁶² EC 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 International Organization for Standardization (ISO) has adopted four international standards on eco-labelling: ISO 14020:1998, ISO/DIS 14021:1999, ISO/FDIS 14024:1998 and ISO/WD/TR 14025.

Canada, Japan and a number of European countries (for example, Ireland and the United Kingdom) have adopted official programmes to award eco-seals to products they consider environmentally superior. It should be noted that there has been some criticism that the use of such seals may impose trade barriers because, in practice, they favour manufacturers in the country that awards the seal.

[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,

development of policies on GMOs is being played out in the media and in other forums.

The fact that the Convention had to take into account many different systems, interests and traditions among the countries in the UN/ECE region is nowhere more apparent than in its dealing with genetically modified organisms (GMOs). GMOs are considered here in the twentieth preambular paragraph and in article 6, paragraph 11. While recognizing the need for increased transparency and greater public participation in decision-making relating to GMOs, the Convention nevertheless allows a lower standard for such public participation through article 6, paragraph 11. This provision implies that Parties may find it unfeasible or inappropriate to apply the provisions of article 6 to particular decisions to release GMOs into the environment, without explaining why this may be so. (See commentary to article 6, paragraph 11.) Meanwhile, the

In the Resolution of the Signatories, the ministers of environment present at Aarhus recognized the importance of the application of the Convention to deliberate releases of GMOs into the environment, and requested the Parties to further develop the Convention in the area of GMOs at their first meeting, taking into account the work done under the Convention on Biological Diversity to develop a biosafety protocol. The negotiation of the Cartagena protocol on biosafety to the Convention on Biological Diversity has proven to be difficult, however, with major divisions between the so-called "Miami Group" of grain-exporting nations and other factions. At the time of printing, negotiations had been prolonged until January 2000.

The public's concern over GMO products and varieties has prompted the European Council to propose reforming its Directive on GMOs, among other things to increase transparency.

[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),

This paragraph builds on the ninth, tenth and seventeenth preambular paragraphs. 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.

The links between the Convention and democratization are made clear by the Chairman's Summary of the Seventh Economic Forum of the Organization for Security and Cooperation in Europe (OSCE) (May 1999).⁶³ That document urged countries to ratify the Aarhus Convention to affirm their commitment to public participation. The meeting considered that the

matters at the heart of the Aarhus Convention were important for security in Europe, and recommended that the principles of the Aarhus Convention should be incorporated into an OSCE charter on European security. The report of the relevant working group was accepted even by States that had not signed the Aarhus Convention. The same organization, then called the Conference on Security and Cooperation in Europe (CSCE), held a significant meeting on the protection of the environment in Sofia in the midst of the democratic changes of 1989.⁶⁴ The meeting was interrupted by accredited journalists telling of beatings of peaceful demonstrators (members of the environmental organization Ecoglasnost) taking place outside the hall. The response of all but one country present was to issue the following proposed⁶⁵ conclusions:

“[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.”

UN/ECE is the forum at which 55 countries of North America, western, central and eastern Europe, and Central Asia come together to forge the tools of their economic cooperation. The membership includes Canada, Israel and the United States, as well as countries of Central Asian and Caucasian territory of the former Soviet Union. Its main purpose is to harmonize the policies and practices of its member countries. Through these activities, UN/ECE reduces the risk both of cross-border tensions and of disagreements within or between such regional institutions and bodies as the European Union, the North American Free Trade Agreement (NAFTA) 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.

The Resolution of the Signatories expressly acknowledged that the Convention's ratification would “further the convergence of environmental legislation and strengthen the process of democratization” in the UN/ECE region.

Several of the preceding preambular paragraphs have dealt with ways in which democratic institutions can be strengthened through application of the Convention. This one links the others with the UN/ECE region. Parts of the UN/ECE region experienced large shifts in political systems and great leaps in democratization within the decade previous to the Convention's adoption. Even where the changes were not so dramatic, however, greater democratization was an important part of the historical landscape in UN/ECE during the 1990s. Cooperation between the public and public authorities has developed throughout the region due to a recognition of their common interests as well as a reformulation of the relationship between the State and the individual and associations in society.

[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,

UN/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 “Environment for Europe” process. A review of the UN/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 UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making. The idea of the Guidelines originated at the Second Ministerial Conference in Lucerne Switzerland, in April 1993. There, public participation was indicated as one of seven key elements for the long-term environmental programme for Europe suggested by the Senior Advisers to ECE Governments on Environmental and Water Problems (which later became the Committee on Environmental Policy). As a consequence, in paragraph 22 of the Lucerne Ministerial Con-

ference Declaration, the ministers requested UN/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 Guidelines were developed and by May 1995 accepted by the Working Group of Senior Government Officials responsible for the preparation of the Sofia Conference. They were endorsed at the Third Ministerial Conference “Environment for Europe” held in Sofia, in October 1995. The same Conference decided that consideration should be given to the development of a convention. The Committee on Environmental Policy in January 1996 decided that the scope of the future convention should reflect the scope of the Guidelines.⁶⁶

The ministers at Aarhus specifically recommended that the Sofia Guidelines (see Introduction) should be taken into account in the early implementation of the Aarhus Convention in the Resolution of the Signatories.

The “Environment for Europe” process is one of the main political frameworks for cooperation on environmental protection in Europe. It brings together environment ministers as well as many organizations and institutions working with the environment in the region, including citizen organizations, at pan-European conferences to formulate new environmental policies. Those conferences allow the environment ministers from approximately 55 countries to meet and to share experiences and ideas. (See box.)

“Environment for Europe”

Ministerial conferences within the “Environment for Europe” process have been held in 1991 at Dobris, Czechoslovakia, in 1993 at Lucerne, Switzerland, in 1995 in Sofia, Bulgaria, and in 1998 in Aarhus, Denmark. At Dobris 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, the ministers endorsed a broad strategy codified in the Environmental Action Programme for Central and Eastern Europe (EAP). The agenda of the Sofia Conference included a review of the implementation of the EAP and the further development of the Environmental Programme for Europe (EPE). 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.⁶⁷ The fourth pan-European conference of environment ministers within the “Europe for Environment” process was held in June 1998 in Aarhus. This Conference marked the signing of the Aarhus Convention.⁶⁸ 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.

Today, the “Environment for Europe” process is based on three central programmes: the Environmental Programme for Europe (EPE), the Action Programme for Central and Eastern Europe (EAP) and the Pan-European Biological and Landscape Diversity Strategy adopted at the 1995 Sofia Conference.⁶⁹ Pending the entry into force of the Aarhus Convention, the implementation of the requirements concerning access to information, public participation in decision-making and access to justice in environmental matters could be considered as the fourth core programme. After its entry into force, the Convention will have its own life apart from the “Environment for Europe” process, which will focus on new instruments, such as the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.⁷⁰

[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,*

Countries in the UN/ECE region have been very active over the past 10 years in concluding a series of environmental treaties on subjects such as transboundary environmental impact assessments, transboundary effects of industrial accidents, transboundary watercourses. All of these conventions have addressed access to information and public participation to some degree and several have even 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 consider the experiences of other multilateral agreements in its implementation as well.

The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) obliges Parties to assess the environmental impact of certain activities at an early stage of planning and lays down the general obligation of States to notify and consult each other on all major projects that are likely to have a significant adverse environmental impact across boundaries.⁷¹ It includes the most advanced public participation provisions in any UN/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. The following table lists the main provisions

of three UN/ECE conventions that relate to access to information, public participation in decision-making and access to justice in environmental matters.

Name of convention	Purpose	Aarhus-related provisions
Convention on Environmental Impact Assessment in a Transboundary Context	Stipulates the obligations of Parties to assess 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.	1 (x), 2.2; 2.6; 3.8; 4.2 and appendices III and IV (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.	1 (j); 3.1, 3.2, 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.	11.3; 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 “Environment for Europe” process has been described above (see twenty-second preambular paragraph, box). The signing of the Aarhus Convention by 35 countries and the European Community was one of the central events of the 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.”⁷²

Have agreed as follows:

GENERAL PART

The General Part of the Aarhus Convention consists of the objective (art. 1), the definitions (art. 2) and the general provisions (art. 3). The objective of the Convention establishes its overall goal and places it within the context of the greater body of international environmental law and the international law of 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 UN/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 firm obligations found in the body of the Convention. They provide an overall structure for its implementation and express certain values that must be taken into account in implementation.

Article 1

OBJECTIVE

international law into a succinct new formulation. In spite or perhaps because of its brevity it is densely packed with language significant not only to the Convention itself but to the overall development of the international law of 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.

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. It has the advantage of being strongly rooted in pre-existing international and domestic environmental and human rights law, while at the same time pulling together elements from various trends in

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 the clearest statement in international law to date of a fundamental right to a healthy environment.⁷³ Whereas the Rio Declaration states that human beings “are entitled to a healthy and productive life in harmony with nature,” this concept is continually being 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.⁷⁴ While the Convention does not expressly state that the right exists, it does refer to it as an accepted fact. This may be optimistic, given the debate concerning whether such a right does in fact exist.⁷⁵ However, when the Convention is in force, it will be a fait accompli, although the exact formulation and meaning of the right will be a matter of debate for some time to come.⁷⁶

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 1 of the Stockholm Declaration, but the Aarhus Convention is the first international legal instrument to extend this concept to a set of legal obligations. Forging the link between environmental and human rights puts into a larger perspective the interpretation and possible implementation of the Convention. See also commentary to preamble, especially its first, fifth, sixth and seventh paragraphs.

Basically, the Convention is not primarily about the right to a healthy environment, but about the (mostly) procedural rights of access to information, access to decision-making and access to justice. 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 in how to take steps to guarantee the basic right of present and future generations to live in an environment adequate to health and well-being. 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.⁷⁷ 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, society can do more to stop environmental degradation and can work towards sustainability.

Article 1 also concretizes the role of the State in helping 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 home-grown 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 in 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 valuable tools for contributing to the basic welfare of the people.

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 valuable help in discharging their awesome responsibility to help the people to overcome the formidable challenges of the times.

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 UN/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 made 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 explanation. 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).

Terms not defined in article 2

“In the framework/in accordance with (national legislation)”—These and similar phrases can be found at several instances in the Convention. Among them are article 2, paragraph 4, and article 6, paragraph 1 (b) (“in accordance with national legislation”), article 4, paragraph 1, article 5, paragraphs 2 and 5, article 9, paragraphs 1 and 2 (“within the framework of national legislation”), and article 4, paragraph 4 (d) (“within this framework”). These expressions are open to interpretation, and the manner in which they are interpreted is of the utmost importance to the overall implementation of the Convention. During the Convention’s negotiations, 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 agreed. Given this background, the best that can be done at present is to express some hopefully well-founded suggestions about interpretations of these terms, taking into account the principles and objectives of the Convention. In the end, it is the Parties that must take responsibility for its full implementation.

One possible interpretation is that the terms pertain primarily to flexibility in the means of implementation but not to 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. 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 were a pre-existing national law on the subject. The language merely introduces some flexibility in the means that Parties may use to meet the obligation and apply the principles of the Convention, taking into account different national systems of law. 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.

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. An example is the determination of “significant” environmental effect. Under article 6, paragraph 1, Parties are obliged to apply the provisions of article 6 to decisions on proposed activities which may have a significant effect on the environment. For those proposed activities not listed in annex I, Parties must determine whether a proposed activity has a significant effect on the environment in accordance with its national law. Thus, differences in the rules or criteria for determining what is significant among Parties might lead to a different scope in the application of the Convention to activities, though such differences might be ironed out over time through the Meeting of the Parties. It should be mentioned that the term “in accordance with national legislation” is particularly applicable in this kind of situation.

The idea that the phrases “in accordance with national legislation” or “within the framework of national legislation” might introduce flexibility in the content of the basic obligations of the Convention is more 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.

Flexibility in general is needed because of the special nature of the Aarhus Convention, with its mixed civil and environmental and not just traditional environmental aspects. The debate about how to ensure that the Convention was a “floor” and not a “ceiling” played a role in the generation of such formulas (see commentary to article 3, paragraphs 5 and 6). Where a convention takes a “traditional” approach to an environmental problem by regulating behaviour and enforcing quantitative norms, it is easy to see how it can operate as a floor—Parties may be free to introduce more stringent requirements protective of the environment. As the international law on the subject evolves and Parties assist each other in implementation an “upward harmonization” can take place.

The Aarhus Convention, however, applies not only to the traditional command-and-control means of achieving environmental protection goals, but also to various aspects of administrative and governmental practice and procedure, which may differ from place to place. The notion of “upward harmonization”—while still valid for the Convention as a whole—is less applicable to questions involving mutual respect for various legal traditions. Therefore, the “framework” or general structure of national legislation is referred to at various times in the Convention to manifest this respect. This does not mean that a Party need not make adjustments even to its basic legal framework if necessary to meet the obligations of the Convention, but even with these necessary adjustments, it may still be said that the Party has met the obligation within the framework of its national legislation.

The term “within the framework of national legislation” may also be interpreted as an instruction to the Parties that they should provide more detailed provisions than the general ones presented in the Convention. This takes into consideration the legal system of many countries in the UN/ECE region according to which international agreements are directly applicable within the country in cases where legislation is silent. International agreements operate to override contrary domestic legislation and even to displace it systematically. It may therefore be necessary to include such language to indicate that the Convention should only qualify and not displace the existing national legislation on the subject.

Under the “flexibility in method” interpretation, the phrase “in accordance with national legislation” refers to a more direct link with a matter that may already be covered by national legislation. It is a way of carrying along with the Convention a matter that may evolve independently through national law. Besides the example given above about “significant” environmental effect, another example might involve NGO qualifications. Where NGOs are granted particular rights in a proceeding there may be a reference to those NGOs that meet requirements “in accordance with national legislation”. Country A might require an NGO 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 foul of some other provision of the Convention, it would automatically be incorporated under the regime of the Convention. The words are thus similar to such formulations as “provided under national legislation” or “where laid down in national legislation”.

For the purposes of this Convention,

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

enters into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession. (For more on signature, deposit, ratification, acceptance, approval or accession, and entry into force, see commentary to articles. 17-20).

A State or regional economic integration organization that has indicated its intent to be bound by a convention becomes a Party to it once the convention enters into force. (For a discussion of regional economic integration organizations, see commentary to article 17.) Intent to be bound by a convention can be indicated in various ways, depending on the constitutional order of the subject State or regional economic integration organization. The Aarhus Convention was open for signature to States and to regional economic integration organizations in the UN/ECE region through 21 December 1998 (see article 17). Article 20 of the Convention establishes that it

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 not a party to a particular agreement or transaction but who may have rights or interests therein. The commentary sometimes uses the term “party” when referring to a legal or natural person who takes part in a particular proceeding (for example, see commentary to article 6, paragraph 9) or whose interest is otherwise affected. In the text and the commentary, 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:

age 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 involvement, information and participation.

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 a cover-

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

local or municipal government offices, such as those found in cities, towns or villages, would be covered.

“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

It must be emphasized that public authorities under the Convention are not limited to “environmental authorities” within government. It is unimportant whether a particular public authority 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;

person authorized by law to perform a public function of any kind falls under the definition of “public authority”, although references in the environmental field are provided as examples of public administrative functions and for emphasis.

“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. Any

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, sue and be sued, and make decisions through agents, such as a partnership, corporation or foundation. While a governmental unit may be a 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.

(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. One 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 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 similar to that of article 6 of the Council Directive 90/313/EEC, which refers to bodies with public responsibilities and under the control of public authorities. However, article 2, paragraph 2 (c), fills a gap found in the Directive, because it 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 can 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.

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, this subparagraph does so limit the scope of the definition. Only persons performing public responsibilities or functions or providing public services in relation to the environment can be public authorities under this subparagraph.

At a minimum, this subparagraph covers natural or legal persons that are publicly owned, for example, community-owned public service providers. It may also cover publicly or privately owned entities providing public services where the service provider can oblige residents to pay fees or engage in particular activities, such as those relating to waste collection. Furthermore, it may cover entities performing environment-related public services that are subject to regulatory control.

The provision also reflects certain trends towards the privatization of public functions that exist in the UN/ECE region. During the Convention’s negotiations, 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. For example, the Netherlands Energy and Environment Enterprise has been officially delegated grant-making authority in energy conservation, while practically being a part of the Netherlands Government’s energy policy.⁷⁸

An example from the United Kingdom may help to illustrate the relevance of this provision. There, public functions previously carried out by governmental authorities had been taken over through a privatization process by public corporations. These included major providers of natural gas, electricity, and sewerage and water services. In the case of the water providers, they were highly regulated by the Government and kept financial accounting for these services separate from their other activities. In a court case in the United Kingdom about the applicability of European Community directives to such a water services company, the judge determined that such a service provider was an “emanation of the State” and therefore covered by the directive.⁷⁹

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.

(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 may also be a public authority under the Convention. Article 17 refers to regional economic integration organizations constituted by sovereign States members of ECE if these States have transferred to them their competence over matters governed by the Convention (for more see commentary to article 17). One example of such an organization is the European Community (EC). The European Community has signed the Aarhus Convention and, upon ratification, many of its institutions—for example, the European Commission, the Council of the European Union, the Economic and Social Committee, the Committee of the Regions, the European Environment Agency and the Statistical Office—may be considered public authorities under the Convention.

Added transparency of EC decision-making is a big step forward from the provisions of Council Directive 90/313/EEC, which, although mandatory for all member States, does not apply to the institutions of the EC itself. They have up to now been governed by voluntary codes of conduct. Such change would confirm a positive trend towards more transparency of and participation in decision-making in the EC institutions established through provisions of the Amsterdam Treaty allocating more power to the European Parliament and more accountability to the Commission, as compared with the Maastricht Treaty. The fact that the EC has become a Signatory to the Convention indicates its determination to follow this trend. The Community stated at the signing of the Aarhus Convention that its institutions would be covered, alongside national authorities.⁸⁰ This is also consistent with the Amsterdam Treaty, which mandates a review of the Commission's and Council's rules on access to documents held by them.

The Aarhus Convention and the institutions of the European Community

The European Community signed the Aarhus Convention in June 1998. Legal analysis of the EC legal framework would indicate the following:

- The term “institutions” would, in the case of the Community, not only cover the institutions listed in article 4 of the EC Treaty, but also Community bodies like the Economic and Social Committee and the Committee of the Regions and subordinate agencies, such as the European Environment Agency;
- The Council would in principle be subject to the Convention's obligations when for example deliberating on international environmental conventions;
- The Commission should not be considered as acting in a “legislative capacity” in the meaning of the Convention;
- The scope of the terms “national legislation” should be enlarged, so as to cover Community legislation.

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 fundamentally different character of decision-making either in a legislative capacity, where elected representatives are more directly accountable to the public through the election process, or in a judicial capacity, where tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention should not apply to bodies acting in a judicial capacity in order 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, courts or local councils, but also to executive branch authorities, when they perform legislative or judicial functions. An example of the former can be found in municipal councils, which sometimes serve in both legislative and executive capacities. Where they are acting in an executive capacity they are covered by the Convention; 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 parliaments or other legislative bodies from applying the rules of the Convention *mutatis mutandis* to their own proceedings. At the same time as legislative activities are excluded from the scope of 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”.⁸¹ Finally, the Resolution of the Signatories emphasized the key role to be played by parliaments, regional and local authorities, and NGOs in the implementation of the Convention.

3. “Environmental information”

The definition of environmental information is of central importance to article 4 on access to environmental information and article 5 on the collection and dissemination of environmental information. What constitutes environmental information is explained rather indirectly in terms of what environmental information can be about. The subjects of environmental information are broken into three categories and within each category illustrative lists are set forth. These lists are non-exhaustive.

In any case, the definition of environmental information is, of course, a minimum requirement; Parties may use a broader definition. Several countries in the UN/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, Sweden, Ukraine and the United States are among the countries with general access to information laws that make the question of whether information is “environmental” or not unnecessary. Denmark has both a general information law and a specific law on environmental information.

The Aarhus Convention does not contain a definition of “environment”. Article 2, paragraph 3, is 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.

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 form. Thus, paper documents, photographs, illustrations, video and audio recordings, and computer files are all examples of the material form the information can take. Any other material forms, not mentioned, existing now or developed in the future, also fall under this definition. See also the fifteenth preambular paragraph about electronic 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 is obtainable as well as documents.

(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 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 the EU Council Directive 96/62/EC of 27 September 1996 on ambient air quality assess-

ment and management. The directive defines “ambient air” as “... outdoor air in the troposphere, excluding work places”.⁸² By implication, the Aarhus Convention’s definition, which is broader, invites Parties to include indoor and workplace air as well. 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 tree or 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 Convention on Biological Diversity 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 unit⁸³), are considered components of biodiversity.⁸⁴

Genetically modified organisms are explicitly included as one of the components of biodiversity under the Aarhus Convention. The Council Directive of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (90/220/EEC) 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”. (For more on GMOs see commentary to article 6, paragraph 11.)

The list of “elements of the environment” is non-exhaustive and others may exist without being mentioned. For example, radiation, while being mentioned in subparagraph (b) as a “factor”, may also be considered as an element of the environment. Otherwise, the effect of radiation on human health would be covered by the definition only if it acted through an environmental medium (see commentary under subparagraph (c), below).

Finally, the subparagraph includes “the interaction among these elements”. This provision reflects the approach taken to integrated pollution prevention and control (IPPC), recognizing that the interactions among environmental elements are as important as the elements themselves. The goal of the European Community’s IPPC Directive,⁸⁵ for example, is to achieve integrated prevention and control of pollution arising 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 UN/ECE must be discussed. The effect of the factor, activity or measure does not have to be immediately evident. It is enough if there is some probability that an effect on the environment might happen in the future. In the English version of the text, the words “likely to affect” are used. The literal translation of the Russian version of the text is, rather, “that may affect”. The degree of probability expressed in this provision is already rather vague, but there is a distinct difference in the two formulations. “Likely to affect” may be interpreted to mean “more likely than not”, which requires a certain degree of probability. The Russian text of the Convention appears to require a much lower degree of probability (“possibly may affect”). The French formulation is closer to the Russian one. The difference between these two formula-

tions is potentially significant. It is not clear how this difference might be resolved in the practical application of the Convention. It is interesting to note, however, that the Russian formulation is more consistent with the formulation found at other points in the Convention, for example in article 6, paragraph 1 (b), which refers to activities “which may have a significant effect on the environment”.

A definite difference between this provision and article 6, paragraph 1 (b), is in the use of the word “significant” in the latter provision. There is a very practical reason for this difference. In the case of article 6, where elaborate procedures must be applied, it is efficient and cost-saving to limit its application to the most appropriate cases. Thus it is reasonable to impose a threshold based on the “significance” of the potential effects on the environment. But where information is concerned, efficiency is served not by imposing a threshold, but by including everything that is relevant. Thus, “significance” is inappropriate in the definition of “environmental information”.

The complex formulation of subparagraph (b) 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 subparagraph (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 is the most relevant to the scope of information determined under the requirements of article 6, for example, the contents of the notification to the public concerned in a particular decision-making procedure (art. 6, para. 2) and the information that must be made available to the public concerned (art. 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 include “administrative measures, environmental agreements, policies, legislation, plans and programmes”. These terms imply human action. While the examples given can be seen to be primarily acts of public authorities, although environmental agreements may involve private actors as well, there is no logical reason to limit the activities or measures covered in such a way.

The definition certainly includes decisions on specific activities, such as permits, licences, permissions that have or might have any (in the Russian text), or have or are likely to have an (in the English text) effect on the environment. Again, 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 (in the Russian text) or are likely to have (in the English text) 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.

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”, designating them as measures likely to affect the environment included within the definition of “environmental information” may help to make them more accessible. Voluntary agreements 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.⁸⁶

Finally, the second category 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 the results of the economic analysis 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 it. The quantification of environmental values and the “internalization” of environmental costs are among the most difficult of questions for economists. It is therefore also important to be able to analyse the assumptions behind economic modelling 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;

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 clearly 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. The negotiating parties 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 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 quality of air and water, housing and workplace conditions, relative wealth, and various social conditions.

