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COMMITTEE ON ENVIRONMENTAL POLICY

(Ninth session, 4 - 6 November 2002)  
(Item 9 of the provisional agenda)

**ANALYSIS OF THE LINKS BETWEEN THE AARHUS CONVENTION AND OTHER  
UNECE ENVIRONMENTAL CONVENTIONS AND PROTOCOLS \*/**

**Introduction**

1. At its seventh session (September 2000), the UNECE Committee on Environmental Policy hosted a round-table discussion with representatives of the governing bodies of the ECE environmental conventions to explore ways of strengthening mutual support between the conventions and protocols. The ECE secretariat was invited to identify areas of possible cooperation to ensure synergies and consistency between the different instruments (ECE/CEP/74, paras. 14 - 15).
2. The topics covered by the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) were identified by the secretariat as being cross-cutting in nature, having implications within a wide variety of environmental areas and therefore being of relevance to the other environmental conventions and protocols.

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\*/ Prepared by a consultant.

3. At an informal follow-up meeting (Geneva, 25 June 2001) representatives of each of the conventions gave presentations on how the Aarhus themes were relevant to their conventions and activities. A consensus on the need for an in-depth legal analysis of the links between the Aarhus Convention and the other conventions and their protocols emerged, as had been proposed in a discussion paper prepared for the first round-table discussion (CEP/2000/1). Such an analysis would help countries to understand the legal implications of the ratification and entry into force of the Aarhus Convention, and would also identify possible inconsistencies between the instruments.

4. At its eighth session, the Committee reviewed the outcome of the informal meeting (CEP/2001/6) and agreed that such legal analysis should be undertaken (ECE/CEP/80, para. 35 (a)).

## I. OVERVIEW OF ANALYSIS

5. Within the framework of the UNECE, the following legally binding environmental instruments have been adopted:

- The Convention on Long-range Transboundary Air Pollution and its protocols;
- The Convention on the Protection and Use of Transboundary Watercourses and International Lakes and its Protocol;
- The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention);
- The Convention on the Transboundary Effects of Industrial Accidents;
- The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

6. This paper analyses the following significant links between the first four conventions and their protocols and the Aarhus Convention:

(a) Provisions of the other environmental ECE conventions and protocols, and their activities, relating to or having relevance to the principal themes of the Aarhus Convention;

(b) The implications of the entry into force of the Aarhus Convention in the fields covered by the other conventions and protocols.

7. With regard to the former, the application of the relevant provisions is addressed to the extent possible, as well as its legal meaning. With regard to latter, the Aarhus Convention entered into force on 30 October 2001. By the end of July 2002, 22 ECE member States had become Parties to the Convention. It is expected that many others will follow suit within the next few years. Many of these Parties and prospective Parties are also Parties to one or more of the other environmental instruments.

## **Instruments under development**

8. Protocols are being negotiated under several of the aforementioned instruments. The analysis also describes the way in which these draft instruments are addressing the Aarhus themes.

## **Relevance of Aarhus Convention to UNECE environmental conventions generally**

9. The provisions of the Aarhus Convention can apply to the other instruments in three ways. The first includes the procedural and substantive provisions of the Convention that relate to the three pillars of access to information, public participation, and access to justice *as such matters are reflected in the other instruments*. These provisions further develop and substantiate nascent references to these matters in other UNECE instruments. Where a particular country is a party to the Aarhus Convention and another UNECE instrument, these provisions of the Aarhus Convention in essence fill the content of the more general and imprecise provisions of other instruments. A prime example is the Espoo Convention: the Aarhus Convention further elaborates on the public participation requirements in the context of transboundary environmental impact assessment (EIA). In short, the other UNECE instruments tend to describe *what* information should be accessible, whereas the Aarhus Convention provides guidance as to *how* it should be made accessible. In the case of public participation, again the Aarhus Convention provides the *how* where other instruments state a basic requirement.