The term “cultural sites” covers specific places or objects of cultural value. The Convention Concerning the Protection of the World Cultural and Natural Heritage 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” (art. 1). “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 things covered by subparagraph (c) depend upon a linkage with the matters found 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 decision-making would be environmental information under subparagraph (b);
- Information relating to the quality of air or water would be environmental information under subparagraph (a); 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” applies the “any person” principle (for an explanation of natural and legal persons, see comment to article 2, paragraph 2). The definition of “public” in article 1 (x) of the Espoo Convention, for purposes of comparison, is “one or more natural or legal persons.” The same definition can be found in article 1 (j) of the Convention on the Transboundary Effects of Industrial Accidents. For emphasis, the Aarhus Convention also explicitly mentions associations and groups. The term “public” under this definition is not subject to any conditions. Thus, the issue of whether a particular

member of the public is affected or has an interest is not significant where rights under the Convention apply to the “public”.

Moreover, applying article 3, paragraph 9, requires that no person be excluded from the definition on the grounds of nationality, domicile, citizenship, or place of registered seat. Under certain circumstances, therefore, persons who are non-citizens may 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 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 or meeting is held 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 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.

As mentioned above, the Convention’s definition of “public” differs from that of other UN/ECE conventions in the addition of language referring to associations, organizations or groups of nat-

ural or legal persons. 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.

The Convention treats environmental NGOs advantageously in some places, but usually signals that individuals and persons not organized into formal groups can equally participate in environmental decision-making. This would apply to businesses as well as to non-environmental NGOs and other, different forms of associations, entities, etc.

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” refers to a subset of the public at large with 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. This definition applies to the second pillar of the Convention—public participation in 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 provisions (art. 9, para. 2).

As mentioned above under article 2, paragraph 4, applying article 3, paragraph 9, requires that no person should be excluded from the definition on the grounds of nationality, domicile, citizenship, or seat. Under certain circumstances, therefore, persons who are non-citizens may have rights and interests under the Convention. For example, in cases where the area potentially affected by a proposed activity crosses an inter-

national border, members of the public in the neighbouring country might be members of the “public concerned” for the purposes of article 6.

While narrower than the “public,” the “public concerned” is nevertheless still very broad. It appears to go well beyond the kind of language that is usually found in legal tests of “sufficient interest”, including not only the members of the public who are likely to be affected, but also the members of the public who have an interest in the environmental decision-making. This definition includes members of the public whose legal rights guaranteed under law might be impaired by the proposed activity. Potentially affected rights vary depending on the domestic legislation, but may include material and property rights, as well as 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. Persons with a mere factual interest do not normally enjoy the full panoply of rights in proceedings and judicial remedies accorded to those with a legal interest under these systems. The Convention appears to accord the same status (at least in terms of article 6—procedural rights—and possibly article 9—remedies) regardless of whether the interest is a legal or factual one.

An alternative reading of this definition in the context of the Convention, however, is that it requires Parties that narrowly define legal interest in the fields covered by the Convention to expand those definitions. That is, Parties would be required to recognize subjective rights in a select class of cases on the basis of articulated concern, rather than on the basis of narrowly defined property or other legal interests.⁸⁷

The Resolution of the Signatories explicitly commended the “active and constructive” participation of NGOs in the development of the Convention and recommended their continued participation in the Meeting of the Signatories. Recognizing the integral role that NGOs will play in the implementation of the Convention, Parties should strive to ensure that requirements on NGOs are not

overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in civic affairs.

Article 2, paragraph 5, explicitly includes NGOs whose statutory goals include environmental protection within the category of the interested public, as 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 purposes consistent with the implied definition of environment found in article 2, paragraph 3.

Parties may set requirements for NGOs under national law, but these requirements should be consistent with the Convention's principles, such as non-discrimination and avoidance of technical and financial barriers to registration. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary. For example, one UN/ECE country requires environmental NGOs to have been active in that country for three years and to have at least 2,000 members.⁸⁸ The requirement of activity in the country would not be consistent with the Aarhus Convention, because it would violate the non-discrimination clause of article 3, paragraph 9. The membership requirement might also be considered overly strict under the Convention. Similar requirements would certainly 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.

It is also worth noting that, once an NGO meets the requirements set, it is a member of the "public concerned" for all purposes under the Convention, and may even be deemed to have a sufficient interest under 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".

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 is a need for 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"> • Compatibility • Proper enforcement
Article 3, paragraph 2	Endeavour to ensure that public authorities assist and guide the public	<ul style="list-style-type: none"> • Best efforts • All three pillars
Article 3, paragraph 3	Promote environmental education and awareness	<ul style="list-style-type: none"> • Generally • Especially with respect to three pillars
Article 3, paragraph 4	Recognize and support environmental NGOs within legal context	<ul style="list-style-type: none"> • Adjust legal system if necessary • "Promoting environmental protection" • "Appropriate"
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

Provision	Obligation	Implementation guidance
Article 3, paragraph 6	Discourage backsliding	<ul style="list-style-type: none"> • No derogation from existing rights required
Article 3, paragraph 7	Promote Convention's principles in international arena	<ul style="list-style-type: none"> • International environmental decision-making processes • International organizations
Article 3, paragraph 8	Anti-harassment	<ul style="list-style-type: none"> • "Penalized, persecuted or harassed" • Costs in judicial proceedings not affected
Article 3, paragraph 9	Non-discrimination	<ul style="list-style-type: none"> • All three pillars • Citizenship, nationality, domicile or seat

1. 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 rather elevated goals. Seemingly simple, this provision actually includes general obligations that go to the heart of administrative and judicial institutions and practice. Implicitly acknowledging that this is a difficult and complex task, paragraph 1 sets out a number of elements that must be incorporated in any scheme to implement the Convention.

The means for Parties to implement the Convention is a "clear, transparent and consistent framework". The main beneficiaries of the Convention are the public. Conforming to the most basic principles of State administration, the public has to be aware of the opportunities for participation and the applicable rules must be clear and consistent. The specific language of the Convention implies that the mere declaration that the Convention is directly applicable would not be enough to meet this obligation. Rather, it is incumbent upon Parties to develop implementing legislation and executive regulations to establish this framework.

Consistency of the framework should receive special attention, as it is directly related to another clause in this paragraph concerning "compatibility". The negotiating parties were aware that the Convention's commitments reached out in many directions, drawing new connections among aspects of State 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 disparate range of institutions and authorities, great attention must be paid to ensuring consistency throughout the implementing legislation and the civil administration.

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.

Finally, this provision draws attention to enforcement. Enforcement is of course linked to access to justice, since the whole edifice of the Convention is backed up by it. But, while the access-to-justice pillar might be seen as a means for enforcement of the whole Convention, in fact even the access-to-justice provisions 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 guidance laid out in the eighth preambular paragraph, which acknowledges 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. In many UN/ECE countries the public is relatively inexperienced in the use of the tools for access to information, public participation and access to justice found in the Convention. In such countries it might be useful to develop the capacities of the public in various ways. Because officials are in the public service, it is reasonable to expect that they might help to activate the public's use of these instruments, by providing information, guidance and encouragement. Provid-

ing information is not enough, as can be seen by reading this provision together with the following paragraph. 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 opinion 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 the reasoning behind this provision of the Convention becomes clear. It is in the authorities' own interest to assist the public in exercising their rights because positive results can be expected—both in the level of participation and in the spirit of cooperation.

Rather than softening the obligation, the word “endeavour” 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 measures. Using electronic information as an example, easy-to-use Internet-based search engines can help the public gain access to information. However, where the public does not have widespread Internet access, authorities should consider establishing publicly accessible environmental information reference centres in convenient locations.

Article 3, paragraph 2, does not directly require Parties to appoint special officials to help the public find the requested information and in other phases of participation, 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 want to participate. In connection with information rights, 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 makes him or her more effective in dealing with members of the public.

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.

elevates this objective to the status of a binding international legal obligation. Moreover, besides codifying the general obligation of the Parties to promote environmental education and awareness, article 3, paragraph 3, lays special emphasis on building the public's capacity in the matters that are the subject of the Convention.

The paragraph partly refers to general environmental education and awareness-raising and partly to the dissemination of meta-information (information about sources and use of information) on the subject matters of the Convention. Naturally basic environmental knowledge is an indispensable element of capacity-building for public participation.

Environmental education and awareness-raising may also be distinguished. 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.

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.

ous environmental and human and civil rights instruments that recognize the importance of contributions from governments to support civil society so as to ensure that different interests in society are represented in a balanced manner.

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. This type of NGO is sometimes called an "environmental citizens' organization". 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. While some UN/ECE countries have encountered problems when persons abused the law by creating sham foundations that covered private business activity, Parties must ensure that measures taken to combat illegal activities do not inhibit the formation of legitimate NGOs.

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, groups organize over specific topics at the

Paragraph 3 recognizes that environmental education and awareness are important foundations upon which the pillars of the Convention are based. It deals further with public capacity-building, using a different approach from that employed in paragraph 2. This paragraph starts with a general obligation to promote environmental education and environmental awareness among the public. This is consistent with several soft obligations and statements found in the provisions of various international instruments, including the Stockholm Declaration, principle 19, the United Nations Framework Convention on Climate Change (New York, 1992), article 6 (a) (i), the Convention on Biological Diversity (Rio de Janeiro, 1992), article 13, the Convention to Combat Desertification (Paris, 1994), article 19, and Agenda 21, *passim*. The Aarhus Convention

Recognition of and support to associations, organizations, or groups are issues running throughout the Convention. For example, articles 2, 5, 6 and 9, paragraph 2, together establish a special status for environmental NGOs in the Convention. This special status recognises that such NGOs have a particularly important role to play in the implementation of the Convention. The effective use of the status, 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. The Convention follows on numer-

grass-roots level. In these cases registration as a formal, “permanent” organization may be unnecessary. The level of recognition and support may, however, vary between registered organizations and ad hoc 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 in the interests of its members or other persons if its founding document, articles of association or relevant law grants it this right.⁸⁹

Appropriate recognition of such associations, organizations and groups, besides the possibility of meeting legal requirements for existence, may also involve recognition of certain powers and rights. For example, under article 18 of the Lugano Convention:

“any association or foundation which according to its statutes aims at the protection of the environment and which complies with any further conditions of internal law of the Party where the request is submitted may, at any time, request:

- the prohibition of a dangerous activity which is unlawful and poses a grave threat of damage to the environment;
- that the operator be ordered to take measures to prevent an incident or damage;
- that the operator be ordered to take measures, after an incident, to prevent damage; or
- that the operator be ordered to take measures of reinstatement.”

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 UN/ECE countries it is not unusual for substantial financial grants or awards to be given to environmental citizens’ organizations to support their activities. Other countries suffer from a lack of financial resources or are reluctant to provide support because 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.

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, provisions should be non-discriminatory. In addition, procedural rules, which give environmental citizens’ organizations, for example, advantages when they participate in individual cases might also be counted as support. Moreover, the rules for access to justice should remove or reduce financial and other barriers, in conformity with article 9, paragraph 5.

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, are among the most important provisions of the Convention, establishing that the Convention is a “floor, not a ceiling”. Parties have at any time 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. That is, 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.

The wording of these paragraphs is specifically crafted to take note of the fact that countries will be meeting the obligations of the Convention through legal frameworks. Since these frameworks will be subject to interpretation, article 3, paragraphs 5 and 6, guide this interpretation, essentially restricting differences between the Convention and the implementing laws to a “one-way” interpretation—in the direction of greater rights and guarantees to the benefit of the public. The Convention establishes the grounds for future developments whereby the Parties might raise the accepted international standards in the future, based upon experience with higher standards on the domestic level. Nevertheless, 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. It is important to keep in mind the interests expressed by certain States during the negotiation that led to the particular language of article 3, paragraphs 5 and 6.

Because of the special nature of the Aarhus Convention in comparison with traditional, command-and-control oriented international agreements, a different approach had to be taken to ensure that the Convention would carry Parties forward in its subject areas. Consequently, the negotiating parties had difficulty in finding the right formulation. They were faced with a constitutional oddity that threatened to undermine the Convention. It is a well-known tendency, when drafting international agreements that must take into account national differences, for the negotiations to lead towards the lowest common denominator. The problem thus encountered was to avoid the possibility that rights and protection in some eastern European countries might actually be diminished. This could happen if ratification of the Convention were to *supplant* the prior national legislation on the same subject matter, a real possibility under some constitutional orders. This would cause obvious difficulties when maximum limits are set on the basis of the lowest common denominator rule.

Earlier UN/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.”⁹⁰

The use of the word “stringent” is appropriate when the subject matter of a convention is the obligation of the Parties to take protective measures and 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 public activities.⁹¹ The language finally settled upon was intended to make clear that pre-existing rights or provisions 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.

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 concerning environmental matters in international decision-making processes and within the framework of international organizations. These categories may overlap in certain instances. International environmental decision-making processes may include bilateral or multilateral decision-making relating to shared natural resources (such as river basin management regimes), as well as the decisions of bodies established under international conventions. It may also include international forums, such as the United Nations General Assembly, dealing with specific issues with significant potential environmental impacts. It should also include conferences of States on environmental issues, such as the 1992 Rio Conference or the periodic ministerial meetings “Environment for Europe” or “Environment and Health”. Working groups charged with the

negotiation of international legal instruments would also fall under this category. The drafting of the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes is one process in which many of the principles of the Aarhus Convention have already been applied. The Protocol’s negotiating parties expressly took the Aarhus Convention into account.⁹²

Parties are also obliged to promote the Aarhus Convention’s principles in respect of international organizations in matters relating to the environment. Such organizations include 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 post-war infrastructure in the Balkans. The phrase may include bodies of organizations such as the European Community, although the Convention uses a special term—regional economic integration organizations—to apply to the latter.

It should be noted that European Community institutions are affected directly as well as indirectly through the obligation found herein. That is because the European Community is also a Signatory to the Convention. It stated at the signing of the Aarhus Convention that its institutions would be covered, alongside national authorities.⁹³ It is irrelevant whether these international organizations were formed before or after the coming into force of the Convention. The Resolution of the Signatories included a recommendation that NGOs should be allowed to participate effectively in the prep-

aration of instruments on environmental protection by intergovernmental organizations other than UN/ECE, and encouraged international organizations, including the regional commissions of the United Nations and bodies other than UN/ECE, to draw upon the Convention to develop appropriate arrangements relating to the subjects covered by it.

A similar provision can be found in the draft principles on human rights and the environment concerning measures States should take to implement the principles of the declaration (E/CN.4/Sub.2/1994/9, annex I, para. 22). One of the points covered measures “aimed at ensuring that the international organizations and agencies to which they belong observe the rights and duties in this Declaration.”

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 rights under the Convention. To some extent it reflects the so-called whistle-blower protection principle (referring to the notion that someone is “blowing the whistle” to call the attention of the authorities to particular unlawful activities). In many countries the principle is aimed at protecting employment. To be applied in a wide variety of legal contexts, however, it goes beyond traditional whistle-blower rules. It has been given maximum flexibility and is aimed at preventing retribution of any kind. As in so many other situations that involve openness and transparency and where economic interests are at stake, persons who take the risk of demanding that the rules should be complied with and proper procedures followed need to be protected from various forms of retribution. Early forms of this type of provision can be 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. A good example of employment protection is found in a United States statute known as the Occupational Safety and Health Act of 1970.⁹⁴ It protects workers if they complain to government officials about unsafe or unhealthy working conditions. The statute makes it illegal for the employer to discharge or otherwise discipline the worker who makes such a complaint. If a worker is wrongfully discharged or disciplined, the worker has the right to reinstatement with back pay.⁹⁵ The United States Congress assumed that the employees in a given work site would best know the hazards there.⁹⁶

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, which must be granted unless the effectiveness of the examination of the data requires otherwise. In this case the complainant must be informed of an intent to disclose his or her identity in advance.⁹⁷ Moreover, 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.⁹⁸

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.

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 the citizens of the subject Party. Although the public is defined without respect 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. 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, additionally, that this provision is potentially useful to domestic persons in cases of positive discrimination in favour of foreign entities.

A similar provision may be 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”. 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”. Another similar provision can be found in the 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” (E/CN.4/Sub.2/1994/9, annex I, para. 3).

The non-discrimination provision may be especially significant for defining the “public concerned” under article 2, paragraph 5, article 6 and article 9, paragraph 2, and identifying the public under 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. Article 3, paragraph 9, makes it clear that distinctions based upon citizenship, nationality, residence or domicile, place of registration or seat of activities are improper under the Convention.

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 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 access-to-information pillar

Under the Convention, access to environmental information ensures that members of the public can 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 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 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 persons 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, article 1 on the objective 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

The Convention develops at the international level rules that have long been found at the national level. Some of these national rules have found their way into international law, especially in recent years. Many treaties developed before the 1990s provided for access to information among Parties. 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 declares that 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.

Treaties including elements of the Pillar I access to information principles include both UN/ECE and worldwide agreements, such as the Convention on Civil Liabilities for Damage Resulting from Activities Dangerous to the Environment (Lugano, 1993) and the United Nations Framework Convention on Climate Change (1992).

Like the Aarhus Convention, the Lugano Convention specifies that any person has the right to access information held by public authorities upon request without having to prove an interest (art. 14, para. 1). It also lists the conditions under which that right may be restricted (art. 14, para. 2)—these conditions closely mirror those in the Aarhus Convention. Finally, it specifies time-frames in which information must be supplied (art. 14, para. 4), stipulates that fees for information should be “reasonable” (art. 14, para. 6), and guarantees a right to appeal against wrongful denial or inadequate fulfilment of a request for information (art. 14, para. 5). The United Nations Framework Convention on Climate Change, by contrast, simply instructs Parties to promote and facilitate public access to information on climate change and its effects (art. 6 (a) (ii)).

Another example of access-to-environmental-information provisions in international law is article 16 of the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. This article 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.

Directive 90/313/EEC on the freedom of access to information on the environment has provided the legal basis for access to environmental information in the EC countries and in other countries in the UN/ECE region since its adoption. The Directive establishes basic obligations for European Community member States to ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his or her request. The differences between the EC Directive and the Aarhus Convention are described in the box at the end of article 4.

Many of the environmental treaties of the past 15 years also provide that Parties should collect and disseminate specific environmental information, relevant to that treaty, to members of the public. For example, the 1992 Convention on the Transboundary Effects of Industrial Accidents 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 (art. 9, para. 1).

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 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**

Article 4

A system to allow the public to request and receive environmental information from public authorities

- 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

A system under which public authorities collect environmental information and actively disseminate it to the public without request

- 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 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 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, the documentation of the process in writing, and provision for review under article 9, paragraph 1.

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. In addition, even if the exceptions are adopted, under all of the following exceptions, Parties may allow the public authority under some circumstances to exercise discretion to provide the information requested. The conditions contained in article 4, paragraphs 3 and 4, simply outline circumstances under which public authorities may withhold the information if necessary to protect the relevant interests, limited in some cases by the public interest in disclosure.

Article 4, paragraph 3, covers practical concerns related to the possession of the information, the form of the request or the completeness of the information requested rather than to the substance of the information requested. Article 4, paragraph 4, covers situations in which the Party or public authorities may allow for a balancing of interests, where legitimate interests might weigh in favour of protecting information from disclosure.

Provision	Obligation	Implementation elements
Article 4, paragraph 1	Requires public authorities to make information available upon request	<ul style="list-style-type: none"> • No interest stated • In form requested (with exceptions)
Article 4, paragraph 2	Sets time limits for public authorities to respond and supply information	<ul style="list-style-type: none"> • As soon as possible • At the latest: one month • Possible extension with justification to two months
Article 4, paragraph 3	Optional exceptions	<ul style="list-style-type: none"> • Not held • “Manifestly unreasonable” or “too general” • Material in the course of completion or internal communications
Article 4, paragraph 4	Optional exceptions and if they adversely affect certain interests	<ul style="list-style-type: none"> • Proceedings of public authorities • International relations, national defence or public security • Course of justice • Commercial and industrial confidentiality • Intellectual property rights • Personal data • Voluntary information • Protecting the environment

Provision	Obligation	Implementation elements
Article 4, paragraph 5	Ensures that the information request will reach the appropriate public authority	<ul style="list-style-type: none"> • Inform applicant • Transfer information request
Article 4, paragraph 6	Ensures that even if some of the information requested falls under the exceptions, the remaining information will be made available	<ul style="list-style-type: none"> • Separate out information
Article 4, paragraph 7	Procedures for refusals	<ul style="list-style-type: none"> • In writing • Stated reasons • Information on the review procedure • Time limits • Notice to applicant
Article 4, paragraph 8	Optional charges for information	<ul style="list-style-type: none"> • Reasonable costs • Schedule of charges

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 (i) national legislation should set out a framework for the process of answering information requests in accordance with the Convention and that (ii) national legislation may limit access to information in accordance with the optional exceptions outlined in article 4, paragraphs 3 and 4. (See also 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.

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. The “actual documentation” requirement already exists in many countries. For example, in Portugal, the right of access includes the right to be informed of the existence of the document, as well as the right to obtain a full copy.⁹⁹

(a) Without an interest having to be stated;

Under the Convention, public authorities shall 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.

(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 geographical information systems (GIS), that can produce information in a variety of forms.

The issue of form 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 subparagraphs (i) and (ii) below. This may be compared to article 6, paragraph 6, which requires public authorities to give the public access for examination of documents in decisions on specific activities.

(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 km 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, article 3 stipulates 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.

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 two months”: 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.¹⁰⁰ 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.¹⁰¹ 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 a refusal under article 4, paragraph 7. This time limit was chosen because the vast majority of countries in the UN/ECE region already have such limits, many of them even shorter. For example, Denmark and Portugal require answers in 10 days, Hungary and Latvia in 15 days.

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 in article 4, paragraph 7, which also requires a reason for an extension beyond the one-month period to be given to the applicant.

The possibility of an extension or of an eventual refusal shows how important early notification of the status of the request is 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.

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 chooses to apply 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 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). Where another public authority may hold the information, however, 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 Parties do choose to do so, they 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 does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, 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).

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 chooses to implement 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 they can look for guidance to existing cases.

For example, the French Commission for Access to Administrative Documents (CADA) 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 environmental impact assessments 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. CADA 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 “customary practice” may apply only to those materials covered by evidence of established norms of administrative practice.

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, the mere status of something as a draft alone does not automatically bring it under the exception. The move from the language of Directive 90/313/EEC on the freedom of access to information on the environment of “unfinished documents” to “materials in the course of completion” suggests 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, environmental impact assessments, 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.

The second part of this exception concerns “internal communications”. Again, Parties may wish to clearly define “internal communications” for implementing the Convention. 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. Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an “internal communication”.

Again, 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.” It would seem that Parties may choose to consider the public interest categorically across an entire issue or case by case in each decision on whether to release information, or may provide some latitude for case-by-case determinations within the framework of policies or guidelines. Some countries already take the public interest into account in deciding whether to apply exceptions, such as the “internal communications” exception. For example, in a 1994 decision in Ireland, the Ombudsman had to decide whether or not a public authority had exercised its discretion to withhold information in a reasonable manner. The Ombudsman looked at the reasonableness of the public authority’s action in the light of the harm, if any, that would be likely to result from releasing the information. In that particular case, the Ombudsman decided that the Cork County Council was obliged to provide drinking water monitoring data requested by an NGO, even though the County Council might have claimed an internal communications exemption.¹⁰² In the Netherlands, it is the broader public interest in effective democratic administration, rather than the specific public interest represented in a particular information request, that is weighed against the potential adverse effect of releasing the information.¹⁰³

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 exceptions to the general rule that information must be provided upon request to members of the public. Parties are not required to incorporate these exceptions into their implementation of the Convention. For the exceptions Parties do accept, the Parties may provide criteria for the public authorities to apply within their discretion, or may categorically exclude certain information from disclosure.

In any case, public authorities must make a determination that disclosure will adversely affect any one of these interests. 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 affect than applies in other provisions of the Convention (e.g. art. 6, para. 1 (b)).

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.

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

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.

Article 4, paragraph 4 (a), provides 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

(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 suggests that the definition of such terms will be determined by the Parties consistent with 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.¹⁰⁴ 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.¹⁰⁵

- 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 “in 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.

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. 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.”

Options for implementing “legitimate economic interest”

The Convention does not define “legitimate economic interest”. There are several steps that countries have taken to help define legitimate economic interest case by case:¹⁰⁶

- 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 its 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. Any information on emissions that may affect the quality of the environment, in view of the Convention’s principles and objectives, should be considered relevant for environmental protection, irrespective of their quantities. 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 UN/ECE member States.

Defining “emissions”

The term “emissions” has been defined in Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive)¹⁰⁷ as a “direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the 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 forms of intellectual property are copyright, patent and trade secret, plus rights for databases where applicable and with trade marks having some relevance as well. Generally, patents protect novel ideas or inventions, copyrights protect original expressions (art, literature, music, etc.), trade marks 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 trade marks, 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.

(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. 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 commentary to article 2, paragraph 1).

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 require formally that this information should be reported if it is already being reported in practice. Most countries have found this type of information not to be “voluntary”. In this way, in Ireland, “voluntary” means that the public authority lacked the competence to oblige the information in question to be reported.¹⁰⁸ This definition protects the public interest by ensuring that any information that the public authority may require under national rules 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 in practice, it would be a good idea to specify the use of any information disclosed by the private party to the public authorities among the terms of the agreement itself.

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

environment into consideration when making a decision whether or not to release information.

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.

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 and when the public interest will be taken into account, in conformity with the principles and objective of the Convention. The Guidelines on Public Participation in Environmental Decision-making (see Introduction) provide Parties with some guidance as to what could be meant by the reference to the public interest served by disclosure. Paragraph 6 of the Guidelines stipulates 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 Signatories to the Aarhus Convention have endorsed the Sofia Guidelines, and the Guidelines are specifically mentioned in the preamble and the Resolution of the Signatories. In addition, national law provides some guidance for defining “public interest”. Taking interests into account thus requires an active balancing of interests. Nevertheless, Parties can and should give substantial guidance on balancing so as to limit arbitrary distinctions and promote uniformity.

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.

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 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

Defining public interest

In Ukraine, under the Law on State Secrets (No. 3855-XII, January 1994), information cannot be withheld if refusal to release the information either violates the constitutional rights of an individual or would cause harm to public health or safety.

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

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.

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.¹⁰⁹ 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.¹¹⁰

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, paragraph 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.¹¹¹

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. Some countries require even shorter deadlines for refusals. For example, in Norway, refusals must be sent out within two weeks along with an explanation.¹¹² In practice, this is often accomplished within one week. However, as the authorities in all cases of refusals should consider whether the information can be released despite the fact that it has been classified as exempt from public access, such decisions may take up to the two-week maximum.

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.

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 (i) a schedule of charges; (ii) criteria for when charges may be levied; (iii) criteria for when charges may be waived; and (iv) 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, in the Netherlands, a published schedule of charges exists for the ministries of the national Government, while local authorities are free to establish their own charging provisions.¹¹³ Some countries provide clear criteria of when charges can be levied. 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 non-governmental organizations.

Comparing access to information under the Aarhus Convention and Directive 90/313/EEC

As indicated above, Council Directive 90/313/EEC on freedom of access to information on the environment was one of the main starting points for the Convention's negotiations on access to information. All EU member States and the European Community signed the Aarhus Convention. There are several places where its requirements differ from those of the current EC Directive including:

- *Definitions*: under the Aarhus Convention, the definitions of environmental information and public authority are expanded (art. 2);
- *Use of term "adversely"*: in the definition of "environment information", the Directive limits measures to those that *adversely* affect the environment, whereas the Aarhus Convention covers measures affecting the environment in any way.
- *Response time limits*: under the Aarhus Convention, the deadline for supplying the requested information is one month, with a possible extension of up to two months (art. 4, para. 2); the Directive was ambiguous on this point;
- *No stated interest*: under the Aarhus Convention, the applicant need not state an interest (art. 4, para. 1 (a)), while under the Directive, the applicant did not need to prove an interest;
- *Form requested*: the Aarhus Convention requires information to be given in the form requested with certain exceptions (art. 4, para. 1 (b));
- *Actual documents*: the Aarhus Convention explicitly gives the public the right to receive a copy of the actual document (art. 4, para. 1);
- *Information on emissions*: when relevant to environmental protection, information on emissions may not be withheld from disclosure as confidential commercial or industrial information under the Aarhus Convention (art. 4, para. 4 (d));
- *Course of completion*: under the Aarhus Convention, Parties may except "material in the course of completion" from disclosure (art. 4, para. 3 (c)), while under the Directive, member States may except "unfinished" materials from disclosure;
- *Course of justice*: the Aarhus Convention's exceptions refer to information that may adversely affect the "course of justice" (art. 4, para. 4 (c)), rather than the "sub-judice" exception in the Directive;

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- *Public interest test*: the Aarhus Convention requires exceptions to be construed narrowly, taking into account the public interest in disclosure (art. 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 (art. 4, para. 5);
- *Information appeals*: under the Aarhus Convention, a refusal must include information on appeals procedures (art. 4, para. 7).

Article 5

COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

Article 5 sets out the obligations of the Parties and public authorities to collect and disseminate environmental information. It covers a wide range of different types of information that Parties should actively provide to members of the public. Therefore, article 5 defines the types of information that fall under this more active obligation for collection and dissemination. In general, it covers information such as emergency information, product information, pollutant release and transfer information, information about laws, policies and strategies, and information about how to get information. Some of its provisions 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.

To a large extent, article 5 focuses on concrete implementation guidance for the collection and dissemination of environmental information. In doing so, it often suggests a range of implementation steps, leaving the choice of precisely how to fulfil the general obligation to each Party. The following table outlines the main obligation for each provision and 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	Implementation elements
Article 5, paragraph 1	General obligations for Parties to ensure that public authorities collect, possess and disseminate environmental information	<ul style="list-style-type: none"> • Relevant to their functions • Adequate flow to public authorities • Immediate dissemination if imminent threat to human health or environment
Article 5, paragraph 2	Practical arrangements for making information accessible	<ul style="list-style-type: none"> • Publicly accessible lists, registers or files at no charge • Support to public in seeking information • Points of contact
Article 5, paragraph 3	Aims to ensure that information will eventually become available electronically	<ul style="list-style-type: none"> • Accessible through public telecommunications networks
Article 5, paragraph 4	Requires national state-of-the-environment reports	<ul style="list-style-type: none"> • Regular intervals, not exceeding three or four years
Article 5, paragraph 5	Requires the government to disseminate legislation and policy documents	
Article 5, paragraph 6	Applies to the public dissemination of privately held information	<ul style="list-style-type: none"> • Framework of voluntary eco-labelling or eco-auditing schemes
Article 5, paragraph 7	Requires the government to publish information concerning environmental decision-making and policy-making	

Article 5, paragraph 8	Requires mechanisms for disseminating environment-related product information to consumers	<ul style="list-style-type: none"> • Enable consumers to make informed choices
Article 5, paragraph 9	Concerns the development of national systems for maintaining information on pollution releases and transfers	<ul style="list-style-type: none"> • Coherent, nationwide system • Structured, computerized, publicly accessible database • Compiled through standardized reporting
Article 5, paragraph 10	Incorporates the optional exceptions from disclosure listed in article 4	

Whereas article 4 applies to “environmental information,” article 5 applies to specific categories of information. The requirements for active collection and dissemination of information by the government imply a sense of urgency and importance that certain types of information should reach the public. This includes information in times of emergencies, information necessary for the public to make decisions in their daily lives, information central to basic public decisions and policies, and information to facilitate implementation of the Convention itself. The following table sets out, by provision, the types of information contained in each general requirement.

Provision	Requirement	Type of information
Article 5, paragraph 1	<ul style="list-style-type: none"> • Possess and update • Adequate flow to public authorities • In the event of imminent threat to public health or environment 	<ul style="list-style-type: none"> • Environmental information relevant to function • Information about proposed and existing activities which may significantly affect the environment • All information which could enable the public to take measures to prevent or mitigate harm arising from the threat and that is held by a public authority
Article 5, paragraph 2	<ul style="list-style-type: none"> • Provide sufficient information 	<ul style="list-style-type: none"> • Type and scope, terms and conditions, and process to obtain environmental information
Article 5, paragraph 3	<ul style="list-style-type: none"> • Electronic databases 	<ul style="list-style-type: none"> • Environmental information • State-of-the-environment reports • Legislation • Policies, plans, programmes and environmental agreements
Article 5, paragraph 4	<ul style="list-style-type: none"> • National state-of-the-environment report 	<ul style="list-style-type: none"> • Information on the quality of the environment • Information on the pressures on the environment
Article 5, paragraph 5	<ul style="list-style-type: none"> • Measures for dissemination 	<ul style="list-style-type: none"> • Laws and policies and implementation progress reports • International environmental agreements

Article 5, paragraph 6	<ul style="list-style-type: none"> • Encourage certain operators to inform the public directly 	<ul style="list-style-type: none"> • Impact of their activities and products
Article 5, paragraph 7	<ul style="list-style-type: none"> • Publish 	<ul style="list-style-type: none"> • Facts and analyses of facts for policy proposals • Explanatory material on dealings with the public under the Convention • Information on the performance of public functions relating to the environment
Article 5, paragraph 8	<ul style="list-style-type: none"> • Develop mechanisms 	<ul style="list-style-type: none"> • Product information
Article 5, paragraph 9	<ul style="list-style-type: none"> • Steps to establish pollution inventories or registers 	<ul style="list-style-type: none"> • Inputs, releases and transfers of a specified range of substances and products
Article 5, paragraph 10	<ul style="list-style-type: none"> • Exceptions 	

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. As already discussed, “environmental information” is defined earlier in the Convention (art. 2, para. 3). 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 a reliable system 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). 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.

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 “significance” in 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 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. The 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. The Russian Federation provides examples of several ways in which a country can establish a mandatory flow of information from private entities to public authorities. For instance, since 1993, the Russian Federation has had a system of ecological monitoring that provides a flow of information from private entities to public authorities. Public authorities receive regular information from polluters. An additional source is the information that private entities must submit to public authorities under the system of licensing and renewal of licences.

Elements of possible information flow systems

- 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 records of information submitted in permitting and other licensing procedures.

(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 information dissemination 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 anything 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 include safety recommendations, predictions about how the threat could develop, results of investigations, and reporting on remedial and preventive actions taken.

International law concerning environmental accidents

Environmental emergencies generated by industrial and hazardous substances accidents such as those at the Chernobyl nuclear facility (Ukraine) and at the chemical facility in Bhopal (India) have brought attention to the citizen’s right to know.

- Seveso Directives: the European Council Directives on the major-accident hazards of certain industrial activities and major-accident hazards involving dangerous substances;¹¹⁴
- UN/ECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992).

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 European Court of Human Rights dealt with this issue. The Government 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.¹¹⁵ The Court held that the State did not fulfil its obligation to secure the applicant’s right to respect for their private and family life by failing to provide timely information.

Emergency preparedness

- Require public authorities, especially localities, to develop emergency preparedness plans;
- Arrange for notification of local governments, hospitals, fire and emergency medical services, and citizens that can be immediately implemented;
- Use local radio, newspapers, television, and public announcement systems;
- Conduct training for emergency personnel, especially in the handling of hazardous substances.

Public authorities may distribute the information as widely as they wish. The Convention sets a minimum obligation to disseminate the information to members of the public who may be affected. In some cases, this will be 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 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.

Implementing the obligation to collect and disseminate

- *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 really accessible. Parties are required to do so “within the framework of national legislation”. First, this means that Parties must have placed the obligations and mechanisms of article 5, paragraph 2, in their national legal framework. It also means that Parties can be flexible in implementing this provision within their own national legal frameworks. Article 5, paragraph 2, does require a minimum of 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.

Transparency 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, requiring Parties to establish and maintain a clear and transparent framework to implement the Convention, and article 3, paragraph 2, requiring officials to assist the public in seeking access to information.

Effectively accessible information

There is a world of difference between making information available to the public in the minimalist sense that it is not secret, and actually making it accessible in a user-friendly form that reflects the needs and concerns of the public. The difference is well-illustrated by the Web site set up by the NGO Friends of the Earth in the United Kingdom. This project took publicly available information from the United Kingdom Environment Agency’s Chemical Release Inventory and entered it into a GIS-type database. The new Web site attracted massive public interest to data that had already been in the public domain but had received little attention because it was unwieldy and difficult to sort through.

“Effectively accessible” means that the established information systems should go beyond simply making the information available to the public. Records, databases and documents can be considered effectively accessible when, for example, the public can search 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 copies of large documents to make them more effectively accessible to members of the public.

The following provisions of article 5, paragraph 2, set out specific requirements for how Parties should achieve transparency and effective accessibility. The Convention provides 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. The public will have much better access to environmental information if it knows what type of information is held, where it is held, the terms 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.

Information about information (“meta-information”)

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 (UDK) has been drawn up to assist in locating environmental information. UDK 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. The European Environment Agency (EEA), through its Catalogue of Data Sources topic centre in Hanover (Germany), encourages the development of national meta-information systems in each of its member countries and is building capacity in the EU accession countries to develop similar systems.

Furthermore, public authorities must provide sufficient information about the basic terms and conditions under which the 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 Web sites, television or radio public service announcements, or as part of environmental information catalogues, as described in the box above.

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

Paragraph 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. The Convention includes examples of practical arrangements that Parties are likely to find useful in implementing it.

(i) Publicly accessible lists, registers or files;
accessing environmental information and information about where to find that information.

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

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, 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 exist and where they are to be found. For example, 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 is 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, giving worldwide public access.

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 proceedings of any meetings. For example, the environment ministry might maintain a publicly accessible register or file with all the documentation from an environmental impact assessment 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 decision in review cases under article 9 on access to justice.

(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, paragraph 2, to provide guidance to the public in seeking access to information. Parties can require public authorities to assist members of the public in formulating their requests, if need be.

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 understanding the exceptions 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.

In thinking about how to implement this provision, Parties can consider identifying individual points of contact in specific cases, such as environmental impact assessment, permitting, or rule-making. Some countries require that every time a public authority gives notice of a process, such as licensing or environmental impact assessment, that provides an opportunity for public participation, 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 an extensive database and library on the environment, and offers a range of information materials in readily accessible form. It operates out of a walk-in information centre in Dublin, backed by a network for distributing information around the country. An increasing amount of information is being made available in electronic form (CD-ROM) and via the ENFO Web site (www.enfo.ie).

Implementation guidance for national environmental information services

The INFOTERRA Programme of UNEP helps countries to establish an integrated environmental information service along the following guidelines:

- Easy public access to wide-ranging and authoritative information on the environment;
- Content and format of the substantive information should be compatible with users' needs, i.e. be demand-driven;
- Service is provided collectively by a consortium of information suppliers and a representative group of major users on the demand side;
- Publicly accessible reference centres should be used where appropriate by information suppliers;
- Service is coordinated by a government-designated national focal point;
- Service uses a meta-information system to provide a referral service to the appropriate source for substantive information—in particular, technically difficult data, such as computerized maps and geo-referenced information;
- Modern information and communication technologies are used where feasible to facilitate structured, customized queries by clients;
- Information support is provided to national environmental education programmes;
- Easily accessible to policy and decision makers, scientists, planners, researchers, businesses and the general public;
- National focal point located at site of best concentration of environmental information and expertise within the national government;
- Staffed by professionals with information services, computing and telecommunications support;
- Service should encourage the exchange of environmental information and experience among countries with similar information demands.

(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 the 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. 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 and transfer 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, and can be flexible 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 estab-

lished 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:

- Setting up databases that can be searched 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;
- Using telecommunications networks, as discussed in article 5, paragraph 3, to facilitate access to the databases and avoid the need for a public authority operator;
- 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.

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 recommends Parties to take this course of action, rather than requiring them to do so. The fact that accessible information should “include” [the following], 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;

ities 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.

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 the public author-

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

Czech Republic, Finland, Hungary and Poland, ministries and parliaments make texts of legislative drafts, international treaties and laws electronically accessible.¹¹⁶ Parties may wish to take advantage of ECOLEX, an Internet-based information service (www.ecolex.org) on environmental law that UNEP is developing in cooperation with the World Conservation Union (IUCN). It will link national custodians of environmental law and related literature.

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 Web sites of ministries. For example, the Danish Ministry for Environment and Energy has a publicly accessible Web site with a wide range of documents, including legislation. In the

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

grammes 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.

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, pro-

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 Web sites.

Paragraph 3 (c) also requires, as appropriate, that “environmental agreements” should become progressively available in electronic databases. Environmental agreements include covenants or contracts between the government and private enterprises or industry groups, and may also include bilateral or multilateral agreements and other types of agreement. (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,

that the Convention’s information provisions are not limited to written text only, but also apply to graphics, photographic materials, sound recordings, etc.

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 the 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 require that proposals for specific activities, for 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

provided that such information is already available in electronic form.

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.

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 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

Article 5, paragraph 4, requires that a national state-of-the-environment report should be published at regular intervals. The regular intervals may not exceed three to four years. Throughout the UN/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, in the Russian Federation annual federal reports on the state of the environment are distributed, in written form, through publishing and computer networks, as well as through announcements on television and radio.

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 through public telecommunications networks, provided that the information is already available in electronic form.

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 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

ing 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 is similar to the earlier 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 (art. 5, para. 1 (c)). 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 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.

(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 contracts between two or more countries. In general, once a country has ratified an international treaty, convention or agreement and it comes into force, that international law becomes domestic law in that country. For example, the Convention on Biological Diversity has become part of national

law in many countries, along with the nature conservation laws, and under article 5, paragraph 5 (a), should be disseminated to all members of the public through, for example, journals, publications, and radio and television announcements.

One way to disseminate international treaties, conventions and agreements is to require publication. 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, is already doing 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. Agenda 21 provides an excellent example of a significant international document on environmental issues that the public should have the opportunity to receive.

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 this 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. Multilateral environmental agreements signed by the Party in question would fall in the category of “appropriate” for dissemination.

International documents on environmental issues do not only come from international environmental institutions. Countries can sign or develop many other types of international documents on environmental issues. For example, countries that participate in the deliberations of the World Trade Organization (WTO) can disseminate information on WTO policies and rules on environmental issues, such as decisions in cases that will directly impact the environment. 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, can disseminate information on bank policies and loans relating to environmental issues.

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. 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.

At the national level, many countries only have requirements concerning the direct flow of information from an enterprise to the public in the event of potential emergencies, as required by the EC. Austria provides a common example of how a Party could approach implementation: Austria requires enterprises posing a risk of 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.

The Aarhus Convention goes beyond merely encouraging a direct flow of information in emergencies. Its article 5, paragraph 6, requires Parties to encourage operators whose activities have a significant impact on the environment to give information directly to the public. This is a much lower threshold than environmental “emergencies”. There are many ways in which Parties can encourage operators to use the 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 provision of information to the public as a criterion for selection in other government 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.

7. Each Party shall:

Paragraph 7 requires Parties to publish information that will help members of the public, public authorities and other Parties to the Convention 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;

If a Party considers that certain facts and analyses of facts are relevant and important in framing major environmental policy proposals, it must publish them. Parties have the liberty to decide which facts and analyses of facts are relevant and important. In implementing this provision, Parties can consider facts such as water and air quality data, natural resource use statistics, etc. and analyses of facts, such as cost-benefit analyses, environmental impact assessments, and other analytical information used in framing proposals and decisions.

Paragraph 7 (a) requires Parties to publish background information underlying major policy proposals, and thus contribute to effective public participation in the development of environmental policies. This is information that the Party considers “relevant and important” in framing policy proposals. Since article 7 provides for public participation during the preparation of policies, article 5, paragraph 7, is intended to ensure that the public will be properly equipped with the information necessary to take advantage of this opportunity.

(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 explanatory materials on the Convention’s implementation. 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 can 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.

The Convention does not require Parties to generate this explanatory material, only to make it publicly accessible once it has been generated. This will include, for example, reports to the Convention’s secretariat on implementation practices.

(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.

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. Furthermore, the Ministry of the Environment prepares a yearly publication of statistics on environmental indicators that assists the public in assessing the performance of public functions. 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 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 developed greatly by governments in implementation.

The EC has long been developing a body of consumer law, including access-to-information, public-participation and access-to-justice principles. Since the entry into force of the Maastricht Treaty, consumer protection has been a full Community policy.¹¹⁷

One common tool for providing consumer information is eco-labelling (see article 5, paragraph 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.

In general, mechanisms for product information can be effectively established through codes of conduct that ensure consistency and reliability. In addition, public authorities that embrace the new ISO 14021 standard on 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.

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 as “organic,” “green” or “recyclable”
- More detailed product information available on request from producers
- Register of consumer information

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.

Paragraph 9 establishes a framework of requirements concerning national pollution inventories or registers. The framework is meant to guide the further development of these mechanisms in the signatory countries.

Article 5, paragraph 9, sets out general parameters to guide the development of these pollution inventories or registers in signatory countries. In addition, in article 10, paragraph 2 (i), the Parties have undertaken to continue to work on this area by considering the next steps. These next steps could include, for instance, the development of a formal annex or a protocol to the Convention. At their first meeting in April 1999, the Signatories established a dedicated task force to make specific recommendations concerning the implementation of pollution inventories or registers.

Several existing international, regional, and domestic programmes will provide guiding principles that help define the potential scope and composition of pollution inventories or registers under the Convention. Following Agenda 21, which refers to the use of emission inventories, the Organisation for Economic Co-operation and Development (OECD) developed a guidance manual on *Pollutant Release and Transfer Registers* (PRTRs), with reference to systems already in use by several countries, including some of the Convention's European signatories.¹¹⁸ These existing registers illustrate functional forms that such registers and inventories could take in response to the Convention's guidelines.

What is a pollution inventory or register?

A pollution inventory or register 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 governments, enterprises and the public to track the generation, release, further use and disposal of various hazardous substances from “cradle to grave”.

The United States Emergency Planning and Community Right-to-Know Act of 1988 was the first law of this kind. 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, and developing adequate emergency response policies, as well as 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, although much less comprehensive, contains similar kinds of information, while also plotting maps of diffuse pollution sources in addition to the industrial sources.

The Convention requires Parties to take steps to establish pollution inventories or registers. Under article 5, paragraph 9, the fully developed systems are required to be (i) coherent and nationwide; (ii) structured; (iii) computerized; and (iv) publicly accessible.

The Convention requires public authorities to compile the pollution inventories through standardized reporting. The information collected may include “inputs, releases and transfers” of a specified range of substances and products. The substances and products can be from a specified range of activities.

Why develop pollution inventories?

The most dynamic aspect of public pollution inventories 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.

Reporting releases can often yield a double dividend. Many companies have found that the quantitative analysis of waste streams and the 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 under inventory programmes can be (and has been) 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 be analysed to set priority targets (particular substances or geographic areas) at local or national level, and could be used at international level if they were sufficiently comparable. Inventory data can be used to judge compliance with permit conditions, or to analyse the effectiveness of pollution control laws. Educational programmes use inventory data to illustrate pollution problems.

What type of information can a pollution inventory or register 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 the industrial production processes (or other point sources) such as chemicals, 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 fresh water, groundwater, marine waters, air and soil.

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 factories 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, are developing all of the elements of a pollutant release and transfer register at once. Others may choose to implement the different elements of a pollutant release and transfer system step by step.

Implementation options for pollution inventories and registers

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 these pollution release and transfer-type registers have started to become publicly accessible.

Step 2—Organize the information: Under national law, public authorities can be obliged 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 flow of information from the private sector to the public authorities usually mean different reporting schemes for the different environmental media. In practice, these tend not to be integrated and are difficult to use for the coherent prevention, control and minimization of pollution. However, some countries have or are developing an integrated approach to reporting and to their own internal organization of the reported information. A new Croatian law requires the information collected under this 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 has prepared and provided to county and town register subscribers common programme equipment for the development and maintenance of the register. In 1998, seminars were held for officials who would be using the equipment and would be put in charge of collecting data.¹¹⁹

Step 3—Make the information publicly accessible: Countries developing a pollutant release and transfer system can put the information in the public sphere. For example, under Council Directive 96/61/EC concerning integrated pollution prevention and control, the results of release monitoring as required under the permit conditions must also be made available to the public, as well as the three-year inventory. In the United States, Toxics Release Inventory data are available on paper, CD-ROM, microfiche and via the Internet. Public outreach programmes and training aim to 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 above, 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 employ these exceptions to refuse a request for information under article 4. But there are limits within article 4 itself as to the conditions under which 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 in a nuclear power station, the environmental and human health implications would take precedence over any national security interest, and require information to be disclosed. However, if a person requests information about a *potential* leak at a nuclear facility and the government refuses to give the information claiming a national security exception, the applicant’s claim might not automatically prevail over the national security exception.