10. In the second category are the same procedural and substantive provisions of the Convention *as such matters apply to measures for the implementation of the other instruments*. While similar to the first category, these provisions further develop and substantiate the way in which particular measures are carried out. For example, where one convention requires the gathering of information by public authorities, the Aarhus Convention may require it to be structured in a certain way (to make it publicly accessible), or may require it to be available upon request. Where another convention requires the adoption of plans or programmes, the Aarhus Convention may require the plans or programmes to be developed with specific public participation procedures.

11. In these two ways, the Aarhus Convention primarily applies to national (including transboundary) practice, and promotes the overall development of a consistently evolving UNECE-environmental legal framework.

12. The third category of Aarhus provisions relevant to the other instruments is the category of meta-provisions. These provisions differ from those above in that they also have relevance to the behaviour of States with respect to each other, and can even apply to a State Party with respect to the further development of the existing instruments. Perhaps the most obvious example is article 3, paragraph 7, of the Aarhus Convention, which requires Parties to “promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”

13. This provision arguably obliges States Parties to the Aarhus Convention who are also members of other bodies, including those discussed in this paper, to work towards the reform of the meetings or conferences of the Parties and other international bodies in the direction of greater access to information, public participation and access to justice. Internal regulations such as rules of procedure and bureau practices could be influenced by the Aarhus Convention. Convention bodies could take a proactive approach and adopt internal policies to anticipate this trend.

14. As the way in which the Aarhus Convention influences other UNECE environmental conventions and protocols is cross-cutting, it is discussed in more general terms following the specific instrument-by-instrument examination.

15. Finally, another issue which is discussed separately in this paper is access to justice. As one of the three pillars of the Aarhus Convention, it occupies a prominent place in the Convention's regime. However, it covers a subject area which is largely absent in other UNECE environmental instruments. It is an emerging subject for further development of the international law of environment and sustainable development. Its potential relevance to the future application of the other UNECE environmental instruments would deserve further study. However, a few generalizations can be made, and are presented in Chapter VIII.

### **Relationship between national and international law**

16. States that are Parties to one or more of the UNECE environmental instruments have taken measures to implement the instruments, that is, to meet their international obligations, through domestic legislation. This domestic legislation may be in conflict with the Aarhus Convention in certain respects. This does not amount, however, to a conflict between the instruments themselves, as the Aarhus Convention may simply place *additional* requirements on Parties that need to be reflected through amendments to existing legislation.

### **Situations where not all Parties to a particular instrument are Parties to the Aarhus Convention**

17. Differences can arise where not all Parties to a particular instrument are Parties to the Aarhus Convention. This situation is not unique to Aarhus; it often arises in international law. It is a general rule that a treaty applies only to its Parties and cannot create obligations to a non-Party without its consent.

18. An exception to this rule is where the provisions of a particular treaty become binding because it becomes a part of customary international law. This would be quite remarkable in the case of such a young convention, except insofar as it could be held to have codified existing custom.

19. In situations where treaties among the same Parties are incompatible, the general rule is that a later treaty prevails over an earlier one. In certain cases, however, particular norms can overrule others, for example where they are norms of *jus cogens*, or where a treaty expressly provides that it prevails over subsequent incompatible treaties.

20. Wherever possible, however, provisions of treaties should be interpreted to be consistent and mutually supportive. The multilateral environmental agreements (MEAs) negotiated under the auspices of UNECE are in a more advantageous position in this regard, in that the UNECE secretariat ensures consistency and mutual supportiveness. Provisions of a particular treaty are read in the light of that treaty's overall object and purpose. The objects and purposes of the UNECE agreements are coordinated to a great degree. There are therefore no overt conflicts between the international obligations established under the Aarhus Convention and those established under any other UNECE environmental instrument.

21. Within the context of a matter relating to another MEA, it is of course the case that the Aarhus Convention may impose additional requirements on its Parties as compared to non-Parties. Some examples of this will be given in connection with specific instruments below. This may result in differences in implementation of the same obligation in different States, based on whether or not the State is a Party to Aarhus Convention.