In short, the duties to disseminate certain information according to article 5 might prevail over refusals to release it, based on an exception under article 4.

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 policy-making. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures, and appropriate taking account of the outcome of 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. Many speak of a “ladder” of participation, in which members of the public have the most power—even approaching direct democratic decision-making—with respect to local matters with no impact outside the community. As issues become more complex and involve more global issues and affect larger numbers of people, the role of individual members of the public diminishes and the role of politicians and public authorities that must bear responsibility for such decisions becomes greater. The involvement of the public can pass through various stages as one climbs up the ladder—from direct decision-making to administrative status, participation, consultation, to the right to be informed only. 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 policy-making 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 good public authorities take advantage of the interest and the energy of the public. As decisions become increasingly complex, this factor becomes less a matter of good practice and more a matter of urgency. 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 also preambular paragraph 16). 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 responsibility 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—improve the ability of authorities to carry out their responsibilities and provide the necessary conditions for the people 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—that takes place when options are foreclosed—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. 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 and policy-making processes. From this, it can be deduced that public participation should be timely, effective, adequate and formal, and contain information, notification, dialogue, consideration, response. 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 large facilities, or on the licensing of products into the market place. 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, relevant information, commenting, response, 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. 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 number of other 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 UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) contained the most developed public participation provisions of any UN/ECE convention. In its article 2, paragraphs 2 and 6, and article 4, paragraph 2, it established 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 Framework Convention on Climate Change, article 6 (a) (iii), requires Parties to promote and facilitate public participation in addressing climate change and its effects and developing adequate responses. The 1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents, in 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 on Environment and Development, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro 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 shall 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 United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 1994), at articles 3 (a) and 4.2 (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. A project under the auspices of the Economic and Social Council of the United Nations has resulted in the draft declaration of principles on human rights and the environment. Its paragraph 18 states that all persons have the right to “active, free and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development”, including prior assessment of proposed activities. Finally, the Sofia Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making, endorsed by the environment ministers of the UN/ECE region in 1995, included nine detailed paragraphs on public participation and was the starting point for the negotiation of the Aarhus Convention.

Implementing public participation

Under the Aarhus Convention, Parties have core obligations to put it into practice. Under these obligations, each Party has some flexibility in how it adapts the Convention’s obligations to its own national legal and institutional system. The following is an overview of the clear obligations for Parties and practical considerations for implementation found in articles 6, 7 and 8.

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 for non-listed activities • 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 • May limit application to decisions on GMOs if not “feasible and appropriate”
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 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 policy-making • 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"> • Promote public participation in the preparation of laws and rules with potential environmental impact • Establish sufficient time-frames for public participation • Publish or publicize drafts • Provide opportunities for the public to make comments • Take due account of the outcome 	<ul style="list-style-type: none"> • Develop clear rules for participation • Develop criteria for evaluating 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 • Flexibility in setting time-frames • Broad latitude in how to provide public participation in preparation of laws and rules • Flexibility in taking due account of outcome

Article 6**PUBLIC PARTICIPATION IN
DECISIONS ON SPECIFIC
ACTIVITIES**

Article 6 concerns public participation in decision-making by public authorities on whether to permit or license specific activities. It does not require a licensing or permitting procedure to be established, as do international instruments on environmental impact assessment, but once such a procedure is established, the public participation requirements of article 6 must be implemented as part of it. In every country, however, some government approvals are required to engage in the kinds of activities that are covered in annex I to the Convention.

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. Public participation in decision-making pulls together many of the threads of the Convention into concrete results, and thus is one of its most important subjects. Article 6 is to be enforced by article 9, paragraphs 2 and 3.

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"> • List of activities (annex) • Non-listed activities • National defence exemption
Article 6, paragraph 2	Sets requirements for notifying the public concerned about the decision-making	<ul style="list-style-type: none"> • Early in the process • “Adequate, timely and effective” • Minimum contents
Article 6, paragraph 3	Sets time-frames for public participation procedures within a decision-making process	<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 that public participation take place early in decision-making	<ul style="list-style-type: none"> • Options are 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"> • <i>Before</i> 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"> • Free of charge • As soon as available • Article 4, paragraphs 3 and 4, exceptions may apply • Minimum contents
Article 6, paragraph 7	Procedures for public participation	<ul style="list-style-type: none"> • In writing or public hearing • <i>Any</i> comments, information, analyses or opinions • Public to judge relevance

Provision	Obligation	Implementation guidance
Article 6, paragraph 8	Parties must ensure that decision takes due account of public participation	
Article 6, paragraph 9	Public must be informed of final decision	<ul style="list-style-type: none"> • Promptly • Publicly accessible texts • Reasons and considerations
Article 6, paragraph 10	Public participation if activities are reconsidered or changed	<ul style="list-style-type: none"> • Public authority • Paragraphs 2 to 9 apply
Article 6, paragraph 11	Decisions on GMOs	<ul style="list-style-type: none"> • Article 6 shall apply • To extent “feasible and appropriate”

Article 6 sets certain requirements for public participation during decision-making on specific activities. It applies in the first place to decisions on whether to permit the proposed activities. This means mainly specific administrative decisions—in other words, decisions made to permit a particular proposed project, activity or action to go forward. The forms of such decisions will 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 of types of permitting 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.

At first glance, it may appear that article 6 refers simply to public participation in “environmental impact assessment” (EIA). Environmental impact assessment is not in itself a permitting or authorization process. It is a tool for decision-making. The Convention expressly mentions EIA in article 6, paragraph 2 (*e*). The term EIA has become associated with a particular standard form of process for the assessment of potential environmental impacts as part of the decision-making process relating to a particular proposed activity (see commentary to article 6, paragraph 2 (*e*)). It is found in many countries in the UN/ECE region.¹²⁰ While this term 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 an “environmental decision-making” under national law (for example, because EIA is required), but whether the decision-making itself may have a potentially significant impact on the environment.

Environmental impact assessment is not itself a permitting or authorization process. It is a tool for decision-making. EIA may be contrasted with ecological expertise, a model found in many countries in the UN/ECE region, which is a separate permitting procedure, requiring permission (that is, a positive conclusion) for a project to go forward. Ecological expertise procedures sometimes include EIA-type elements with public participation.

EIA is often 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 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 reveals a probability of no significant environmental effects and yet the decision is not to proceed. Given that EIA often involves the most detailed examination of the environmental consequences of proceeding with a proposed activity, the findings of the EIA often correlate with the decision itself.

International and regional instruments on EIA

Two important instruments on EIA are the Espoo Convention on Environmental Impact Assessment in a Transboundary Context Council Directive 85/337/EEC of 27 June 1985 as amended by Council Directive 97/11/EC (“EIA Directive”) on the assessment of the effects of certain public and private projects on the environment.

Both, significantly, oblige parties or member States to take the necessary measures to establish an EIA procedure for specified activities (Espoo Convention, art. 2, para. 2, and EIA Directive, art. 2 (1)) that allows the public to participate. 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”. As the European Community is a Signatory to the Aarhus Convention, its EIA Directive will have to be adapted to it.

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 (art. 6, para. 8). 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, owe a lot to the emerging international norms of EIA.

Most ECE countries require some type of assessment of the potential environmental impact of certain 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.

Integrating environmental considerations into decisions on specific activities

In Poland, the development authorization procedure for some projects is divided into two stages: issuance of the planning permission and issuance of construction consent. Both constitute separate administrative decisions where public participation is required.¹²¹ The planning permission is given by the local authority such as the mayor, head of the town, or head of the local “commune”. The prior consent of the relevant environmental authorities is required: regional ones for development projects considered especially harmful to the environment and human health, or district (“powiat”) ones for projects considered to have some potential impact on the environment. In both categories of projects both EIA and public participation are mandatory elements of the planning permission issuance procedure. It may also involve other environmental authorities if the development site or the proposed activity is within their sphere (e.g. directors of national parks if the project may have an impact on parks, or forest authorities if the territory has been allocated for forestry purposes in a territorial plan). The planning permission conditions are binding on the district authorities issuing construction consent pursuant to the Construction Code. Here again, in both categories of projects, the prior consent of the environmental authorities, as well as EIA and public participation are required. The European Union’s EIA Directive uses the term “development consent” to describe decisions approving projects subject to this Directive.¹²²

While EIA is the most familiar process within decision-making covered by article 6, the article also applies to other decision-making where EIA-type procedures do not apply. It might apply, for example, to specific regulatory decisions with a potential environmental impact such as rate-setting. It may apply to decisions for the renewal or modification of existing permits or approvals for the introduction of new products into commerce. An example of the former is contemplated under

article 6, paragraph 10, which concerns the reconsideration or updating of operating conditions for activities covered by article 6. An example of the latter is the “environmental supervision” under Hungarian law, which may be triggered by several possible non-EIA occurrences, such as the discovery of new environmental harm or risk resulting from an increase in knowledge. Under current Hungarian law, a public hearing is optional in such cases.¹²³

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 with potential significant effects on the environment. The key question is whether the particular decision-making meets the triggering requirements of article 6, paragraph 1.

While decision-making on plans, programmes and policies in general is regulated by article 7 (see 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.

One way to implement the Convention is to have a single procedure to cover the public participation requirements triggered by both parts of article 6, paragraph 1. Thus, if the public participation requirements for activities listed in the annex are met by carrying out an EIA, the law could provide that the triggering of requirements under article 6, paragraph 1 (b), would trigger an EIA. It would also be possible to implement article 6 by establishing levels of EIA and by determining their applicability based on factors such as significance. This would ensure that the most significant problems get the most attention.

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 certain proposed activities shall 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 potential significant effect on the environment. Subparagraph (b) establishes an obligation for Parties to include under article 6 other activities not contained in the annex that may have a significant effect on the environment. Paragraph 1 as a whole has been drafted with reference to article 2 (1) of the EIA Directive, its annexes, and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC).¹²⁴

Article 6, paragraph 1 (a), states that the provisions of article 6 apply to all proposed activities listed in annex I. Annex I is based on the Espoo Convention, the EC IPPC Directive and the EC EIA Directive, with some modifications (see comment to annex I). This includes all activities that according to domestic law require EIA with public participation (annex I, para. 20).

“Proposed activity”

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” (art. 1 (v)).

By virtue of subparagraph (a), article 6 applies automatically to changes or extensions in activities where they meet the criteria or thresholds set out in annex I (see annex I, paragraph 22). In such cases, it is assumed that they may have a significant impact. Where the thresholds are not met, the Parties must still apply subparagraph (b) to any change or extension of activities listed in annex I.

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 commentary to annex I, paragraph 21).

Article 6, paragraph 1 (b), requires that, for decisions on proposed activities not listed in annex I, each Party shall determine, in accordance with its national law, whether the activity might have a significant impact on the environment. If this is the case, article 6 must be applied. To answer any questions about who shall decide on the application of article 6 to activities not listed in annex I, the Convention provides that “Parties shall determine whether such a proposed activity is subject to these provisions”. Parties are given wide latitude to develop ways in which this determination shall be made. It is not clear from the wording of the subparagraph whether Parties must develop categories for application of the article 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 does develop additional categories for EIA, these activities would already fall under subparagraph (a) by virtue of paragraph 20 of annex I *as long as public participation is required*. Furthermore, paragraph 22 of annex I provides that subparagraph (b) will be applied to changes or extensions of activities listed in annex I that in and of themselves do not meet the threshold requirements of annex I. These provisions might indicate that the Convention, even though it does not expressly use the term “case by case” as it does in the following subparagraph, assumes that determinations under subparagraph (b) will be done case by case. By way of comparison, the EC Directive on EIA establishes a mandatory list for EIA, and a list of activities requiring screening. The screening may be done case by case, or according to thresholds or criteria, or both (Dir. 85/337/EEC as amended, art. 4, para. 2).

In the Netherlands, Provincial Councils have authority to require EIA in certain localities where special conditions, such as environmental sensitivity, prevail. In Norway, ministry-level authorities may extend EIA requirements to particularly controversial proposals.¹²⁵ Other legal provisions regarding the power of public authorities to require EIA for non-listed activities can be found in Bulgaria, Romania and Slovenia. In Bulgaria, the Environmental Protection Act, in its article 20, paragraph 3, gives discretionary power to the competent authorities to require EIA for projects recommended by concerned natural or legal persons.¹²⁶ In Romania, the relevant authorities are empowered to make a discretionary decision to require EIA based on certain criteria listed in the Environmental Permitting Procedure for identifying significant environmental impact.¹²⁷

It is also clear that there does not need to be a prior determination that a proposed activity will definitely have a significant effect on the environment before subparagraph (b) can be applied. The Convention states that Parties shall determine the applicability of article 6 where the proposed activities that are not listed *may have* a significant effect on the environment.

The question of “significance” is an important one. Use of the term “significance” answers the need to adequately address the goals and interests recognized by the Convention where public participation is an important factor in decision-making. It also helps ensure that the usefulness of the public participation process is proportional to the need. The “significance” is what takes ordinary decision-making into the realm of environmental decision-making as contemplated under the Convention. Some guidance as to the determination of significance can be found in appendix III to the Espoo Convention and other sources (see box).

What is environmentally “significant”?

Paragraph 1 of appendix III to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context 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.”

EC Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, includes an annex (annex III) on selection criteria for determining whether a particular project should be subject to EIA. 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;
- 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.

Some countries may have developed substantial guidelines for determining “significance” that may be of use to Parties in implementing the Convention. The United Kingdom’s Circular from the Department of the Environment (Circular 2/99) on Environmental Impact Assessment is one example. Romania also has criteria for establishing significance.

As well as the question of how to determine significance, it is also important to consider who will determine it. It must be emphasized that 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.

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. This is also consistent with the system set up by the EIA Directive.

Finally, article 6, paragraph 10, supplements this paragraph by providing that any reconsideration or updating of the operating conditions for an activity referred to in paragraph 1 shall also be subject to the full public participation requirements of article 6 wherever appropriate.

(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 would have an adverse effect on national defence 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. Presumably, this means that they would 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 in cases of national defence. 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 on authorities to provide the notice, while in others it may be appropriate to place this obligation on the proponent or 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. (See commentary to article 2, paragraph 5.)

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 for the purposes of this article—public notice and individual notice. Public notice means the dissemination of particular information to as many members of the public as possible, making use of the customary means for general and widespread transmission of information. 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, paragraph 4). The Convention requires notice to be given to the whole concerned public at an early stage of the proceeding. Means of notification may include publication in a newspaper or other generally available printed media, dissemination through electronic mass media (TV, radio, Internet), or posting of notices in areas with heavy traffic. 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, models as valid means of notification.¹²⁸

Individual notice—that is, dissemination of particular 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 Directive establishes zones in the immediate vicinity of facilities engaging in potentially dangerous activities. A similar approach is followed in many UN/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 since the “public concerned” may include non-governmental organizations whose goals include environmental protection.

Giving individual notice

For example, the Polish Environmental Protection Act requires the relevant authorities to draw up a list of environmental NGOs that have expressed interest in being notified on decision-making related to EIA.¹²⁹ When the decision concerns a permit for a project that requires an EIA, the Polish authorities must notify in writing all environmental NGOs that are based in the affected area.¹³⁰ Open-ended standing lists can also be useful tools. Electronic mail has proven to be an easy and inexpensive means of distributing information.

Criteria for notice

The inclusion of the terms “adequate, timely and effective manner” adds much to the basic obligation. This is meant to draw attention to practical problems of notification. 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 today’s information-saturated society, it may 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 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 Web sites as state-of-the-art noticeboards are a powerful tool in reaching the public in some parts of the UN/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.

Furthermore, 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

this paragraph, at subparagraph (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.

Timing of 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 commentary to article 6, paragraph 6.)

(a) The proposed activity and the application on which a decision will be taken;

public to fully understand the scope and potential consequences of the proposed activity.

This provision requires the notification to include information about the proposed activity and the application. 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 and the project applicant, and any other information that is necessary for the

The term “proposed activity” is often used in connection with EIA. However, the term must also be interpreted to apply in other cases where public participation may be required (see above).

(b) The nature of possible decisions or the draft decision;

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.

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

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 commentary to article 6, paragraph 6.) For example, an indication in a notice of “air emission permit” would constitute the nature of the decision, while a draft permit for a particular facility, including conditions, would be a draft decision.

(c) The public authority responsible for making the decision;

vision is a requirement similar to that of transparency and effectiveness in the way that environmental information is made accessible (see commentary to article 5, paragraph 2 (b) (iii)).

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 and fourteenth paragraphs). This pro-

(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), referring to 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 type of decision-making, with details provided about the stages at which public participation will take place.

The details that shall be provided, at a minimum, in respect of the decision-making and the public participation procedures pertaining to it are set forth in this subparagraph. Significantly, 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. This also confirms that 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.

The list of information to be presented is non-exhaustive. The notification may include any other information that will further inform members of the public about the procedure, such as the requirements of article 4, paragraph 2, of the Espoo Convention that its Parties must distribute EIA documentation to the public of the affected Party in the areas likely to be affected and to arrange for the submission of comments to the competent authority of the Party of origin.

Information about the procedure should include a description of its stages, phases and steps. The Convention considers the matters that are included under subparagraph (d) (i) to (vi) to be elements of the procedure.

(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;

As a part of the description of the procedure, the notification must 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 art. 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, paragraph 7), the notification must also include sufficient information for the public concerned to understand where and when the public hearing will take place.

(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 in accordance with article 6, paragraph 6. The identification of the public authority should be complete enough to enable the public concerned to contact the identified person or body, consistently with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth and fourteenth paragraphs).

This provision recognizes 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.

“Relevant information” versus “environmental information”

There is a slight difference, however, in that requests under article 4 are limited to environmental information, whereas the indication of the public authority found here is not so limited. The indication should identify public authorities from which any relevant information, whether or not it meets the definition of environmental information (art. 2, para. 3), can be obtained.

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.

Where and when it is possible to find information can heavily influence the capabilities of the public to obtain real, as opposed to formal, access to information. Similar provisions in domestic law and practice often provide times for viewing information 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

The notification must identify the public authority or other official body to which comments or questions may be submitted. The identification of the public authority should be complete enough to enable the public concerned to contact the identified person or body, consistently with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth and fourteenth paragraphs). 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. 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”.

The notification must also 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 commentary to article 6, paragraph 4).

(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 art. 2, para. 3.) In a typical EIA proceeding, 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, provides some further guidance as to “relevant” information.

As already explained, the obligation to give notification as to the matters found in article 6, paragraph 2, 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.

(e) The fact that the activity is subject to a national or trans-boundary 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 significant form of decision-making falling under article 6. Thus, it is important for the public to be notified that the activity falls under a national or trans-

boundary EIA procedure, as that procedure can carry specific public participation rights and obligations.

Understanding the EIA procedure

At the outset, it is important to understand what the Convention means by environmental impact assessment. Article 1 (vi) of the Convention on Environmental Impact Assessment in a Trans-boundary Context (Espoo, 1991) defines “environmental impact assessment” as “a national procedure for evaluating the likely impact of a proposed activity on the environment”. Many countries use the term EIA to refer to a range of procedures, usually including public participation, often conducted by the proponent of the activity under the supervision of a public authority, that results in a study of the potential environmental impacts of various alternatives for the achievement of the proposed activity. Some EIA laws also require comparative evaluation of a “no action” alternative, in which the proposed activity does not go forward. At the conclusion of the procedure, a report is produced outlining the alternatives and their impacts, which is then factored into the decision-making process.

Other countries, most notably the newly independent States, employ a substantially different approach, in which expert bodies established by the State review scientifically the alternatives proposed for the achievement of the proposed activity. The information, concerns or opinions expressed by the public within the procedure are considered as data relating to expected changes in social conditions resulting from the decision. The result of this kind of procedure is a final decision about whether the project may go forward. This so-called “ecological expertise” form of review can be found in many countries in the UN/ECE region. Public participation is not necessarily a part of the ecological expertise, but where it does take place, it is often conducted within a separate parallel procedure euphemistically called “environmental impact assessment”, sometimes known by the acronym “OVOS”,¹³¹ Because the term “environmental impact assessment” may be used in two quite different ways depending on national legislation, inclusive terms such as “biosphere reflection” have been suggested.¹³²

The definition of “environmental impact assessment” used in the Espoo Convention is general enough to include both these forms—the EIA procedure known in some countries, and the ecological expertise known in others.

The provisions of article 6 of the Convention are automatically applicable to permissions relating to activities listed in annex I. Annex I covers any activity not otherwise listed which requires public participation under an environmental impact assessment procedure in accordance with national legislation (para. 20). This should not be read to require the application of article 6 to any activity for which environmental impact assessment is required. The national legislation must additionally include public participation as a requirement in the environmental impact assessment. Where the national legislation of a Party provides for a form of environmental impact assessment without public participation, article 6 applies automatically only to activities listed in annex I. The applicability of article 6 to other activities requires the invocation of article 6, paragraph 1 (b). If public participation is limited, then the Party has to bring it up to the standards of the Convention.

Article 6, paragraph 2 (e), also requires Parties to give notice if the activity is subject to a transboundary EIA procedure, such as the one established in the Espoo Convention (see box).

The Espoo Convention on Environmental Impact Assessment in a Transboundary Context

In 1991, the Convention on Environmental Impact Assessment in a Transboundary Context was adopted in Espoo (Finland). It has been ratified by many of the countries that are Signatories to the Aarhus Convention. The Espoo Convention lists activities likely to cause a significant adverse transboundary impact and provides for environmental impact assessment 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 public of the affected country (art. 4) and to take due account of the comments submitted (art. 6, para. 1).

Article 6 of the Aarhus Convention closely follows the kinds of requirements that are common to various forms of environmental impact assessment currently in force in the UN/ECE region. Such common provisions may include specific provisions about the timing and content of notification, requirements on holding public hearings, the opportunity for the public to submit comments and suggestions, the requirement to take such comments and suggestions into account, and obligations establishing standards for reasoned decision-making.

In any case, if the proposed activity is subject to either a national or transboundary environmental impact assessment procedure, the public must be notified about it in accordance with article 6, paragraph 2, of the Aarhus Convention. With respect to transboundary EIA, it is interesting to note that article 3 of the Espoo Convention concerning notification includes a similar provision about notifying affected Parties “as early as possible” and the timing of notification is linked to the time when the public in the Party of origin shall be notified. 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”.

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 (see especially article 3, paragraph 1) is repeated in article 6, paragraph 3. The Convention requires time-frames to be set so that the public can be informed about the specific information required under paragraph 2 and can participate effectively. In addition, however, this provision specifically refers to another consideration in the establishment of reasonable time-frames—that is, the interest in allowing the public adequate time to prepare for its participation in the decision-making.

This provision of the Convention also refers to “the different phases”. Considering the rationale behind the need for adequate time-frames (giving information, allowing the public to prepare, and effective participation), the reference to “phases” should relate directly to the phases of the public participation procedures. Thus, each phase during the public participation procedures 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.

Finally, the reasonable time-frames must also take into account the interaction between article 6 and other parts of the Convention. For example, it may be necessary for a member of the public to request information under article 4, following the notification and as part of the preparation for participation in a hearing or commenting opportunity. Parties should build flexibility into the system to ensure, for example, that waiting for a request to be met in the time limits set out in article 4 does not undermine the public participation process. (See also the commentary to article 3, paragraph 1, requiring compatibility among the Convention provisions.) 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.

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. One is about the pace, while the other 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. Obviously, this prevents the public authority from taking steps to implement a preliminary decision prior to its finalization based upon, *inter alia*, the outcome of the public participation.

Decision-making in relation to large activities may be complex and long, involving several stages and parallel processes. In a particular decision-making process the effectiveness of public participation 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 that 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, 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.

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 aspects of the decision-making.

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.