## **II. CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION AND ITS PROTOCOLS**

22. The Convention on Long-range Transboundary Air Pollution (LRTAP) was adopted in 1979 and entered into force in 1983. It has been extended by eight protocols:

- The 1984 Protocol on Long-term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP);
- The 1985 Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent;
- The 1988 Protocol concerning the Control of Nitrogen Oxides or their Transboundary Fluxes (NO<sub>x</sub> Protocol);
- The 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (VOC Protocol);
- The 1994 Protocol on Further Reduction of Sulphur Emissions;
- The 1998 Protocol on Heavy Metals;
- The 1998 Protocol on Persistent Organic Pollutants (POPs Protocol); and
- The 1999 Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol).

### **Relevant provisions and their implementation**

23. At the time of the adoption of the LRTAP Convention in 1979, the focus was on technical solutions to pressing global and regional problems. The clear identification of the role of public access to information, participation and justice that would influence future negotiations was still some years away. Thus, there are no provisions in the LRTAP Convention that make specific reference to the matters under the Aarhus Convention. The same can be said for its first three protocols.

24. Between the adoption of the 1988 NO<sub>x</sub> Protocol and that of the 1991 VOC Protocol, a slight change occurred. In a similar provision relating to the basic obligations of Parties, the latter Protocol introduced a requirement for Parties to “foster public participation in emission control programmes through public announcements...” (art. 2, para. 3 (a)(iv)).

25. This innovation was not followed in the 1994 Protocol on Further Reduction of Sulphur Emissions.

26. Subsequently, the 1998 Protocol on Heavy Metals included the following preambular paragraph:

*“Noting the important contribution of the private and non-governmental sectors to knowledge of the effects associated with heavy metals, available alternatives and abatement techniques, and their role in assisting in the reduction of emissions of heavy metals...”*

without including relevant operative provisions.

27. A similar provision appeared in the preamble to the 1998 POPs Protocol. In that case, however, an operative provision was also included (art. 6). The Protocol is not yet in force.

28. Finally, the 1999 Gothenburg Protocol includes a similar preambular paragraph and operative article (art. 5). It is not yet in force.

29. Between these two Protocols, a further development can be noted. The earlier Protocol includes a recommendatory list of information that shall be made available to the public, whereas the Gothenburg Protocol includes a core mandatory list and a supplementary recommendatory list.

30. Other provisions in these instruments relevant to the Aarhus Convention include those requiring Parties to gather and exchange information (e.g. LRTAP Convention, arts. 4, 8, 9), and those requiring Parties to adopt plans, programmes or policies (e.g. VOC Protocol, art. 7). The specific requirements of the Aarhus Convention may oblige Parties to both instruments to implement these requirements according to specified procedures.

### **Relevant activities**

31. The Executive Body of the LRTAP Convention gives priority to providing information to the public on the activities undertaken under the Convention and a communication strategy is being developed. With regard to public participation, NGOs are invited to all meetings under the auspices of the Convention and participate actively, especially in working groups and task forces. The CLRTAP Convention and its protocols do not contain any provisions on access to justice (CEP/2001/6, para. 6).

32. In response to a questionnaire on the implementation of the VOC Protocol, Germany, the Netherlands, Spain, Switzerland and the United Kingdom made reference to promoting public participation in emission reduction through traffic management schemes and public announcements (<http://www.unece.org/env/lrtap/conv/conclusi.htm>).

33. The Bureau of the Executive Body is one of three UNECE convention bureaux that post the minutes of their meetings on their web sites.

### **Implications of entry into force of the Aarhus Convention in the subject area**

34. The definition of “environmental information” found in the Aarhus Convention is broad enough to cover the recommendatory lists of information to be provided to or made available to the public under the POPs and the Gothenburg Protocols. Read together, the two Protocols make a distinction between active dissemination of information and passive availability of information. With respect to the latter, Parties to the Aarhus Convention are obliged to make this information available to the public. For non-Parties, the practice developed under the Aarhus Convention may give rise to a practice under the Gothenburg Protocol to make all such information available to the public. Once these two Protocols come into force, the active dissemination of information will be informed by the practice developed under article 5 of the Aarhus Convention, which may determine how the information is structured in order to be effectively available to the public.

35. On the national level, States Parties to the LRTAP Convention and its protocols are required to meet their obligations through certain implementation measures, including the development of national programmes, policies and strategies (see, e.g. VOC Protocol, art. 7). The Aarhus Convention includes an article on public participation in decision-making with respect to plans, programmes and policies (art. 7). Parties to the Aarhus Convention and the other instruments would thus be required to develop such strategies, policies and programmes in accordance with the requirements of its article 7. Whether a specific strategy, policy or programme fell under the scope of article 7 would need to be determined case by case, applying the principles of the Aarhus Convention. Undoubtedly, any such instrument would be found to relate to the environment, as required under article 7.

36. Moreover, article 7 of the Aarhus Convention distinguishes between “plans and programmes” on the one hand, and “policies” on the other, with different obligations tied to each. However, the labelling of a particular instrument should not be definitive. Something called a strategy under a protocol to the LRTAP Convention might correspond to a plan or a policy under the Aarhus Convention. The development of a protocol on strategic environmental assessment to the Espoo Convention should assist in the further definition of plans, programmes and policies.

### **III. CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES AND ITS PROTOCOL**

37. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) was adopted in 1992 and entered into force in 1996. Its Protocol on Water and Health was adopted in 1999. A new legally binding instrument on civil liability to both the Water Convention and the Convention on the Transboundary Effects of Industrial Accidents is currently being negotiated.

#### **Relevant provisions and their implementation**

38. The relevant provisions of the Water Convention are its articles 11 and 16. The practices promoted by Parties to provide information to the public have been analysed, <sup>1/</sup> and although many bilateral agreements do not yet include provisions on public information, their Parties usually provide information upon request to the public in their countries. The replies to the questionnaire also show that riparian Parties do not face difficulties in complying with article 16 of the Convention. Good practices include:

(a) Reports of meetings of the joint bodies are made available to the competent entities, including municipalities and industry. On request, these are also made available to the public. It is established practice to hold press conferences in connection with meetings of joint bodies. Press releases are issued whenever major decisions are made;

(b) Some Parties are setting up ministerial departments to act as contact points for the public.

39. An advisory network on legal instruments has been established under the Convention. This body could further analyse the links between the Water Convention and other UNECE instruments such as the Aarhus Convention.

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<sup>1/</sup> See <http://www.unece.org/env/water/partnership/part64.htm#643>



## **Protocol on Water and Health**

40. The Protocol on Water and Health was the first UNECE instrument adopted with the final text of the Aarhus Convention available to it. It was adopted in 1999 and is not yet in force. The Protocol specifically takes note of the Aarhus Convention in its preamble.

41. It employs the definitions of “public” and “public authority” that are found in the Aarhus Convention. Article 4 contains a paragraph on enabling the public to contribute to water management, while article 5, subparagraph (i), includes a reference to the Aarhus principles.

42. Article 6, paragraph 2, requires Parties to establish periodically revised national and/or local targets and target dates for the standards and levels of performance that need to be achieved or maintained for a high level of protection against water-related disease. These targets are specified in a wide range of detail, and include targets for the frequency of publishing information on waters. In establishing such targets, Parties shall provide for public participation. Moreover, Parties should meet these targets through the establishment of water management plans (art. 6, para. 5 (b)), subject to the same public participation requirements found in paragraph 2 of article 6.

43. The Protocol’s article 10 on public information is based to a large extent on the Aarhus Convention itself, including its exemptions for the disclosure of information and its public interest test. In addition, the Protocol provides that information about the achievement of targets and progress in eliminating water-borne disease, including the results of the collection and evaluation of data, should be published periodically, and that the results of water and effluent sampling carried out for the purpose of data collection to meet the Protocol’s requirements should be publicly accessible (art. 7, paras. 2-4). Article 8, paragraph 1 (a) (iii), basically repeats the provision in the Aarhus Convention requiring public authorities to disseminate to members of the public who may be affected all information that they hold and that could help the public to prevent or mitigate harm in the case of an imminent threat to public health from water-related disease.

44. A provision with some relation to the Aarhus Convention’s access to justice provisions is article 9, paragraph 1 (b), in which Parties are obliged to take steps designed to enhance the awareness of all sectors of the public regarding, inter alia, “the rights and entitlements to water and corresponding obligations under private and public law of natural and legal persons and institutions, whether in the public sector or the private sector...”