Paragraph 5 points the way towards increasing the efficiency of public participation, by encouraging the prospective applicant to take certain steps *before* the start of the decision-making procedure. In so doing the Party may increase the involvement of the applicant or proponent of a proposed activity in public participation, and may encourage the applicant to shoulder some of the responsibility of communicating with the public. As a result, the public concerned may also feel greater responsibility towards the decision-making process at an early stage. Misunderstandings can be resolved and conflicts minimized, so reducing the burden on public authorities to address these matters. This provision resembles paragraph 4.

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. According to the discussion under paragraph 1 with respect to “proposed activity”, 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.¹³³

The responsibilities that Parties should encourage prospective applicants to take on where appropriate are specified according to three steps. The first of these is identifying the public concerned. (For a discussion of the definition of “public concerned”, see the commentary to article 2, paragraph 5.) The Convention takes note of the fact that the proponent, due to his familiarity with the local conditions, may help to identify those members of the public who are likely to be affected by the environmental decision-making and should do so prior to applying for the permit. The second step is for the applicant to enter into discussions with the public concerned. This has obvious benefits, including increased understanding of the goals and parameters of the proposed activity by the public, and increased understanding of the nature of the public’s concerns by the applicant. 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 proponent and the public can help to narrow the differences and issues to be discussed in the public participation procedures. Similarly, providing information on the objectives of the application before applying for a permit can reduce burdens on public authorities by allowing the proponent to modify the application in view of public reactions *even before the permit application is submitted*.

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 restrict the definition of the public concerned, for example by giving a right to the proponent to identify the public concerned to the exclusion of other members of the public who assert an interest in the environmental decision-making. Encouraging applicants to be responsible towards the public does not affect the primary obligations of the Parties under the Convention, moreover, and should not be considered a substitute. For example, 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’ 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.

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* shall be made available. 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, 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. This question is also relevant in considering how to implement paragraph 2, on notification. 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. Moreover, the notification should include an indication of the public authorities from which information can be obtained. Thus, a notification according to 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.

The reference to the information “available at the time of the public participation procedure” 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, 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 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 the information that is in every case *relevant* to a decision-making procedure, indicating a minimum standard. Consequently, the second interpretation of the meaning of “available” appears to be more in the spirit of the Convention. To hold otherwise would mean that decision-making could proceed without considering all the relevant information. Thus, the implication is that public authorities should generate the listed information.

Finally, the relevant public authority must give access to the information “as soon as it becomes available”. This obviously imposes an 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 the same as that found in the Espoo Convention, which requires its Parties to inform the other concerned Parties immediately upon the discovery of additional information on a significant transboundary impact of a proposed activity (art. 6, para. 3).

Grounds for refusal

The Aarhus Convention 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, for instance, 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.

The relevant information shall include at least, and without prejudice to the provisions of article 4:

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 goes on to establish minimum standards for the information that shall 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 the decision-making. This list draws heavily on domestic and international experience relating to environmental impact assessment, in which certain documentation is generally required

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. 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.

(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;

these physical and technical characteristics and the potential environmental impact of the proposed activity.

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

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 commentary to article 4, paragraph 4.)

(b) A description of the significant effects of the proposed activity on the environment;

proposed activity on the environment. Such a requirement is already part of the documentation that must be submitted to authorities in the permitting procedure in many UN/ECE countries. In Ukraine, for example, not only must an environmental impact statement (EIS) be prepared by an applicant for a decision relating to a proposed activity with potential effects on the environment, but the EIS is also to be disseminated to the public at the applicant’s cost.¹³⁴

The public authority must also give the public concerned access to a description of the significant effects of the proposed activity on the environment. (With respect to “significance”, see the commentary to article 5, paragraph 1 (b) and art. 6, para. 1 (b).) 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

Various countries have established factors to be taken into account in the estimation of the significant environmental effects of proposed activities in their national legislation. These laws may provide good examples of ways to meet this requirement of the Convention, covering such issues as description of the site, determination of the impact area, and evaluating the scope of potential effects. Public authorities must first determine the scope of the expected effects on the environment. The geographical area in which such effects can reasonably be expected is known as the “impact area”. Hungary’s Decree on EIA¹³⁵ provides an example of how one country defines the impact area of a particular project. It demands that the area to be examined in an EIS 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 EIS. Furthermore, areas falling outside the impact area must be presumptively unable to be affected by the proposed activity. Factors include 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.

In Ukraine, the EIS contains information on the purpose and means of the activity, and the factors that potentially have an impact on the environment, including possible emergencies, impact on human health, quantitative and qualitative indicators of the assessment of environmental risk, and measures foreseen to comply with environmental standards and norms.¹³⁶

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

Besides studying and assessing the possible effects of the activity on the environment, an applicant and/or relevant public authority must draw up measures to prevent such effects or, where they are absolutely unavoidable, to reduce them as much as possible. This applies to emissions and 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.

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 Protection¹³⁷ 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 can propose an alternative through its right to comment, guaranteed by article 6, paragraphs 2 (d) (v), 7 and 8.

(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 commentary), 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.

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 administration of a particular decision-making procedure.

Environmental impact assessment documentation

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.

“Appendix II

“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;

(Continued on next page.)

(Continued from preceding page.)

- “(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.).”

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

Paragraph 7 differs from most of the other provisions of article 6 in that here the Convention grants rights not only to the public concerned, but to the whole public. While the public concerned has stronger rights with respect to the notification and examination provisions of this article, any member of the public has the right to submit comments, information, analyses or opinions during the public participation procedures. The public authority cannot reject any such comments, information, analyses or opinions on the grounds that the particular member of the public was not a part of the public concerned. 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 submitter. 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. Naturally, the weight given to the particular comments, information, analyses or opinions will depend upon its objective relevance to the proposed activity, which will be reflected in the manner in which the matter is taken into account under article 6, paragraph 8. The relevant public authority or other official body for taking comments will have been identified in the notification to the public concerned under article 6, paragraph 2 (d) (v), together with the time-frame for submitting the information.

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. The public hearing also provides a venue for dialogue among stakeholders.

Public hearings

In most UN/ECE countries, public hearings may be held within the EIA process and other decision-making procedures. The hearings should be held after a sufficient period of time from the moment of notification to allow the public to study the materials and other information relevant to the proposed activity, and to come up with 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 it considers relevant to the proposed activity.

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.

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 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 many UN/ECE countries general administrative law already requires decisions to be reasoned and given in writing (see also 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 need for authorities to seriously consider the outcome of public participation and to address it in decision-making, policy-making and law-making is given special attention in 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 requirement 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, must be something more than “as far as possible”; rather should the paragraph be strictly construed to require the establishment of definite substantive and procedural standards.

Taking the outcome of public participation into account

Standards for taking into account the outcome of public participation are in development in the countries of the UN/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 recording of public hearings. Such measures may also become important where an aggrieved person uses article 9, paragraph 2, to challenge a particular decision-making process. In general, it can be said that taking account of the outcome of public participation requires the relevant authority to consider seriously the substance of all comments received, regardless of their source, and to include the substance of the comments in the motivation of the final decision.¹³⁸ It does not require the relevant authority to *accept* the substance of all comments received and to change the decision according to every comment. However, the relevant authority is ultimately responsible for the decision based on all information, including comments received, and should be able to show why a particular comment was rejected on substantive grounds.

Some countries employ a “best practice” in handling comments received, by requiring 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, below, which requires decisions to be given in writing and for the decision to be motivated by the “reasons and considerations on which [it] is based”.

This provision also implies that the 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. Article 6, paragraph 8, is similar to article 8 of the EIA Directive.

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 inform the public of the decision taken, in accordance with appropriate procedures. As in paragraph 7, this obligation does not only entail notification of the parties to the proceeding, or of the public concerned, but requires a general notification to the public at large.

The timeliness of notification of the decision must be judged in the context of the other requirements of the Convention. 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 the time limit for appeal would not begin to run until

the notification under most legal systems, 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.

The general administrative law of a Party may also include provisions about the notification of parties to a proceeding, and this provision of the Convention does not affect those obligations. It is customary for notification of decisions to parties to include specific information of interest to them, such as information about opportunities for appeal. Bulgaria’s administrative law, for example, requires the appellant in administrative appeals of decisions by public authorities to be notified within seven days after a decision is made in the appeal.¹³⁹ Such requirements should be taken into account in designing requirements for informing the public of final decisions under this paragraph.

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. A similar provision can be found in article 9 of the EIA Directive. 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 on any relevant question of law. In accordance 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 who participated in the decision-making. The general

administrative law of a particular Party may also provide for general publication of decisions in particular cases. Bulgaria’s administrative law, for example, requires the decision in an administrative appeal of a decision by a public authority to be reasoned, unless all the demands of the complaint have been met and no rights of other citizens are affected.¹⁴⁰ In Croatia 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.¹⁴¹

Reasoned decisions

There are many reasons for 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.¹⁴²

As mentioned above under paragraph 8, the requirement to take due account of the outcome of public participation may be interpreted to require the reasons and considerations to address the substance of all comments received, in addition to meeting other legal requirements. In so doing, the authority can also satisfy the requirement that the decision should set forth the “reasons and considerations” on which it was based. In some countries response documents are 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. Accessibility should be considered in the light of articles 4 and 5 and article 6, paragraph 6.

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 brings under this article significant changes or extensions of covered activities. Whereas that paragraph takes the approach found in article 7 of the Espoo Convention (and in EIA legislation in many countries), and triggers obligations on the basis of physical changes or advances in knowledge, paragraph 10 in effect supplements paragraph 1 on the basis of subsequent administrative procedures. Further administrative procedures relating to the operating conditions for a covered activity require the application of full public participation procedures under article 6.

Mutatis mutandis means “with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary”¹⁴³ and requires that the paragraphs be applied with the least possible change—only to be made when necessary. 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.

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 apply article 6 to decisions on whether to permit the deliberate release of genetically modified organisms (GMOs) into the environment, “to the extent feasible and appropriate”. The application of article 6 shall be accomplished within the framework of national law.

The Convention on Biological Diversity does not use the term “genetically modified organism”. Instead it refers to “living modified organisms resulting from biotechnology” (arts. 8 (g) and 19, para. 3). The EC Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically-modified organisms¹⁴⁴ defines GMO as “an organism in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination”.¹⁴⁵ A number of UN/ECE member States have passed GMO legislation or taken legal measures against the introduction of GMOs in recent years, including Austria, Denmark, France, Greece, Hungary, Italy, Luxembourg, Norway and Switzerland.

The Aarhus Convention atypically gives special treatment to decisions and to information pertaining to GMOs. Besides this provision, GMOs are also discussed in the twentieth preambular paragraph and in the Resolution of the Signatories.¹⁴⁶ The provision on product labelling under article 5, paragraph 8, is also relevant to the consideration of GMOs under the Convention. Because of the controversial nature of GMOs at the time that the Convention was negotiated, the negotiating parties intentionally kept open the issue for determination in the light of future developments. While most countries were prepared to treat GMO decisions like any others, a few countries insisted on the special provision. This provision is one that notably caused great concern, especially among NGOs, at the time of the Convention’s adoption.

A biosafety protocol to the Convention on Biological Diversity was under negotiation while the Aarhus Convention was being drafted. The wording of article 6, paragraph 11, takes into account the unclear status of those negotiations at the time, and the desire of the negotiating parties not to presuppose the final text of the biosafety protocol. The negotiation of the Cartagena protocol on biosafety to the Convention on Biological Diversity has proven to be difficult, however, with major divisions between the so-called “Miami Group” of grain-exporting countries and other factions. At the time of printing, negotiations had been prolonged until early 2000. As a matter of principle, however, there appears to be no fundamental difference between decisions relating to the release of GMOs and any other decision-making with potential significant effects on the environment.

Significantly, the fifteenth paragraph of the Resolution of the Signatories recognized:

“[T]he importance of the application of the Convention to deliberate releases of genetically modified organisms into the environment, and request[ed] 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.”

At their first meeting, in April 1999 in Chisinau, the Signatories to the Aarhus Convention decided to establish a task force on GMOs, with Austria as the lead country. It was mandated to monitor developments in other forums and to make recommendations for the future treatment of GMOs under the Convention.

Many countries that apply public participation laws do not distinguish between decision-making on GMOs and decision-making on other environmental matters.

Public participation and genetically modified organisms

How the EC Directive on GMOs and the United Kingdom’s Seed Law work together to provide “feasible and appropriate” public participation

Increasingly, the safety of genetically modified organisms (GMOs) is becoming an issue of concern among consumers, producers and governments. As a result, applicable laws and regulations are being subjected to a high level of scrutiny as to their potential health and environmental impacts.

The binding Community instrument on the GMO issue, Directive 90/220/EEC, mandates human health and environmental impact assessments. Article 4 of the Directive states that member

States must ensure all appropriate measures to avoid adverse effects to human health and the environment, including all necessary inspections, control measures and data gathering. Article 7, though, holds that *only if member States consider it appropriate* may they consult groups or the public on such aspects of the proposed release. Nevertheless, the Directive allows for public participation to come in “through the back door”. Article 10, paragraph 1, holds that final consent to the release of a GMO product is contingent, in part, on *compliance with relevant Community product legislation*. This contingency makes proposed GMO products subject to provisions within product legislation that are not delineated by the broader Directive 90/220/EEC.

For example, pursuant to article 10, paragraph 1, Directive 70/458/EEC, the guiding Community instrument for seed listing proposals, should be applied to proposed GMO seed releases. Directive 70/458/EEC states that deference should be given to national law provisions (1) when plant varieties may be harmful from the point of view of plant health to the cultivation of other varieties or species growing in a member State and (2) when justified on grounds of the protection of health and life of humans, animals or plants or the protection of industrial or commercial property.

Consequently, the courts in the United Kingdom have ruled that the introduction of seed products is an issue governed by its seed law (S.I. 1982/844) and not Directive 90/220/EEC. As a result, proposed GMO seed varieties are now subject to a distinct vehicle for public participation in subsequent decision-making.

Article 7

PUBLIC PARTICIPATION CONCERNING PLANS, PRO- GRAMMES 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 incorporated by reference, 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.

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 UN/ECE region, however. The terms were also used without definition in the Espoo Convention.¹⁴⁷ The experience of the Meeting of the Parties to the Espoo Convention may be relevant in interpreting the meanings of “plans, programmes and policies”.

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	

Provision	Obligation	Implementation elements
[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	
Third sentence	Requires the relevant public authority to identify the participating public	<ul style="list-style-type: none"> • 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

While the Convention does not oblige Parties to undertake assessments, a legal basis for the consideration of the environmental aspects of plans, programmes and policies is a prerequisite for the application of article 7 (see similar discussion under article 6, above). Thus, proper public participation procedures in the context of strategic environmental assessment (SEA) is one method of implementing article 7 (see box). SEA provides public authorities with a process for integrating the consideration of environmental impacts into the development of plans, programmes and policies. It is, therefore, one possible implementation method that would apply to both parts of article 7—the provisions covering public participation in plans and programmes, and the provision covering public participation in policies.

The requirement 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. This is similar to article 6, paragraph 1, which implies a legal basis for taking environmental considerations into account in decision-making, and its link to an EIA-type process. The requirement to take the outcome of public participation into account further points to the need to establish a system for evaluating comments, which may be satisfied through the establishment of national SEA procedures.

In 1996 the European Community adopted a proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, COM/96/0511 Final—SYN 96/0304 (SEA proposal).¹⁴⁸ The purpose of the SEA proposal was to ensure that the environmental consequences of plans and programmes were identified and assessed before adoption. The proposal covered a range of public plans and programmes in several areas such as transport, energy, waste, water, industry, telecommunications, tourism, town and country planning, and land use. It outlined the procedure to be followed and the content of the assessment. The proposal contained provisions for the public to give its opinion and for the results of public participation to be taken into account during the adoption procedure of the plans and programmes. In October 1998, the European Parliament completed the first reading of the SEA proposal. The Commission amended it in February 1999. The negotiations at Council level were proceeding during late 1999. UN/ECE has also discussed the idea of SEA as the subject of the next multilateral environmental agreement under its auspices.¹⁴⁹

Strategic environmental assessment

The Sofia Initiative on Environmental Impact Assessment describes “strategic environmental assessment” (SEA) as “a process that helps governments to assess the environmental impacts of proposed development policies, plans and programmes. SEA enables policy makers to promote public participation in broad environmental policy-making, identify and predict cumulative impacts of broad governmental programmes and take this information into account early in policy-making”.¹⁵⁰ It is a mechanism for organizing public debate about proposed and alternative strategies, for predicting and assessing the environmental impacts of the proposed strategies, and for documenting key findings for use in subordinate decision-making processes. Among the main features of SEA:

- SEA is clearly relevant for the integration of environmental concerns into broad national sectoral policies (especially energy, transport, agriculture, forestry, tourism, etc;) and regional and local development plans (i.e; land-use plans, urban development plans, etc;);
- The introduction of SEA relates to the implementation of article 7 of the Aarhus Convention;
- Most central and east European countries and newly independent States have already established elementary legal grounds to deal with SEA application and substantive improvements can be achieved by capacity-building and expert assistance to SEA experts during pilot SEA applications;

Within the UN/ECE region, SEA is legally required in Bulgaria, the Czech Republic, Denmark, Finland, the Netherlands and Slovakia.¹⁵¹ Many other UN/ECE countries (such as Sweden and the United Kingdom) use informal SEA systems.

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 adopt guarantees for the rights contained in this article. If Parties already have existing guarantees, these must be maintained under the principles of 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 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.

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.

Understanding “plans and programmes”

The Convention establishes a set of obligations for Parties to meet in public participation during the preparation of 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. 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” (art. 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.

**Public participation in preparation of plans:
development plans in EU member States and applicant countries**

Public participation may be found in the drawing-up of development plans for the allocation of EU financial assistance under EU structural funds. Council Regulation (EC) No. 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds requires applicant member States to submit development plans (the 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) developed in “partnership” between the public administration and “social and economic” partners. The objectives of structural funds are:

- 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.

In some countries (such as Ireland, United Kingdom) these “partnership arrangements” 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.

Similar provisions apply to EU pre-accession funds (PHARE and SAPARD). The Czech Republic is one example where partnerships with NGO participation have been used.

Providing for implementation provisions

The Convention emphasizes that Parties shall, at a minimum, make practical provisions for public participation in such plans and programmes. This is consistent with its overall goal that opportunities for public participation should be real and effective. Good practices and examples might be used to illustrate existing or possible practical provisions, for example the SEA on transport and energy conducted by the Czech Republic.

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, but it was decided that the word “other” permitted Parties to satisfy article 7 by providing legal provisions for public participation. 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.

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.)

Public information

This provision requires the Parties to ensure that the necessary information is provided to the public. In this respect, the provision is linked to article 5, paragraph 3 (c), providing for the progres-

sive availability in electronic databases of policies, plans and programmes relating to the environment, and article 5, paragraph 7 (a), which obliges Parties to publish the facts and analyses contributing to major environmental policy proposals. This naturally includes the obligation to notify the general public, and can also involve specifically notifying interested individuals and organizations, for example through a standing list.

In Hungary and Poland, information on such plans and programmes is provided to anyone who expresses an interest.¹⁵² The information that is necessary for public participation can be determined by referring to other provisions of the Convention, in particular article 6.

Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied.

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, and by incorporation article 6, paragraph 2, concern information to the public, early in the process, of certain elements of the process that will facilitate effective participation. Article 6, paragraph 4, requires Parties to provide for early public participation in the process. Article 6, paragraph 8, requires Parties to ensure that the decision takes “due account” of the outcome of the public participation.

Some paragraphs of article 6 are expressly omitted from this application. 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.

In planning and programme development, the information and documentation developed would normally differ from that specified in article 6, paragraph 6.

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 fact that the result of public participation might require the final plan or programme to be explained with reasons, 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 rights and obligations under article 7 are good candidates for the application of the access-to-justice provisions in article 9, paragraph 2. There, the Convention sets forth review procedures for persons aggrieved by decisions, acts or omissions under article 6 or “other relevant provisions” of the Convention. To make use of article 9, paragraph 2, however, a person must meet the standing requirements of that article, including being a member of the “public concerned” as defined in article 2, paragraph 5.

The words “within this framework” refer back to the transparent and fair framework for public participation established under the previous sentence. The implication is that paragraphs 3, 4 and 8 of article 6 are elements of such a framework.

The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.

This sentence is the result of a compromise during the drafting which might lead to some misunderstanding. It seems to introduce the concept that the “public which may participate” in article 7-type proceedings may be a subset of the “public” as defined in article 2. Article 2 of course employs an “any person” principle to define the public. The “any person” concept is applied in the first sentence of article 7, concerning the obligation to provide necessary information to the public so that it may participate in the preparation of plans and programmes relating to the environment. Since there is no limitation with respect to

the public to be informed, requiring a general notification, it may be expected that certain members of the public who learn about the process through notification will express their interest in participating. This may be in addition to the expected representatives of special interest groups that are traditionally included in these processes.

With this understanding, the reference in this sentence to the objectives of the Convention gives some guidance to the relevant public authorities in identifying the public that “may” participate. In particular, some of the preambular provisions that set forth the purposes, goals and benefits of public participation indicate that the authorities should have an open mind towards including interested members of the public in these processes. For instance, the seventh to the eleventh preambular paragraphs, the thirteenth, the sixteenth and seventeenth, and the twenty-first can give guidance to authorities in determining who has a “recognizable interest” in participation. In this context, NGOs promoting environmental protection ought to be considered to have such a recognizable interest.

The most reasonable interpretation of this provision, therefore, is that the Convention places a *responsibility* on the public authority to make efforts to identify interested members of the public and, while not bound to accept every expression of interest, should be as inclusive as possible. In any case, the strategy for identification of the public should be transparent and accessible.

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. Parties are obliged, at a minimum, to make an effort to identify the interested public and to make a strategy for public participation that is transparent and accessible. Among the issues that should be laid down in law are the 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 policy-making in specific areas or on specific subjects, are useful in this regard.

To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Nor does the Convention define “policies”. A policy may be defined as a “principle, plan or course of action”.¹⁵³ 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.

Public participation in policy-making

“An illuminating and informative example of the participation of the public in the preparation of environmental policies can be found in the development of an environmental policy by the Ministry of Defence of the Netherlands. It should be noted that the development of this policy was not required by any law, but was an initiative of the Ministry itself. The Ministry considered the creation of this policy to be its duty in order to carry out its activities consistently with the national environmental policy of the Netherlands. Besides the expected consultations with the armed services and relevant ministries, such as the Ministry for the Environment and the Ministry for Nature Conservation, the Ministry of Defence also contacted NGOs, including environmental action groups, to comment on the draft policy.”¹⁵⁴

This provision can also be considered in the light of article 3, paragraph 7, which discusses the obligation to promote the Convention’s objectives in international processes and bodies.

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 rights 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. 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 shall 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. Enforcement by members of the public of these obligations through the access-to-justice provisions of article 9 requires a national “opt-in” under article 9, paragraph 2. A national “opt-in” means that Parties take legislative steps to adopt guarantees for the rights contained in this article.

If Parties already have guarantees, these must be maintained under article 3, paragraphs 5 and 6.

Article 8 addresses public participation in a particular area of decision-making: the preparation, by public authorities, of normative acts. 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.

Provision	Obligation	Implementation guidance
First sentence	Requires Parties to promote public participation in the preparation of laws and rules by public authorities	<ul style="list-style-type: none"> • Best efforts • Options open • Possible significant effect on the environment
Second sentence	Sets elements of public participation procedures	<ul style="list-style-type: none"> • Sufficient time-frames • Publication of drafts • Opportunity to comment
Third sentence	Parties must ensure that 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

policy-making under article 7 in that they result in definite behavioural norms.

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, art. 2), it seeks to implement public participation in law-making through these actors.

Role of public authorities in the preparation of legislation

In many UN/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 institutions competent for final adoption of the 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 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 the “effectiveness” of public 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” is also used elsewhere in the Convention (see commentary to article 6, paragraph 1).

Many UN/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 normative instruments. The Hungarian Act XI of 1987 on Legislation is a typical example. That law provides that NGOs and professional associations shall have the opportunity to give an opinion on legislative drafts prepared by the Government and drafts of ministerial and other governmental decrees.¹⁵⁵

To this end, the following steps should be taken:

including time limits, notification and opportunity for commenting.