45. The Protocol’s article 15 on compliance includes a provision requiring appropriate public involvement but falls short of the Aarhus Convention’s additional optional arrangement of receiving communications from the public. Finally, article 16, concerning the meeting of the Parties, requires the Parties to keep under continuous review the implementation of the Protocol, and to establish modalities for participation (art. 16, para. 3 (f)).

46. Other provisions in these instruments relevant to the Aarhus Convention include those requiring Parties to gather and exchange information (e.g. Water Convention, art. 6), those requiring Parties to adopt plans, programmes or policies (e.g. monitoring programmes, Water Convention, art. 4), and those requiring Parties to establish executive regulations and/or generally applicable legally binding normative instruments (e.g. setting emission limits, Water Convention, art. 3, para. 2). The Water Convention includes a general provision on the protection of “information related to industrial and commercial secrecy, including intellectual property, or national security” (art. 8). Similar provisions are developed in greater detail in article 4 of the Aarhus Convention with respect to grounds for refusal to disclose information upon request. The development of State practice in the implementation of this article should help to define the obligation found in article 8 of the Water Convention.

### **Relevant activities**

47. A joint UNECE-United Nations Environment Policy (UNEP) project drew up guidance on public participation in water management and a framework for compliance with agreements on transboundary waters under the title “Water Management: Public Participation and Compliance with Agreements” (UNEP/ROE/2000/1). As a part of this initiative, draft guidelines on public participation in water management (MP.WAT/2000/4, 6 and Add.1) were prepared by a group of invited experts. This work is reflected in the Water Convention’s work plan for 2000-2003.

48. Under the Protocol on Water and Health, there is an interesting initiative of relevance to the Aarhus Convention in the work plan for 2000-2003 for early implementation of the Protocol, adopted by the Meeting of the Signatories (MP.WAT/AC.2/2000/4). The annex to this document includes work to be undertaken by the Working Group on Water and Health in preparation for the first meeting of Parties to the Protocol. One of the documents to be finalized is draft guidelines on the participation of intergovernmental organizations and NGOs in the meetings and activities of the Protocol, under article 16, paragraph 3 (f).

### **Implications of entry into force of the Aarhus Convention in the subject area**

49. In cases where States are Parties to the Aarhus Convention and one or both of the other instruments, the specific requirements of the Aarhus Convention may oblige Parties to implement these instruments according to specified procedures. For example, the public participation provisions of the Aarhus Convention are relevant in the context of decisions concerning water management under the Water Convention and its Protocol. Article 8 of the Protocol requires each Party to ensure that surveillance and early-warning systems are established and that contingency plans to respond to outbreaks, incidents and risks are properly prepared in due time. It is likely that such systems and plans would fall under article 7 of the Aarhus Convention and Parties to that Convention would thus be required to provide for public participation in the preparation of such plans. The draft document on guidance on public participation in water management (MP.WAT/2002/6, para. 41) recommends inter alia that “public participation in the preparation of plans, programmes and policies relating to water management at different levels of Government should be ensured through the national legal system.”

#### **IV. CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT**

50. The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted in 1991 and entered into force in 1997. A protocol on strategic environmental assessment is currently being negotiated.

##### **Relevant provisions and their implementation**

51. The Espoo Convention has many links to the Aarhus Convention and deals with the three main Aarhus subject areas to a larger extent than any of the UNECE instruments examined. This is due to the fundamental link between environmental impact assessment (EIA) and participation of the public in environmental decision-making. EIA is the primary tool in the UNECE region for the latter.

52. The Espoo Convention is the ECE instrument with a provision that comes closest to the anti-discrimination clause of article 3, paragraph 9, of the Aarhus Convention. Article 2, paragraph 6, of the Espoo Convention establishes a non-discrimination principle for public participation rights in a transboundary context. This provision works together with article 3, paragraph 1, to ensure equal treatment of the public in the affected Party as compared to the public of the Party of origin.