(a) Time-frames sufficient for effective participation should be fixed;

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 these cases. They establish a basic procedural framework for public participation,

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. This 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 shall 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; and
- The type of organization giving the opinion.¹⁵⁶

(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 of publishing draft rules in an official governmental publication, such as the Federal Register in the United States and other examples from Europe (see box) (see also commentary to article 6, paragraph 2). Such a mechanism will often be the appropriate vehicle for public notice and offers several advantages. First, it may already be institutionalized

with an adequate staff and other resources (most UN/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.

The mechanics of publishing draft rules

The government rule-making process in the United States is governed by the provisions of the Administrative Procedures Act (APA), 5 U.S.C. 500-596. Among its provisions is a requirement that government agencies must notify the general public in advance of any proposed new rule or change to the rules.¹⁵⁷ This is accomplished by publishing the proposed new rule in the Federal Register. The Federal Register is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents. This publication is available free of charge to the general public in public libraries across the United States, and it is also available by individual subscription.

Along with notice of the proposed new rule, the agency must invite the public to comment and give information about how comments may be submitted. The public is then given time to review the proposed change and to prepare its comments. After a statutory comment period of at least 30 days, the government agency is then required to consider the comments before issuing the final rule.¹⁵⁸

The environment ministries in some countries, such as the Czech Republic, Hungary, Ukraine and the United Kingdom, have already developed the practice of publishing draft laws on electronic networks, sometimes using their own facilities and sometimes taking advantage of NGO initiatives. For example, 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.¹⁵⁹

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

Many UN/ECE countries already have policies for public authorities to routinely consult the public in the process of law-drafting 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.¹⁶⁰

This provision acknowledges the good practice that has developed in the UN/ECE region, by not specifying how the public is to be involved, but leaving that up to each Party. It is implicit in this provision that law-makers 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.

For this reason, 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 and openness. Analogy may be drawn here with the “transparent and fair framework” that is often discussed under the Convention. It is further 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 enjoys the maximum public input.

The result of the public participation shall be taken into account as far as possible.

While the specific contours of public participation in the preparation of rules are not made obligatory 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 for public authorities to take into account public comments in processes under article 8.

While the direct rights and interests of particular members of the public might not be so implicated as in a proceeding under article 6, the propriety of public involvement in law-making must nevertheless be upheld by giving effect to public comments “as far as possible”. As a practical matter, the final document adopting the legislation or rules should explain the public participation and how it 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 a public authority to be responsible for coordinating the public input. In the preparation of the final documents relating to the legislation and rules, therefore, the public authority responsible for the public participation should properly and clearly inform the bodies involved in the process so as to give a full picture of public participation. Moreover, the final document should demonstrate that public participation has been used in coming to 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. The realities of law-making might prevent the kind of analysis of the process of decision-making that would be necessary to challenge the outcome of the process on substantive public participation grounds.

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 legal mechanisms that they can use to gain review of potential violations of the access-to-information and public participation provisions of the Convention as well as of domestic environmental law.

Purpose of access-to-justice pillar

The rationale behind the access-to-justice pillar of the Convention is to strengthen access to environmental information, environmental decision-making, implementation and enforcement by enabling citizens to invoke the power of the law. Access to justice creates a level playing field and helps ensure consistent and effective implementation of the Convention’s access-to-information and public participation provisions. In addition, 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 signatory countries. For example, citizens and NGOs often lack legal standing to bring a legal challenge for violation of their rights or to enforce the law. In some countries, bodies with judicial functions lack authority to provide injunctive relief and to enforce their decisions. These and other barriers weaken the ability of members of the public to seek redress if the government or private sector does not comply with the Convention or with national environmental law. The access-to-justice provisions in article 9 are intended to address these issues.

What is access to justice under the Convention?

Access to justice under the Convention means that the public has the ability to go to court or another independent and impartial review body to ask for review of potential violations of the Convention. The Convention’s access-to-information and public participation provisions create certain rights and obligations. The access-to-justice provisions establish that not only Parties, but also individuals and NGOs as members of the public can enforce the Convention.

Access to justice under the Convention applies primarily to the access-to-information provisions of article 4 and the public participation in decision-making provisions of article 6. However, it may also apply to “other relevant provisions”. How the scope of the access-to-justice provisions can be interpreted beyond articles 4 and 6 is discussed below. The access-to-justice provisions also apply to members of the public seeking review of violations of domestic environmental law. Parties have flexibility in how they implement this requirement, but the general obligation allows the public to challenge “acts and omissions” by both private persons and public authorities.

The access-to-justice provisions provide a level of standing to go to court or another review body, to individuals and NGOs. The Convention provides slightly different guidance on standing depending on the type of review requested.

The Convention sets certain requirements for access-to-justice procedures. They must be fair, equitable, timely and not prohibitively expensive. They must also provide adequate and effective remedies and be carried out by independent and impartial bodies. The Convention further requires information on access-to-justice procedures to be disseminated and encourages the development of assistance mechanisms to remove or reduce financial and other barriers.

Implementing access to justice

The following table contains the main elements of article 9 on access to justice. 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 implementation guidance with an even higher level of flexibility for the Party or public authority. These varying degrees of obligation will be discussed in more detail. The table covers the general obligations and provides some insight, beyond the requirements of the Convention, into how Parties may wish to implement them.

Article 9	General requirements	Implementation guidance
	A system to provide review of public authority decisions based on articles 4 and 6 and other relevant provisions	<ul style="list-style-type: none"> • Ensure availability of independent and impartial review bodies, including courts • Develop clear rules concerning standing of individuals and NGOs to access judicial and other review for violations of the Convention and for violations of domestic environmental law
	A system to provide citizen access to review so as to challenge violations of domestic environmental law.	<ul style="list-style-type: none"> • Develop adequate remedies, such as injunctive relief • Establish mechanisms to provide public with information on access-to-justice procedures • Develop assistance mechanisms for public in accessing review procedures

Article 9**ACCESS TO JUSTICE**

Article 9 requires an appropriate mechanism to 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 and guidance in the Convention itself.

Provision	Obligation	Implementation elements
Article 9, paragraph 1	Provides review procedures relating to information requests under article 4.	<ul style="list-style-type: none"> • Judicial or other independent and impartial review • Additional expeditious and inexpensive reconsideration or review procedure • Standing requirements • Binding final decisions • Reasons for decision in writing
Article 9 paragraph 2	Provides review procedures relating to public participation under article 6 and other relevant provisions of the Convention.	<ul style="list-style-type: none"> • Judicial or other independent and impartial review • Possibility for preliminary administrative review procedure • Standing requirements
Article 9, paragraph 3	Provides review procedures for public review of acts and omissions of private persons or public authorities concerning national law relating to the environment.	<ul style="list-style-type: none"> • Administrative review procedures • Judicial review procedures
Article 9, paragraph 4	Minimum standards applicable to access-to-justice procedures, decisions and remedies.	<ul style="list-style-type: none"> • Adequate and effective remedies, including injunctive relief • Fairness • Equity • Timeliness • Not prohibitively expensive • Record decisions in writing • Publicly accessible decisions
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

1. 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.

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”. The concept of “independent and impartial body” has been well developed under the Convention for the Protection of Human Rights and Fundamental Freedoms. “Independent and impartial” bodies do not have to be courts, but must be quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.

Some countries have chosen to create a special, independent and impartial body to review access-to-information cases. For example, in 1978 France established the Commission for Access to Administrative Documents (CADA).¹⁶¹ CADA is an independent administrative authority whose members are drawn from the executive, the judiciary, and the legislature. A person whose request for information has been denied may refer the matter to CADA. Submission of a case to CADA is required before an appeal to the administrative court is possible. CADA decisions are advisory and can be appealed to a court for a final, binding decision—another requirement of article 9, paragraph 1. To meet the requirements of the Convention, such bodies must have been established by law.

What can be reviewed?

The provisions of paragraph 1 guarantee the public the opportunity for review of decisions made under article 4 on access to environmental information. 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 are to carry out this obligation “within the framework of national legislation”. Each Party has very different review systems and has the flexibility under the Convention to implement the Convention’s obligations under paragraph 1 within the framework of that system.

What triggers the review procedure?

Parties must make a review procedure available when a person contends that his or her request for information has been ignored or wrongfully refused. In addition, Parties must make a review procedure available when the applicant considers that the response is inadequate; or when he or she believes that the request was otherwise not dealt with in accordance with the provisions of article 4. It is clear that 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 (art. 4, para. 2), the form in which a response must be given (art. 4, para. 1 (b)), and the grounds upon which requests may be refused (art. 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.

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 and has “standing” 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 natural or legal persons, and their associations, organizations or groups. In addition, article 3, paragraph 9, requires public authorities to

Where does the ombudsman fit under the Convention?

In many countries, some type of “ombudsman” functions as an independent and impartial review body for violations of administrative law against citizens. Depending on how the ombudsman office is structured and on how it fits within the national review system, it may or may not fully meet the criteria under article 9.

The office of ombudsman originated in the Nordic countries as an institution to ensure that public authorities did not commit injustices against individuals. It has since spread widely both in western and in eastern Europe. In the Nordic countries, the ombudsman acts on behalf of parliament, although it is not part of any branch of government. The ombudsman has jurisdiction to review all aspects of public administration to ensure the “proper exercise of administrative powers”. Many of the complaints handled by the ombudsman deal with access to information. During the Convention’s negotiations, Denmark, Finland, Norway and Sweden made an interpretative statement about the institution of ombudsman in the context of article 9, contending that it corresponded with the requirements of the Convention in practical terms, although it did not imply a legal right to any review procedures, did not supply binding decisions, and did not provide injunctive relief.¹⁶² Moreover, the ombudsman does not have strict standing rules for bringing a complaint. Where a person does not achieve the intended results through the ombudsman, however, he or she may still have opportunities to seek review in the courts in some countries, in a manner consistent with the Convention.

Alternative to court review

Article 9, paragraph 1, also requires Parties to ensure that the public has access to faster and less expensive review procedures than court review. Appeal to a court can be time-consuming and expensive and access to information is often needed quickly. Many applicants will not have the financial resources to cover litigation costs, and delays and expenses in court procedures can be a barrier to effective access to information.

The Convention requires Parties whose courts have jurisdiction over access to information disputes to make an “expeditious” and “inexpensive” alternative review mechanism available. “Expeditious” means “efficient and speedy”. The requirement that the process should be free of charge or inexpensive is meant to ensure that any member of the public will be able to afford it.

Such a review process can take several forms, including reconsideration by a public authority or review by an independent and impartial body other than a court of law. “Reconsideration” indicates that the same body goes over the decision once again to ensure its accuracy.

Alternatives: reconsideration and administrative review

Most UN/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, 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.¹⁶³ In Poland, the law 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.

Countries that do not have an administrative appeals process for information requests must provide an expeditious and inexpensive process for reconsideration by the public authority. For example, in the Netherlands, appealing against a decision denying access to information requires the applicant to file a notice of objection with the same administrative authority that made the decision.¹⁶⁴ If the administrative authority confirms its refusal to supply the requested information, appeal is directly to the courts.

Final decisions must be binding

Under the Convention, final decisions under article 9, paragraph 1, shall be binding on the public authority. 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 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. Thus, in addition to any advisory processes, Parties must ensure that a final, binding decision is still possible.

For example, in France the decisions of CADA, discussed above, are advisory. However, if after receiving its opinion, the authorities expressly or tacitly confirm their refusal to provide the requested information, the aggrieved person may appeal to the administrative court. The administrative court then has six months to issue a final and binding decision.

Finally, at least where access to justice is refused under this paragraph, reasons for the decision shall be stated in writing. The formulation chosen does appear to encourage 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 through formal review of matters relating to public participation under article 6. It also expressly applies to “other relevant provisions” of the Convention as provided for under national law. This means that Parties may apply the review procedures to other provisions in the Convention by providing for review in those cases in national law. 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.” These provisions lay the groundwork for many of the obligations set out in article 6 and are relevant to its implementation. Similarly, 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 these procedures also could be reviewable under article 9, paragraph 2. It must be noted, however, that these provisions do not generally refer to the “public concerned”. In applying article 9, paragraph 2, to other provisions of the Convention, therefore, Parties must find a way to determine the scope of the public concerned in those cases. Finally, the reviewability of any provisions of the Convention under this paragraph would not affect the possibility that article 9, paragraph 3, might also apply.

What can trigger the review procedure?

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.

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.

sults of public participation must be taken into account by the public authority under article 6, paragraph 8.

Under article 9, paragraph 2, the public concerned must have a “sufficient interest” in the matter under review or maintain an impairment of a right. These two obligations in article 9, paragraph 2 (a) and (b), are two ways of trying to reach the same result, given the differing legal systems to be accommodated among the Parties. The two requirements can be considered together with later provisions that further explain “sufficient interest” and impairment of a right.

Under paragraph 2 (a), the Convention raises the question of which members of the public concerned have a sufficient interest. With respect to NGOs meeting the definition of “public concerned”, the Convention answers this question itself. The Convention states clearly that NGOs meeting the requirements of article 2, paragraph 5, automatically have “sufficient interest”. However, for other persons, including individuals, the Convention allows sufficiency of interest to be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice. In this case the term “in accordance with the requirements of national law” indicates that Parties will most likely find different ways of determining “sufficient interest”, depending on constraints that may exist in their national administrative or environmental laws. However, the added requirement that “sufficient interest” should be determined “consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention” indicates that Parties should interpret the application of their national law requirements within the light of the general obligations of the Convention as found in articles 1, 3 and 9.

Paragraph 2 (b) was devised for those countries with legal systems that require a person’s rights to be impaired before he or she can gain standing. Considering the clause’s purpose, it is not an invitation for Parties to introduce such a fundamental legal requirement where it does not already exist, and to do so would in any case run foul of article 3, paragraph 6. Where this is already a requirement under a Party’s legal system, both individuals and NGOs may be held to this standard. However, Parties must provide, at a minimum, that NGOs have rights that can be impaired. Meeting the Convention’s objective of giving the public concerned wide access to justice, moreover, will require a significant shift of thinking in those countries where NGOs have previously lacked standing in cases because they were held not to have maintained impairment of a right.

Under this article, Parties must ensure that members of the public concerned within the meaning of this paragraph can obtain review of “decisions, acts or omissions”. First, a governmental decision or act, such as a decision to limit the participants at a public hearing, or holding a public hearing very late in the process, may be subject to review. Moreover, if the government fails to take an action or make a decision required by the Convention, for example by not holding a public hearing at all, or by failing to notify certain persons, review may also be sought. The decisions do not need to be final. However, this must be considered in the context of the final sentence of article 9, paragraph 1, concerning exhaustion of administrative remedies.

Who can ask for a review?—The issue of standing

The Convention sets out—as a minimum – that members of the “public concerned” have standing to pursue review in public participation cases. 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 commentary to article 2, paragraph 5.) However, article 6 has provisions applying to the “public” as well as the “public concerned” (paras. 7 and 9). It is consistent with the objectives of the Convention to hold that a member of the public who actually participates in a hearing under article 6, paragraph 7, would thereby gain the status of a member of the public concerned. This is logically supported by the fact that the full re-

Understanding “sufficient interest”

When national law has used the concept of “sufficient interest”, it has tended to be a common-sense test, rather than a legal or economic interest test. For example, the United Kingdom’s Supreme Court Act of 1981 modified standing requirements to allow any person with a “sufficient interest” to bring a case.¹⁶⁵ In a 1994 decision involving a suit by an NGO challenging a licence to construct a nuclear power plant, the British High Court confirmed the standing of the organization according to the Supreme Court Act. The Court found that due to its long-standing environmental activism, the organization had a “genuine interest” in the issues raised by the proposed licence, and that this genuine interest was sufficient to challenge the licence. This reasoning has been applied to individuals as well as organizations, thus extending standing to public-spirited individuals.

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.

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.

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, many countries require plaintiffs to “exhaust administrative remedies”, that is, to try all available administrative review procedures, before going to court. A person may 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.

Paragraph 3 creates a further class of cases where citizens can appeal to administrative or judicial bodies. It follows on the eighteenth preambular paragraph and the Sofia Guidelines to provide standing to certain members of the public to enforce environmental law directly or indirectly. In direct citizen enforcement, citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm. Indirect citizen enforcement means that citizens can participate in the enforcement process through, for example, citizen complaints. However, for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be said that the member of the public has access to such procedures. Public enforcement of the law, besides allowing the public to achieve the results it seeks, has also proven to be a major help to understaffed environmental enforcement agencies in many countries. In some countries, moreover, the citizen enforcer can even collect civil monetary penalties from the owner or operator of a facility transgressing environmental

law or rules on behalf of the appropriate government agency.

What can be reviewed?

Under the Convention, members of the public have the right to challenge violations of national law relating to the environment, whether or not these are related to the information and public participation rights guaranteed by the Convention. The provision potentially covers a wide range of administrative and judicial procedures, including the “citizen enforcement” concept, in which members of the public are given standing to directly enforce environmental law in court. The obligation can also be met, for example, by providing for the opportunity to initiate an administrative procedure. 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 that the public also has a role to play.

What can trigger the review procedure?

Under the Convention, Parties must ensure that members of the public can directly enforce the law in the case of acts and omissions by either private persons or public authorities. For example, a local environmental organization that meets the criteria set out by a particular Party may challenge a violation by a facility of waste-water discharge limitations in its permit. The environmental organization might have the right 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 waste-water discharges. (See also commentary to article 9, paragraph 4, below, concerning injunctive relief.)

In addition, members of the public may challenge acts or omissions of public authorities that transgress national environmental law. “Omissions” in this case includes the failure to implement or enforce environmental law with respect to other public authorities or private entities.

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 criteria that may exist in national law. The Convention does not affect the right of Parties to set criteria by which members of the public can have access to environmental enforcement proceedings. Paragraph 26 of the Sofia Guidelines promotes the notion of broad standing in proceedings on environmental issues.

Public standing to enforce national law

Most UN/ECE countries already grant some level of standing to individuals and organizations to go to court to challenge violations of national law by both private persons and public authorities. For example, in Poland NGOs may bring both civil and administrative cases, based purely on the statutory goals of the organization. Thus, an organization with the statutory goal of protecting the environment automatically has standing to bring an administrative case to enforce environmental law. In Hungary, any citizen can file a suit in the Constitutional Court against the Government, if it has failed to fulfil legislative responsibilities.

Who carries out the review?

Article 9, paragraph 3, gives the public access to administrative or judicial procedures. This provision can potentially cover a wide range of procedures.

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 ecological ones like the Nature Protection Guard and the Animal Protection Association, to act as public prosecutors in the prosecution of petty criminal offences under the Nature Conservation Act of 1991. The associations enjoy the rights of a public prosecutor, including the right to appeal to the criminal court.

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 describe 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.

“Adequate and effective remedies”

The ultimate objective of any administrative or judicial review process is to obtain a remedy for a transgression of law. Under paragraph 4, Parties must ensure that the review bodies provide “adequate and effective” remedies. These remedies are to include injunctive relief when appropriate. When irreversible damage from a violation has already occurred, a remedy often takes the form of monetary compensation. 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 also may 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”. 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 the resulting damage to health or the environment would be irreversible. Compensation in such cases is often inadequate.

What is injunctive relief?

Injunctive relief: Injunctive relief is a remedy designed to prevent or remedy injury. 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. The order issued by the tribunal is enforceable through other proceedings. In environmental cases, injunctions, which allow the tribunal to cause a person to cease a violation or undertake some act, are therefore often more flexible and responsive to the underlying environmental or other problem than other remedies such as monetary damages or criminal sanctions.

Preliminary injunctive relief: 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, a 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: (i) irreparable injury is immediately threatened or may occur before the case can be heard in full and (ii) 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.

The Convention requires injunctive relief and other remedies to be “adequate and effective”. Adequacy requires the relief to fully compensate past damage, prevent future damage, and may require it to provide for restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.

Option for when to use injunctive relief

In Hungary, preliminary injunctive relief may be ordered:

- (i) If it is “indispensable” to avert damage;
- (ii) To avoid a change in the factual basis of the legal proceedings; or
- (iii) If necessary in other instances deserving special attention.

If the court finds that any one 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.¹⁶⁶ This legal test allows the court to decide whether an injunction is appropriate in a given case.

As mentioned above, injunctive relief is not the only effective remedy. In some countries, for example, the citizen enforcer in a proceeding similar to those contemplated under article 9, paragraph 3, can even collect civil monetary penalties from the owner or operator of a facility transgressing environmental law or rules on behalf of the appropriate government agency.

“Fair, equitable, timely and not prohibitively expensive”

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. Fair procedures must also apply equally to all persons, regardless of position, race, nationality or other suspect criteria. (See also commentary to article 3, paragraph 9, although fairness in justice may require non-discrimination with

respect to other classifications than those laid out there, such as age, gender, religious affiliation, etc.) Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner.

Timeliness is also very important to review procedures under article 9. This requirement reinforces the requirement of 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 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 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.¹⁶⁷

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 may not be so expensive that it prevents the public, whether individuals or NGOs, from seeking review in appropriate cases. Various mechanisms, including waivers and cost-recovery mechanisms, are available to Parties to meet this obligation.

Keeping costs down

Costs associated with going to court can include:

- Court fees,
- Attorney’s fees,
- Witness transport costs, and
- Expert fees.

These types of costs represent a substantial financial barrier for the public. Some countries have taken steps to control them:

- In Slovakia, NGOs are exempt from paying court fees;¹⁶⁸
- 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 the appeal;
- In many countries attorneys’ fees are awarded to the prevailing party in a case. In the United States, in addition, 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.

“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.

First, paragraph 5 requires Parties to provide information to the public on access-to-justice procedures. This reinforces the requirement of article 3, paragraph 3, that each Party shall promote environmental education and awareness on how to obtain access to justice. Such information can be provided in a variety of ways. One example is found in the Convention itself. Article 4, paragraph 7, provides that refusals of access to information requests must include information on access to review procedures provided for in accordance with article 9. A similar mechanism could be used in the issuance of 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.

Article 9, paragraph 5, also 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.

Potential barriers to access to justice

The barriers under article 9, paragraph 5, can include, *inter alia*:

- Financial barriers,
- Limitations on standing,
- Difficulty in obtaining legal counsel,
- Unclear review procedures,
- Corruption,
- A lack of awareness within the review bodies,
- 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.

The Convention already requires or encourages many of the strategies that will 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.

Article 9 requires access to justice to be affordable for members of the public. The earlier discussion under article 9, paragraph 4, gives examples of how to overcome some of the financial barriers to access to justice such as 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, individuals or associations that cannot pay the costs associated with going to court may be entitled to a court-appointed lawyer. Other countries, such as Armenia, Canada, the Czech Republic, Hungary, the Netherlands, the Republic of Moldova, the Russian Federation, Slovakia, Ukraine, the United Kingdom and the United States have privately funded or university-based legal assistance centres. In these cases, elimination by the government of technical obstacles to the creation, operation and funding of a not-for-profit organization is crucial to ensuring that such privately funded legal assistance centres continue to exist.

Article 9 also requires remedies to be available. In addition, if courts and other review bodies have the power to enforce their decisions, one further potential barrier to access to justice will be removed. In many countries, administrative or court judgements have effectively been negated by delay in or lack of enforcement. To remedy this, many countries 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, the United States 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, and impoundment of bank accounts, to attachment of wages.

Finally, countries have many options to reduce the burden of proof in a case. Clear environmental laws, rules and standards are important in this regard. For example, clear emissions levels set out in permits and clear standards of conduct to which actual emissions and actions can be compared can improve the chances that a person may enforce the law. When a person obtains information concerning required emissions levels, deadlines for compliance or other enforceable substantive requirements in statutes, rules or permits, it is easier to identify and prove violations. Under article 9, paragraph 3, a law that simply prohibits “harmful” or “dangerous” pollution is more difficult to enforce consistently and requires citizen enforcers to tackle complicated questions of science and policy. With clear standards of conduct, the only question at issue is whether the defendant violated the legal standard, order or permit.

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 in terms of its own provisions and in terms of enforcing 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.

What are the remedies once a challenge is brought? The Convention requires Parties to provide effective remedies, including injunctions.

How can barriers to access to justice be overcome? Parties can assist the public to obtain access to justice by removing financial and other barriers.

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 provide for changes and additions to the Convention through amendments and annexes, and they provide implementation mechanisms, such as compliance review and methods to settle disputes. As with most conventions, the Parties to the Aarhus Convention will meet regularly to discuss how to effectively meet its goals and objectives. The Parties will be served by the secretariat and set their own rules and work plan to put the Convention into practice.

Article 10

MEETING OF THE PARTIES

In addition to establishing the specific obligations of Parties, most treaties also create their own administrative and policy-making 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 policy-making body: the Meeting of the Parties. Often called "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, etc. The Meeting's basic function is to steer and supervise the process of implementing and further developing the Convention. The Parties typically meet every two years or so and conduct the major business of monitoring, updating, revising and assisting with implementation. The Meeting enables the contracting Parties to review the implementation of the Convention and to adopt decisions to improve the way in which the Convention works.

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.

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:

Article 10, paragraph 1, sets out the timing for the meetings of the Parties. Two years or so is the typical amount of time between meetings of the Parties to most international treaties. Under the Aarhus Convention, the first meeting of the Parties is on an accelerated time-frame and must be held no later than one year after the Convention enters into force. The Executive Secretary of UN/ECE is responsible for conveying information to the Parties concerning requests for a meeting of the Parties. Under article 12, the Executive Secretary of UN/ECE carries out the secretariat functions for the Aarhus Convention.

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 with the treaty. The extent of this obligation varies, but it usually covers at least the measures taken by Parties towards implementing their obligations. For example, the 1992 Convention on Biological Diversity requires its Parties to report on their implementation measures and their effectiveness 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 requires an annual report on all aspects of the transboundary trade and disposal of such substances (art. 13). 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 (MARPOL) calls for reports from national authorities on action taken to deal with reported violations and on incidents involving harmful substances.

(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;

ment. These reports tend to follow standard formats. Typically, committees of meetings of Parties that review such reports make concrete and specific recommendations to particular Parties concerning implementation.

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 requires its Parties to submit information about the quantity of ozone-depleting substances that they manufactured or used during the year. Under the 1989 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 catch problem areas in Parties having difficulty with implementing the Convention and to monitor Parties that consistently violate the convention.

(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;

agreements will be useful for implementing the Aarhus Convention.

(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;

United Nations Commission on Sustainable Development, the World Trade Organization, the European Environment Agency, the Regional Environmental Center for Central and Eastern Europe, and many others.

(d) Establish any subsidiary bodies as they deem necessary;

forward the entire work of the Meeting of the Parties between sessions. This is, for example, the function of the Working Group on Environmental Impact Assessment, which is a subsidiary body of the Meeting of the Parties to the Espoo Convention and is currently overseeing all the work mandated by the Parties at their first meeting. 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. It must comply with the rules of procedure adopted by the Meeting, in accordance with article 10, paragraph 2 (*h*). Examples of potential subsidiary bodies under the Aarhus Convention might include committees on implementation and/or compliance under articles 10, paragraph 2 (*a*), and 15.

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. Under many other conventions, Parties include a review of their domestic policies and approaches to implementing of the convention in their regular reports to the meeting of the Parties, along with proposed strategies for improve-

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

Many of the UN/ECE committees and other international bodies and committees have had experience with the substance of the three pillars of the Aarhus Convention. UN/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 the United Nations Environment Programme, the United Nations Development Programme, the

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

Subsidiary bodies can be composed of government representatives and observers, including NGO representatives. For example, the Convention on Biological Diversity created a subsidiary body on scientific, technical and technological advice to support the Meeting of the Parties in all of its work. The 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat has set up a scientific and technical review panel consisting of individual volunteer experts who advise the Parties on scientific matters. Other examples of subsidiary bodies are committees to help with treaty administration. For example, the biennial meetings of the Conference of the Parties to CITES are supplemented by the more frequent meetings of supplemental committees formed to address specific concerns. The CITES standing committee addresses issues relating to budget, administrative concerns and internal affairs. It consists of six representatives from different regions.

(e) Prepare, where appropriate, protocols to this Convention;

Parties to the Aarhus Convention may prepare protocols to the Convention. Protocols are often legal agreements that provide additional, detailed legal requirements under an international convention. Yet, as in the case of the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, they may also extend into areas not covered by the parent convention.

Under the Convention, Parties may develop a legal document that would establish additional rights and obligations to be signed and ratified as a separate legal agreement by those Parties that wish to bind themselves to the additional obligations. Parties negotiate, sign and ratify a protocol separately from the original convention. 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. For example, subparagraph (i) below refers to the need for Parties to consider developing an appropriate instrument that could be annexed to the Convention, such as a protocol, concerning pollution release and transfer registers in accordance with the objectives set out in article 5, paragraph 9.

Protocols are often used in international environmental law. They allow a detailed and careful consideration and negotiation of specific aspects of an international legal regime. Protocols are separate from the original convention. A Party to the convention may refuse to sign a protocol and will still remain a Party to that convention. Good examples of protocols include the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer adopted on the basis of articles 2 and 8 of the 1985 Vienna Convention for the Protection of the Ozone Layer, and the Protocol on Water and Health (London, 1999) to the Convention on the Protection and Use of Transboundary Waters and International Lakes (Helsinki, 1992). Moreover, some protocols may even allow non-Parties to the parent convention to become Parties.

(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.

(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. Parties are given the responsibility of adopting additional such rules at their first meeting. Rules are to be adopted by consensus and not by voting.

Typically rules of procedure cover issues such as the role of observers, setting the agenda, the representation and credentials of participants, the appointment and conduct of officers, the appointment and conduct of committees and working groups, the role of the secretariat, the conduct of business, voting and languages. Particular matters that would most likely be covered can be found at paragraphs 5 and 6, below.

(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.

consider whether or not to develop appropriate instruments, such as an annex or protocol concerning pollution release and transfer registers. The Convention sets a high priority on this provision, requiring it to be carried out at the first meeting of the Parties. As discussed earlier, at their first meeting in April 1999, the Signatories already designated a task force, led by the Czech Republic, to examine issues concerning pollution release and transfer registers. (For a more detailed discussion of pollution release and transfer registers, see the commentary to article 5, paragraph 9.)

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

non-governmental participation. Financial arrangements are often decided at the first meeting of the Parties and can be either voluntary or mandatory depending on the wishes of the Parties. For example, under the Basel Convention, 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. Part of the budget is used for daily operations and part for technical assistance and implementation. The budget covers items such as travel and per diem costs of representatives from developing countries so that they can attend meetings, a technical trust fund to help developing countries establish national legislation and raise public awareness, and regional and subregional information centres.

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.

to the Convention, may participate as an observer.

The Convention establishes article 5, paragraph 9, on pollution transfer and release registers as a framework. It requires immediate review, at the first meeting, of the Parties' experience in implementing the provisions of article 5, paragraph 9. It then requires Parties to consider what steps are necessary to further develop national pollution transfer and release register systems.

Conventions usually 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 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 UN/ECE countries have some form of pollution registers, few have fully developed pollution release and transfer registers that are publicly accessible. These systems can be highly technical, and methods and requirements can vary greatly from country to country. Thus, the Convention sets out a general obligation to move towards some type of pollution register system, while at the same time requiring the review of national systems. It also requires the Parties to

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

Certain international institutions have the right to participate in the Meeting 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.

Observers are almost always admitted to meetings of Parties to conventions and to other convention-related working groups. The role of observers is determined by each forum. Typically, observers do not vote, but may submit documents, present comments in writing or orally, and attend meetings.

First, bodies of the United Nations and units of its Secretariat, such as the United Nations Environment Programme or the United Nations Development Programme, 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

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.

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.

Many treaties allow NGOs to receive observer status at the meeting of the Parties, including the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1979 Convention on the Conservation of Migratory Species of Wild Animals, the 1979 Convention on the Conservation of European Wildlife and Natural Habitats, and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In addition, the Meeting of the Signatories to the Aarhus Convention has accepted the participation of NGOs on the same basis that they enjoyed in the negotiation of the Convention, in accordance with the Resolution of the Signatories.

Typically, NGO observers may submit memoranda 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 the Framework Convention on Climate Change allow accredited observers to participate in “private meetings”.

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.

The Meeting of the Parties is responsible for the rules of procedure under article 10, paragraph 2 (h). These rules must provide practical arrangements for the admittance of representatives of international organizations, governments and NGOs as observers.

Selected Agenda Items for the Meeting of the Parties

- Continually review implementation (art. 10, para; 2);
- Establish subsidiary bodies, if necessary (art; 10, para; 2 (d));
- Set procedures for the Meeting and for subsidiary bodies (art; 10, para; 2 (h));
- Review the experience in implementing article 5, paragraph 9, and consider next steps, including the drawing-up of an instrument concerning pollution release and transfer registers or inventories (art; 10, para; 2 (i));
- Establish arrangements for reviewing compliance (art; 15);
- Further develop the application of the Convention to decisions on GMOs (Resolution of the Signatories).

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. Typically, its member States have transferred competence in respect of matters governed by this Convention to such a regional organization. In addition, the regional organization has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the Convention. The European Community is the best known example of a regional economic integration organization. The European Community can sign or conclude binding international agreements. 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—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 European Community's treaties 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 Parties' cooperation 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:

(a) The convening and preparing of meetings of the Parties;

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 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.

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.

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. Specifically, under the Aarhus Convention, in addition to disseminating the reports required by article 10, paragraph 2, the secretariat is required to transmit proposed amendments under article 14, paragraph 2.

(c) Such other functions as may be determined by the Parties.

The Parties may determine additional tasks for the secretariat.

Additional tasks given to some secretariats relate to monitoring compliance and facilitating implementation. Recently, secretariats have also been charged with providing or arranging for technical or other support to assist Parties to improve their compliance with treaty obligations. Under the Montreal Protocol, for example, the secretariat is involved in every stage of implementation, from organizing and arranging meetings that prompt action to assisting compliance.

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.

setting the scope and path for implementing certain articles.

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

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 on the Law of Treaties (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 amendments.

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 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.

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.

Once amendments are adopted at the meeting of 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 (art. 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 after three fourths of the Parties have ratified, approved or accepted them, on the ninetieth day after the receipt by the Depositary of the required number of instruments of ratification, approval or acceptance.

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).

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 in 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.

7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

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 annexes 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.

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

reviewing compliance help reach the goals of a convention and help Parties identify problems with compliance early. There are many tools used by different international agreements to monitor and review compliance.

The obligations in this Convention are binding on Parties once the Convention comes into force. Its purposes and objectives will be met only when each Party complies with its obligations. To ensure that their objectives are met, international treaties usually develop mechanisms to monitor progress in implementation. One such mechanism is the requirement for regular reporting on implementation under article 10, paragraph 2 (a). But conventions may make use of more sophisticated arrangements to review and assist in compliance. Mechanisms for

An effective compliance strategy contains three elements: (i) clear primary rules; (ii) a compliance information system; and (iii) a non-compliance response procedure.¹⁶⁹ 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 may be looked to. To date, four multilateral environmental agreements have compliance regimes in operation, including the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), the Convention on Long-range Transboundary Air Pollution (1979), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973), and the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979). In the area of human rights, a legal instrument which provides a model for the consideration of communications from members of the public is the first Optional Protocol to the International Covenant on Civil and Political Rights. Similar provisions can be found in the constitution of the International Labour Organization, allowing certain members of the public to communicate directly with the Organization to ensure compliance with ILO conventions.

The 1987 Montreal Protocol was the first environmental treaty under which the Parties adopted a formal non-compliance procedure. An implementation committee reviews reported non-compliance with the Montreal Protocol and reports to the Meeting of the Parties. This body is empowered to recommend measures to ensure full compliance. The existence of this mechanism makes it clear that communications concerning compliance fall within the competence of the Meeting of the Parties, and that measures may be adopted to ensure compliance, based on the individual needs of the Party. This response may include assistance with collecting and reporting data, technical or financial assistance, technology transfer, or information transfer and personnel training. By avoiding the accusatory process, the Protocol eliminated a major disincentive to self-reporting by the Parties themselves, which may be best monitors of their own compliance. The Parties to the Convention on Long-range Transboundary Air Pollution have adopted a compliance mechanism based on that of the Montreal Protocol.

Article 15 does not establish a compliance review process in and of itself, but requires the Meeting of the Parties to do so along certain parameters. In their Resolution, the Signatories urged the Parties to give priority to the development of a compliance review.

Meetings of Parties to conventions often decide to establish subsidiary bodies on implementation and compliance. Considering the establishment of such a body assists in understanding the implications and interpretation of article 15.

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.

Apart from the requirements relating to the review of implementation under article 10, paragraph 2 (a), the Aarhus Convention establishes the means for adopting more sophisticated, optional arrangements for compliance once the Convention comes into force. Article 15 obliges the Parties to establish optional compliance review arrangements at their meeting. Exceptionally, the compliance review arrangements must be established by consensus among all the Parties. Even though established by consensus, the arrangements are optional. This allows those Parties that want to move ahead with compliance arrangements to do so, while other Parties can join as their confidence with the arrangements grows.

The arrangements shall 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. In any case, as mentioned above, the arrangements shall include “appropriate public involvement”. For example, if the Meeting of the Parties decides to establish a compliance committee, the public will be involved in its “non-confrontational, non-judicial and consultative” activities in an appropriate manner.

mittee, the public will be involved in its “non-confrontational, non-judicial and consultative” activities in an appropriate manner.

It is not entirely clear whether the term “optional” applies to the entire scheme of compliance arrangements, or whether a compliance scheme may contain optional elements. The plain language of the text would seem to support the notion that “optional” applies to the whole set of compliance arrangements. But the notion that the Parties might establish various arrangements on a consensus basis, some of which are optional, in principle cannot be excluded. As most of the wording of article 15 is compatible with the mandatory compliance regimes developed under the Montreal Protocol and the Convention on Long-range Transboundary Air Pollution, it is arguable that the term “optional” is intended to cover only those elements that differ from these established and accepted regimes. The only element that differs substantially from those in the Montreal Protocol and the Convention on Long-range Transboundary Air Pollution is that of considering communications from members of the public on matters related to the Convention. Whatever arrangements are developed for reviewing compliance must include appropriate public involvement. But these considerations are relevant mainly to the process of developing compliance arrangements by consensus, and deciding whether or not to opt out of them. Thus, it would be difficult for a Party not to accept compliance arrangements based on the Convention on Long-range Transboundary Air Pollution and the Montreal Protocol developed by consensus. There is also a question as to whether a particular Party chooses to have arrangements apply to it (opt-in) or whether the arrangements apply automatically unless the Party states that it wishes not to be bound (opt-out). Considering that the arrangements will be developed by consensus, it is more logical that a particular Party must specifically opt out if it does not wish to participate in the arrangements that it has just helped to develop. This is also consistent with the wish of certain countries during the negotiations to remain at least temporarily out of a compliance regime, which was one of the main factors that led to the specific wording used. In general, a Party to which particular compliance arrangements do not apply would not participate in decisions relating to any reports of a compliance committee on these particular compliance arrangements.

Perhaps the most innovative part of article 15 is the requirement for appropriate public involvement. The specific nature of the public involvement is left up to the Meeting of the Parties, although it would be natural to assume that the word would be as defined in the Convention (see article 2, paragraph 4). Moreover, article 15 explicitly provides that the compliance review mechanism may consider communications from members of the public as part of the system.

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 International Labour Organization's conventions allow employers and trade union organizations to participate directly in the process of scrutiny. 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.

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.

Article 16

SETTLEMENT OF DISPUTES

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.

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;

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. They include binding and non-binding procedures. Article 16, like similar provisions

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.

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 International Court of Justice. 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 International Court of Justice, or both. The procedures for arbitration are laid down in annex II to the Convention and discussed below. The procedures for cases before the International Court of Justice are laid down in the Statute of the International Court of Justice, as elaborated by its own practice.

Parties may wish to consider a range of practical aspects when deciding whether to choose the International Court of Justice or an arbitration tribunal to resolve disputes. In general, the International Court of Justice 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.

(b) Arbitration in accordance with the procedure set out in annex II.

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 this Convention, the timing is determined by the limits set in annex II and the needs of the case itself. The costs of the International Court of Justice will be lower than those of arbitration, since in arbitration parties must pay the arbitrators, including travel costs and other expenses. The International Court of Justice 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.

The International Court of Justice 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 International Court of Justice 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

If both parties have accepted both options for compulsory settlement dispute, i.e. arbitration and the International Court of Justice, in writing, the International Court 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.) Signing is 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 European Community (EC) 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 EC 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 on the Law of Treaties (art. 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.

When the period in which the Convention is open for signature has passed, any prospective Parties wishing to participate in the Convention have to follow the procedure of accession provided in article 19, paragraph 2.

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.

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 (art. 14);
- Dispute settlement (art. 16);
- Entry into and withdrawal from the Convention (arts. 19 and 21); and
- Custody of the Convention (art. 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 the United Nations Economic Commission for Europe (UN/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 1969 Vienna Convention on the Law of Treaties, 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**

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.

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.

Prospective Parties typically show their intention to be bound by multilateral environmental agreements 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 a convention. In many States, a treaty must pass through domestic political processes before it can be ratified, accepted or approved, depending on the individual political process. In the majority of the signatory countries, the ratification, acceptance or approval process is the responsibility of the Ministry of Foreign Affairs, in consultation with the Environment Ministry. Typically, the Environment Ministry is 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 usually 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 usually 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, specific 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.

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 UN/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 UN/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. This obviously means that the earliest a State that is not a member of UN/ECE and does not have consultative status with it can become a Party is after the Convention enters into force, and following the first meeting of the Parties.

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.

The rights and obligations of regional economic integration organizations, such as the European Community, 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 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.

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 instrument of ratification, acceptance, approval or accession with the proper authority, will the country become a new Party to the Convention. Once the treaty enters into force, it is only effective between those Parties that have deposited their instruments with the Depositary.

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.

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.

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 Depositary.

Except to the limited extent established by signing a treaty (see commentary to art. 17), the Parties to a treaty are not bound by its terms until the treaty enters into force. No treaty enters into force for a specific Party until that Party has ratified, accepted, approved or acceded to it and deposited its instrument with the depositary (see article 19), and any other preconditions for the treaty's entry into force have been satisfied. It is important to emphasize that the mere ratification, acceptance, approval or accession of a prospective Party to a treaty are not enough—the instruments must also be deposited with the Depositary. The Aarhus Convention requires 16 such instruments to have been deposited with the Secretary-General of the United Nations for it to enter into force 90 days after the sixteenth instrument has been deposited. Thus, whereas ratification is a domestic process that legally commits a country to abide by the requirements of the Convention, only through actually depositing

Paragraph 2 ensures that the process for determining when the Convention enters into force does 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 commentary to article 19, paragraph 4.)

When a prospective Party submits its instrument after the deposit of the sixteenth instrument, the Convention shall enter into force for that prospective Party 90 days after deposit. For example, if a State submits the seventeenth instrument 10 days after the submission of the sixteenth instrument, the Convention will become binding for that State 10 days after the Convention enters into force for the other 16.

Activities pending entry into force

The Resolution of the Signatories set in motion several activities and established parameters for efforts of the signatory countries pending the Convention's entry into force. In the first place, the Signatories pledged to *seek to apply the Convention to the maximum extent possible pending its entry into force*, and recommended that the Sofia Guidelines should be taken into account in this "early application".

Until a convention comes into force, countries that have signed it can meet as signatories. The Meeting of the Signatories to the Aarhus Convention was convened by the UN/ECE Committee on Environmental Policy following the request contained in the Resolution of the Signatories. The Resolution called for the establishment of 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". The Signatories also called for a sufficient secretariat with an adequate budget.

The first meeting of the Signatories to the Convention took place in Chisinau, Republic of Moldova, on 19-21 April 1999. At that meeting 23 countries indicated that they would ratify the Convention by the end of the year 2000.

The Meeting of the Signatories agreed to establish task forces to address: compliance mechanisms (lead country: United Kingdom), pollutant release and transfer registers (lead country: Czech Republic), and public participation in procedures relating to deliberate releases of genetically modified organisms (lead country: Austria). The Meeting also agreed to consider a task force on access to justice, and called on governments, international organizations and NGOs to designate focal points for the Convention.

The Resolution of the Signatories called for the UN/ECE Committee on Environmental Policy to give full recognition to these activities within its work programme. The conclusions of the Meeting of the Signatories were formally approved in September 1999 by the Committee at its sixth session. The Committee, which is responsible for overseeing the Convention pending its entry into force, also mandated the holding of a second meeting of the Signatories, scheduled to take place in Dubrovnik in July 2000.

Article 21

WITHDRAWAL

Conventions are only binding for a Party as long as it agrees to be bound. In the case of the Aarhus Convention, a Party will be bound for a minimum of three years and 90 days. However, if a Party decides after three years from the date the Convention takes effect for that Party to withdraw from it, it may do so according to the procedures established under article 21. A Party wishing to withdraw must notify the Depositary of its intention in writing.

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.

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.

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.

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 by only 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) necessitates the amendment

THE 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 is based on the annexes relating to similar provisions in Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,¹⁷⁰ as amended by Directive 97/11/EEC (the “EIA Directive”), the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC).¹⁷¹

Article 6 (Public participation in decisions on specific activities) must be seen in the context of articles 7 and 8 and annex I. Articles 6 to 8 lay down the public participation part of the Aarhus Convention. The provisions of article 6 apply “with respect to decisions on whether to permit proposed activities listed in annex I”. Many specific public participation provisions are triggered as soon as a proposed activity falls within the scope of annex I.

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; 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”.

The Directive on EIA contains three 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 Directive on EIA “shall be made subject to an assessment in accordance with articles 5 to 10”.¹⁷² 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 Directive on EIA lists projects that “shall be made subject to an assessment, in accordance with articles 5 to 10, where Member States consider that their characteris-

tics so require.”¹⁷³ Annex II groups 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. Here we can already observe groupings similar to annex I to the Aarhus Convention, such as “energy industry” and “energy sector”. Other sectors are missing in annex I to the Aarhus Convention, such as the special food industry group. Otherwise, the characteristics of the projects are very similar in annexes I and II to the Directive on EIA and in annex I to the Aarhus Convention.

Appendix I to the Espoo Convention (List of activities) can 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.

The IPPC Directive’s annex I (Categories of industrial activities referred to in article 1) can be compared with annex I to the Aarhus Convention. Article 1 of the Directive refers to its annex I by stating that “The purpose of this Directive is to achieve integrated prevention and control of pollution arising from the activities listed in annex I”. The IPPC 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 even identical in both annexes. Paragraph 4 [Chemical industry] is almost identical but the Aarhus Convention has, in addition to the text of the IPPC 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”. Paragraph 6 of annex I to the IPPC Directive lists under “Other activities” various industrial plants dealing with the production of pulp from timber or other fibrous materials, the pretreatment or dyeing of fibres or textiles, the tanning of hides and skins, slaughterhouses, the disposal or recycling of animal carcasses and animal waste, extensive rearing of poultry or pigs, organic solvents and the production of carbon or electrographite. Paragraph 6 is almost identical to paragraph 19 [Other activities] of annex I to the Aarhus Convention but with minor differences, the main one being that industrial plants dealing with the production of pulp from timber or other fibrous materials and the specific production of paper and board are regulated in paragraph 7 of annex I to the Aarhus Convention. Installations for the extensive rearing of poultry or pigs are addressed in paragraph 15 of annex I to the Aarhus Convention and not in paragraph 19 [Other activities].

Three paragraphs of annex I bear special mention—paragraphs 20-22.

Annex I includes any activity not otherwise listed which requires public participation under an environmental impact assessment procedure in accordance with national legislation (para. 20). This should not be read to require the application of article 6 to any activities for which environmental impact assessment is required. The national legislation must also include public participation as a requirement in the environmental impact assessment. If the national legislation of a Party provides for a form of EIA such as ecological expertise without public participation, article 6 applies automatically only to activities listed in annex I. The applicability of article 6 to non-listed activities requires the reference to article 6, paragraph 1 (b).

With respect to paragraph 21, the authorities may avoid public participation only under very special circumstances 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.

Paragraph 22 of annex I applies article 6 to certain changes or extensions of activities. It takes an approach similar to that of article 7 of the Espoo Convention. The latter speaks of “post-project analysis” and the obligation to monitor activities covered for environmental impacts or factors that may result in such impacts. When a Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or where factors have been discovered which may result in such an impact, the concerned Parties are obliged to consult on further measures to be taken.

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.

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 International Court of Justice when non-binding methods such as negotiation and mediation are not sufficient to resolve the dispute.

While arbitration is not unique to the international context, 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 applicability of various 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 UN/ECE conventions, including the Convention on the Transboundary Effects of Industrial Accidents and the Convention on Environmental Impact Assessment in a Transboundary Context. In practice, the point at which parties enter into arbitration is comparable to when they would seek judicial remedies. 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.

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. 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, are they 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. 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 followed by the International Court of Justice. Ostensibly, the body of international law to be recognized under this Convention will be determined case by case in the drafting of procedural rules.

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. As arbitration begins to take place under this Convention, potential models for procedural rules will likely emerge. Such models may be of consid-

erable 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. Additional guidance may emerge from the “procedural rules in the field of environmental protection” that the Permanent Court of Arbitration is developing.

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 Convention on Biological Diversity, but differs from some procedural 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 who 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.

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 parties to 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 counter-claim against one or more parties initiating arbitration, such action is governed by paragraph 13. The only restriction is that counter-claims 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 counter-claim 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, who under this Conven-

tion is 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. 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. 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.

NOTES

The authors have made no attempt to develop full and comprehensive notes to the text. These notes are provided for background information only, and appear at the request of experts and researchers involved in the subject matter of the Convention. If an opportunity presents itself, the notes may be more fully developed in a future edition of the *Guide*.

¹ Jeremy Wates, *Access to Environmental Information and Public Participation in Environmental Decision-making: UN ECE Guidelines: From Theory to Practice* (EEB, 1996), p. 5.

² 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.

³ The Conference was organized by the Institute for European Environmental Policy and the International Institute of Human Rights.

⁴ General Assembly resolution 37/7 of 28 October 1982 on the World Charter for Nature.

⁵ *Our Common Future*, World Commission on Environment and Development, 1987.

⁶ The parties to the Declaration call in article 22.2 “for the elaboration of proposals by the UN/ECE for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision making, and for cost-efficient measures to promote public participation and to provide, in cooperation with the informal sectors, training and education in order to increase the ability of the public to understand the relevance of environmental information”.

⁷ Philippe Sands, *Principles of international environmental law I: Frameworks, standards and implementation* (Manchester and New York, Manchester University Press, 1995), pp. 144-145.

⁸ *Ibid.*

⁹ Document of the Economic and Social Council of the United Nations (Commission on Human Rights—Sub-Commission on Prevention of Discrimination and Protection of Minorities). Draft principles on human rights and the environment (annex I to the final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur), United Nations document E/CN.4/Sub.2/1994/9 (6 July 1994).

¹⁰ Hans-Dietrich Treviranus, Preamble, in: R. Bernhardt ed., *Encyclopedia of Public International Law* (Amsterdam, Elsevier, 1997), vol. III, p. 1097.

¹¹ The Vienna Convention can be found at: <http://www.tufts.edu/fletcher/multi/texts/BH538.txt>, 1999.07.14.

¹² Treviranus, *op. cit.*, p. 1098.

¹³ L. Glowka and others, *A Guide to the Convention on Biological Diversity*, 2nd printing (1996) (Gland and Cambridge, IUCN, 1994), p. 9, Preamble.

¹⁴ Article 3 of the Convention on Biological Diversity 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 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.”

¹⁵ See, for example, Alexandre Kiss, *Manual of European Environmental Law*.

¹⁶ Legality of the Threat or Use of Nuclear Weapons, I.C.J., 1996, pp. 241-242, para. 29.

¹⁷ United Nations General Assembly resolution 2398 (XXIII) (1968).

¹⁸ United Nations General Assembly resolution 44/228.

¹⁹ Sands, *op. cit.*, p. 99.

²⁰ The resolution can be found in: 23 ILM (1983). It was adopted by a vote of 111 in favour, 18 abstentions and one vote against.

²¹ Sands, *op. cit.*, p. 42.

²² E/CN.4/Sub.2/1994/9.

²³ Environmental Health, www.who.org/peh/index.htm, 5 April 1998.

²⁴ *Environment and Health: The European Charter and Commentary/First European Conference on Environment and Health*, Frankfurt, 7-8 December 1989 (WHO Regional Publications, European series; No. 35).

²⁵ WHO Regional Office for Europe, *Access to Information, Public Participation and Access to Justice in Environment and Health Matters*, EUR/ICP/EHCO 02 02 05/12, 03879-6 April 1999, p. 6.

²⁶ WHO European Centre for Environment and Health, *Concern for Europe's Tomorrow; Health and Environment in the WHO European Region*. Stuttgart, Wissenschaftliche Verlagsgesellschaft, 1995.

²⁷ WHO 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.

²⁸ WHO Regional Office for Europe, *Access to Information . . .*, p. 5.

²⁹ WHO Regional Office for Europe, *Declaration of the Third Ministerial Conference on Environment and Health—Final Draft*, EUR/ICP/EHCO 02 02 05/18 Rev.4, 08259-17 June 1999, p. 9.

³⁰ WHO Regional Office for Europe, *Access to Information . . .*

³¹ WHO Regional Office for Europe, *Declaration of the Third Ministerial Conference . . .*, p. 9.

³² For a more in-depth discussion, see S. Stec, *Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case*, 29 Golden Gate U. L. and accompanying text.

³³ The preamble to the Rio Declaration refers to “the integrity of the global environmental and developmental system”. Principle 2 repeats the formulation of principle 21 of the Stockholm Declaration, while adding the words “and developmental” between “environmental” and “policies”. Principle 4 states: “[I]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Principle 25 provides “[P]eace, development and environmental protection are interdependent and indivisible”.

³⁴ N. Singh, “Sustainable development as a principle of international law”, *International Law and Development*, 1-12, at 3, 5 (1988).

³⁵ For a discussion of its origins back to 1975, see M. Pallemerts, “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.

³⁶ The consolidated versions of the relevant treaties may be found as Treaty on European Union, Official Journal C 340, 10.11.1997, pp. 145-172. Treaty establishing the European Community, Official Journal, C 340, 10.11.1997, pp. 173-308.

³⁷ United Nations General Assembly resolution 2398 (XXIII) (1968), recognizing the relationship between the enjoyment of basic human rights and the quality of the human environment.

³⁸ Earlier mentions can be found in African and Inter-American regional agreements on the environment. Thus, with Europe joining, the right is approaching global recognition.

³⁹ See, for instance, the World Charter for Nature, the Stockholm Declaration, principle 1; the draft principles on human rights and the environment (E/CN.4/Sub.2/1994/9, annex I), principle 21.

⁴⁰ See E/CN.4/Sub.2/1994/9, annex I.

⁴¹ “Protected Forests Case”, Decision of the Hungarian Constitutional Court, MK. 28/1994 (20 May 1994). See S. 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 S. Stec, “New phase in the legislative struggle for environmental protection in central and eastern Europe”, *Ecodecision*, vol. 15 (winter 1995), pp. 22-23.

⁴² *Minors OPOSA v. Sec’y of the Department of Environment and Natural Resources*, 33 ILM 168 (1994). This case is described in A.G. M. La Vina, “The right to a sound environ-

ment in the Philippines: the significance of the Minors Oposa case". *RECIEL*, vol. 3, No. 4 (1994), p. 246.

⁴³ See Pres. Trib. First Inst. Antwerp, Dec. of 20 April 1999 (on file with author).

⁴⁴ The Constitutional Court of Slovenia (Dec. No. U-I-30/95-26, 1/15-1996) recognized a legal interest of individuals on the basis of the constitutional right to healthy living environment "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* (Szentendre, REC, June 1998).

⁴⁵ Nov. 4, 1950, 213 U.N.T.S. 222, as amended. Article 8, titled "Right to Respect for Private and Family Life", states:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Idem* at 230.

⁴⁶ S. Stec, *Do Two Wrongs Make a Right?* . . .

⁴⁷ *Guerra & Others v. Italy*, XX Eur. Ct. H.R. (ser. X) (116/1996/735/932).

⁴⁸ *López Ostra v. Spain*, XX Eur. Ct. H.R. (ser. A), Judgment of 9 Dec. 1994, series A No. 303-C, p. 55, § 55 (1994).

⁴⁹ E. Brown Weiss, "Our rights and obligations to future generations for the environment", *AJIL*, vol. 84 (1990), pp. 198-199.

⁵⁰ Sands, *op. cit.*, pp. 199-200.

⁵¹ Glowka, *op. cit.*, p. 14, Preamble.

⁵² Legality of the Threat or Use of Nuclear Weapons, . . .

⁵³ *Minors OPOSA v. Sec'y of the Department of Environment and Natural Resources*, . . .

⁵⁴ For an examination of intergenerational standing in the context of the United States Endangered Species Act, see "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 (1996), pp. 529, 597-633.

⁵⁵ Quoted in La Vina, *op. cit.*, p. 247.

⁵⁶ See PELA, *Co-operation amongst environmental authorities and environmental NGOs in six Central and Eastern European Countries*, Wrocław, 1998.

⁵⁷ 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.

⁵⁸ See, for instance, Agenda 21, 29: Strengthening the role of workers and their trade unions, paras. 29.4-29.5.

⁵⁹ Agenda 21, 37: National mechanisms and international cooperation for capacity-building in developing countries.

⁶⁰ United Nations document UNESCO-EPD-97/CONF.401/CLD.

⁶¹ 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". In Deimann, Sven and Bernard Dyssli eds., *Environmental Rights: Law, Litigation and Access to Justice* (London, Cameron May, 1995), pp. 53-69.

⁶² See *Official Journal* L 099, 11/04/1992, p. 1-7.

⁶³ EP.DEJ./92/99, 28 May 1999. See also NATO Committee on the Challenges of Modern Society, Environment and Security in an International Context.

⁶⁴ CSCE Meeting on the Protection of the Environment, Sofia, 3 November 1989. This meeting produced the mandate for the UN/ECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992) and the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992).

⁶⁵ Proposal submitted by the delegations of Austria, Finland, Sweden, Switzerland and those of Bulgaria, Canada, Cyprus, Czechoslovakia, France in the name of the twelve participating States members of the European Community, the German Democratic Republic, the Holy See, Hungary, Iceland, Liechtenstein, Malta, Monaco, Norway, Poland, San Marino, Turkey, the Union of Soviet Socialist Republics, the United States of America and Yugoslavia, Report on Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, CSCE/SEM.36/Rev (3 Nov. 1989). The

document is called a proposal because it was not agreed to by all the countries present. (The one hold-out was Romania, even the host country, Bulgaria, agreed to the proposal.)

⁶⁶ Wates, *op. cit.*

⁶⁷ “Environment for Europe” Process: From Dobris to Sofia, www.unece.org/env/europe/dobtosof.htm, 29 June 1999.

⁶⁸ Aarhus Conference, 23-25 June 1998, www.ens.dk/mem/faktuelt/Aarhuscon.htm, 7 June 1998.

⁶⁹ “Environment for Europe” Process, ...

⁷⁰ WHO Regional Office for Europe, EUR/ICP/EHCO 02 02 05/8, 05299–24 March 1999.

⁷¹ Convention on Environmental Impact Assessment in a Transboundary Context, <http://www.unece.org/env/eia.htm>.

⁷² See ECE/CEP/41, p. 49.

⁷³ 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”, *RECIEL*, vol. 3, No. 17 (1994), pp.197, 199.

⁷⁴ 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, *op. cit.*

⁷⁵ The WCED Legal Experts Report in 1986 stated that it was not yet a well-established right. Not much progress appears to have been made since then. The same conclusion has been reached in V. Koester, “Aarhus-konventionen om ‘borgerlige rettigheder’ pa miljøområdet—isaer i et menneskerettighedsperspektiv” (The Aarhus Convention on “civil rights” with regard to the environment—particularly in a human rights perspective), *Juristen* (1999), pp. 103-115. See also the United Kingdom Government’s interpretative statement on article 1 issued at the Aarhus Conference (annex II below).

⁷⁶ For a panoply of possible rights relating to a healthy environment, see the draft declaration of principles on human rights and the environment, principles 1-10 (E/CN.4/Sub.2/1994/9, annex I).

⁷⁷ 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.

⁷⁸ R. Hallo, “Chapter 10: the Netherlands”, in *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (Kluwer Law International, 1996), p. 200.

⁷⁹ See *Griffin v. South West Water Service Limited*, [1995] IRLR 15, described in P. Roderick, United Kingdom, in R. Hallo ed., *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (1996), p. 267.

⁸⁰ See annex II below.

⁸¹ See Stockholm Statement . . .

⁸² See *Official Journal*, L 296 p. 55, 1996/11/21, Article 2(1).

⁸³ Convention on Biological Diversity, article 2.

⁸⁴ A Guide to the Convention on Biological Diversity (IUCN, 1994), p. 16.

⁸⁵ 96/61/EC.

⁸⁶ See, for instance, S. Rose-Ackerman, “American administrative law under siege: is Germany a model?”, *Harvard Law Review*, vol. 107 (1994), pp. 1279, 1292-1293, 1300.

⁸⁷ For example, a United Kingdom court found that local residents and active environmentalists who regularly visited a certain park had no legally “sufficient interest” in a local planning agency’s permission for a quarry to expand its operations into the park. See *R v. North Somerset District Council ex parte Garnett* (Queen’s Bench Division, Popplewell J, 24 March 1997), reported in “Access to the courts: a conflict of ideologies”, *Journal of Environmental Law*, vol. 10, No. 1 (Oxford University Press, 1998), pp. 161-174. The court looked to ownership of land or being a neighbour to the planned project as factors which may convey standing. Lacking these, the application for judicial review was denied. See p. 170.

⁸⁸ Personal communication on 20 October 1999 with Jonas Ebbesson, LL.D., Associate Professor of Environmental Law, Faculty of Law, Stockholm University, Stockholm, Sweden.

⁸⁹ 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, p. 85 (1999).

⁹⁰ Article 2, paragraph 8, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at Helsinki, on 17 March 1992.

⁹¹ 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.

⁹² 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.

⁹³ See annex II below.

⁹⁴ 29 U.S.C. 651 et seq.

⁹⁵ See 29 U.S.C. 660 (c)(1).

⁹⁶ See Thomas F. P. Sullivan, *Environmental Law Handbook*, 14th ed. (Rockville, Maryland, Government Institutes, Inc., 1997).

⁹⁷ Law on Public Complaints of Hungary [quotation].

⁹⁸ Criminal Code of Hungary, section 257.

⁹⁹ Portugal, Law No. 65/93, 31 August, 1993.

¹⁰⁰ Belgium, Ordinance of the Brussels Region, Article 5.3.

¹⁰¹ Norway, Freedom of Information Act, Section 9 (1970).

¹⁰² Ireland, 1994 Annual Report of the Ombudsman.

¹⁰³ The Netherlands, Open Government Act.

¹⁰⁴ Russian Federation Law on State Secrets 1993, *Rossiiskaia gazeta*, 21 September 1993, full amended text at Sobranie zakonodatel'stva RF 1997 No. 41 item 4673. See Stec, *Access to Information . . .*, pp. 355, 472-473.

¹⁰⁵ Hungary, Act LXV of 1995 on State and Official Secrets, art. 3.

¹⁰⁶ For example, United States case law has defined "legitimate economic interest" under the trade secrets exemption to the United States Freedom of Information Act.

¹⁰⁷ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, Article 2. *Official Journal L 257*, 10/10/1996 pp. 0026-0040.

¹⁰⁸ Ireland, Hallo, *op. cit.*, p. 140.

¹⁰⁹ Armenia, Law on Procedures for Consideration of Suggestions, Applications and Grievances of Citizens.

¹¹⁰ Hungary, Act IV (1954) General Rules of Administrative Procedure, Article 7.1, Article 15.1.

¹¹¹ France, Hallo, *op. cit.*, p. 76.

¹¹² Freedom of Information Act, section 9; see also section 2, para. 2.

¹¹³ The Netherlands, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Western Europe* (Szentendre, REC, June 1998), p. 115.

¹¹⁴ Seveso Directives—Council Directive 82/501/EEC (Seveso 1), amended by Council Directive 87/216/EEC (Seveso 2), amended by Council Directive 88/610/EEC (Seveso 3) on major accident-hazards of certain industrial activities and Council Directive 96/82/EC on the control of major accident-hazards involving dangerous substances.

¹¹⁵ Case of Guerra and Others v. Italy (116/1996/735/932), European Court of Human Rights, Strasbourg, 19 February 1998.

¹¹⁶ *Major Trends in Ratification of the Aarhus Convention in the CEE countries*.

¹¹⁷ Maastricht Treaty, article 129a. While the Treaty's general principles state that the Community must contribute to the "strengthening of consumer protection", Article 129a is the legal framework for consumer policy.

¹¹⁸ *Pollutant Release and Transfer Registers (PRTRs): A Tool for Environmental Policy and Sustainable Development—Guidance Manual for Governments* (Paris, OECD, 1996), OECD/GD(96)32.

¹¹⁹ *Major Trends . . .*

¹²⁰ Among the central and east European countries that have adopted this kind of procedure are Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Romania and Slovakia. It should be noted that there is considerable variance in the provisions of the respective national laws with respect to the public's right of access to EIA documentation, its right to comment on the documentation, whether either the competent permitting authority and/or the permit-seeking project developer need respond to the public's comments, and the public's right to the final decision and right of appeal from the final decision. See "Comparative Review of Environmental Impact Assessment Laws in Central and Eastern Europe", Orestes R. Anastasia, USAID Environmental Law Program (1996) (manuscript on file with author).

¹²¹ J. Jendroska, "Current Trends and Practices in Public Participation in Environmental Decisionmaking in Poland" in, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 314.

¹²² 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 1, as amended by 397L0011, *Official Journal L 073 14.03.97*, p.5.

¹²³ See Act on Environmental Protection, Hungary, Act LIII of 1995, Arts. 73-80.

¹²⁴ *Official Journal L 257*, 10/10/1996, pp. 0026-0040.

¹²⁵ See Par. 3 of Section 33-2, of the Plan and Building Act, which provides for an ordered EIA "where the [environmental, natural resource or social] consequences are regarded as particularly uncertain or controversial".

¹²⁶ Anastasia, *op. cit.*, p. 9.

¹²⁷ See Environment Law, Article 11(b). Source of reference: Anastasia, *op. cit.*, p. 81.

¹²⁸ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, article 6.3, http://europa.eu.int/eur-lex/en/lif/dat/1985/en_385L0337.html, p. 4.

¹²⁹ Jendroska, *op. cit.*, p. 316.

¹³⁰ P. Jindrova, 1998. "Regional Overview: Public Participation in Permitting" in *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 51.

¹³¹ "OVOS" stands for Otsenka vozdeystviya na okruzhayushchuyu sredu, which is Russian for "environmental impact assessment".

¹³² See S. Stec, "EIA and EE in CEE and CIS: convergence or evolution?" in *Rapporto Mondiale sul Diritto dell'Ambiente/A World Survey of Environmental Law*, spec. issue of *Rivista Giuridica dell'Ambiente* (1996), p. 343, 346.

¹³³ Based on the definition of "proposed activity", Convention on Environmental Impact Assessment in a Transboundary Context (art. 1 (v)).

¹³⁴ Law on Environmental Expertise of Ukraine, article 10. *Holos Ukrainy*. - 02. - 1995.

¹³⁵ Decree No. 152 of 1995 of the Government of Hungary (12 December 1995). See annex 3.

¹³⁶ Law on Environmental Protection, Vidomosti Verkhovnoi Rady Ukrainy, 1995, N 8, p. 54; Regulation on the form and content of materials of the assessment of the impact of a proposed activity on the environment and natural resources (OVNS) in various stages of completing the tasks of constructing new, extension, reconstruction, technical re-equipment of existing industrial and other sites. Approved by the Order of the Minekobezpeky Ukrainy N59 from 08.07.92.

¹³⁷ Hungary—Act on Environmental Protection.

¹³⁸ See J. M. Evans and others, *Administrative Law: Cases, Text, and Materials* (1989).

¹³⁹ See Law on Proposals, Signals, Complaints and Requests, *Official Gazette* No. 54, 1988, with amendments as of 1999, described in Galligan and Smilov, *op. cit.*, p. 7.

¹⁴⁰ *Ibid.*

¹⁴¹ See Constitutional Court Decision of 13 November, 1996. *NN (Narodne novine, i.e., National gazette*, No. 103/96 of 6 December, 1996, described in Galligan and Smilov, *op. cit.*, p. 43.

¹⁴² Based on Evans, *op. cit.* pp. 309-344.

¹⁴³ See Black's Law Dictionary (1979), p. 919.

¹⁴⁴ *Official Journal*, L 117, pp. 15-27.

¹⁴⁵ Article 2(2).

¹⁴⁶ See annex I below.

¹⁴⁷ Article 2, paragraph 7, of the Espoo Convention: “To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.”

¹⁴⁸ *Official Journal*, No. C129, 25/04/1997 P.0014.

¹⁴⁹ A protocol to either Convention raises problems—to the Aarhus Convention because SEA is not only about public participation, to the Espoo Convention because SEA should not relate only to transboundary issues. However, there is a precedent in the UN/ECE region for an approach to allowing protocols to go beyond the scope of the parent convention. See the Protocol on Water and Health, Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes. The success of this approach is not yet apparent, however. It would seem to be most appropriate for SEA to be the subject of a new convention.

¹⁵⁰ Sofia Initiative Environmental Impact Assessment, “Policy Recommendations on the Use of Strategic Environmental Assessment in Central and Eastern Europe and in Newly Independent States”, ARH.CONF/BD.17.

¹⁵¹ Based on internal reports produced by REC for SEA of the national development plan of the Czech Republic (on file with author).

¹⁵² Quotations.

¹⁵³ Webster’s New World Dictionary, Third College Edition (1988), p. 1045.

¹⁵⁴ Presentation of Maj.-Gen. E.N. Westerhuis, *The interface between the military and the civil sector in environmental management*, Round-table Discussion (14 April 1997, Budapest), p. 8 (unpublished manuscript on file with author).

¹⁵⁵ Act XI of 1987, arts. 27, 29.

¹⁵⁶ *Ibid.*, article 31.

¹⁵⁷ 5 U.S.C. 553.

¹⁵⁸ 5 U.S.C. 553(c).

¹⁵⁹ S. Fulop, 1998. Current Trends and Practices in Public Participation in Environmental Decisionmaking in Hungary in *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 214.

¹⁶⁰ Commission Decision 97/150/EC of 24 February 1997, *Official Journal*, L 058 of 27 February 1997, p. 48.

¹⁶¹ Created by the Law no. 78-753 of 17 July 1978 (*Official Journal*, 18 July 1978, p. 2651).

¹⁶² CEP/AC.3/18, para.15.

¹⁶³ Jerzy Jendroska, *State of Environmental Law in Poland* (Centre for International Environmental Law).

¹⁶⁴ General Administrative Law Act, The Netherlands, articles 7 and 8 (1994).

¹⁶⁵ David Robinson and John Dunkley eds., *Public Interest Perspectives in Environmental Law* (Wiley Chancery, 1995).

¹⁶⁶ Hungary, Act. III [1952] on Civil Procedure, article 156.

¹⁶⁷ Ireland, DTD, p. 106.

¹⁶⁸ Slovakia, Act on Court Fees, No. 71/1992, article 4.

¹⁶⁹ Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and the Conclusions, UNEP/GC.20/INF/16, p. 29, citing P.H. Sand.

¹⁷⁰ *Official Journal*, L 175, 05/07/1985, pp. 0040-0048: amended by 397L0011 (OJ L 073 14.03.97, p. 5)

¹⁷¹ *Official Journal*, L 257, 10/10/1996, pp. 0026-0040.

¹⁷² 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 (1).

¹⁷³ *Ibid.*, Article 4 (2).

ANNEXES

Annex I

RESOLUTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

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.

Annex II

DECLARATIONS MADE UPON SIGNATURE

DENMARK

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.

GERMANY

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.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The United Kingdom understands the references in article 1 and the seventh pre-ambular 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.

EUROPEAN COMMUNITY

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.

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