##### **Relevant activities**

53. An early initiative under the Espoo Convention was a workshop on key elements for bilateral and multilateral agreements on EIA in a transboundary context in 1994 in Baarn (Netherlands). The workshop report (ECE/CEP/9) noted that a wide range of public participation mechanisms was used throughout the UNECE region, and made suggestions as to possible ways to meet these requirements.

54. In its final report (ENVWA/WG.3/R.12), the task force on legal and administrative aspects of the practical application of relevant provisions of the Convention discussed some of the factors that should be taken into account in determining responsibility for the procedural steps that aim at participation of the public of the affected Party in the EIA procedures of the Party of origin. One of the suggestions for follow-up work from this task force was the drawing-up of recommendations for the holding of public hearings in a transboundary context.

55. At their first meeting, the Parties to the Espoo Convention established a Working Group on EIA, which developed a report on "Recent EIA developments and links to other ECE Conventions." The report suggests that some provisions of the Espoo Convention may need to be revised in the light of new requirements imposed by the Aarhus Convention, especially with regard to the activities listed in appendix I to the Espoo Convention, the public participation requirements provided by the Espoo Convention and also the need for new provisions regulating access to justice (MP.EIA/WG.1/2000/20).

56. Also at the first meeting, a format for notification under article 3 of the Convention was adopted. This format includes elements designed to ensure that the Convention's public participation requirements are met (ECE/MP.EIA/2, annex IV, appendix).

57. The 1998-2000 work plan for the Espoo Convention included a chapter on public participation in a transboundary context. The work on this chapter led to the draft "Guidance on Public Participation in a Transboundary Context," developed under the leadership of the Russian Federation. The continued work on Aarhus-related aspects of the Espoo Convention was discussed at the second meeting of the Parties. The Parties welcomed the public participation guidance referred to above and called for this guidance to be developed further (ECE/MP.EIA/4, annex III). A questionnaire has been developed in that regard, under the leadership of the Russian Federation and the United Kingdom.

58. An important aspect of implementation of the Espoo Convention is the use of bilateral and multilateral agreements or arrangements and other forms of cooperation, which was discussed at a workshop (Netherlands, 20-22 February 2000). Paragraph 32 of annex I to the report of the second meeting of the Parties to the Espoo Convention (ECE/MP.EIA/4), reads as follows:

"It is recommended that the national or federal government should be involved in negotiating and drafting the agreement as it regards the implementation and application of a convention between States. It is also strongly recommended that the regional authorities should be involved in this process since they too are concerned by the application of EIA. Consideration could be given to the possibility of consulting also other stakeholders in the process of EIA in a transboundary context during the drafting process."

59. Moreover, paragraph 40 reiterates the need to consider procedural aspects such as: notification; how to involve the public of the affected Party; submission of comments; public hearings and consultations between the Parties (participants, subjects); decision (how to reflect comments of the authorities and the public, publication, possibilities for appeal); post-project analysis; dispute prevention and settlement; joint EIA; translation; financial aspects.

60. These matters are treated in greater detail based on the examples of bilateral agreements examined in the workshop, covering items such as the role of contact points with respect to public comments (para. 46), notification (paras. 53-60), information and public involvement (paras. 61-68), taking public comments into account and publishing the decision (paras. 75-77), and deciding whether to involve the public in post-project analysis (para. 80). The issue of translation of documents so that the affected public in the neighbouring State can participate effectively is discussed (paras. 88 and 92), as well as some of the financial aspects of public participation in transboundary EIA (paras. 95-96). Finally, the issue of timing is mentioned with relevance to public participation (paras. 98-100).

61. The Parties also adopted a document on the practical application of the Convention (ECE/MP.EIA/4, annex II, app. I), in which an exchange of experiences at a workshop in Helsinki in 1999 was presented. Among the matters discussed was the differing interpretation of the public participation requirements of the Convention (paras. 13-17). Appendix II to annex II gives detailed information on the case studies, including, in table 4, an analysis of the opportunities accorded to various stakeholders to participate in the EIA or transboundary EIA, and, in table 5, the means for consultation. Other tables examine the extent of translation and the means for consultation for specific stakeholders. In summary, significant work has been done under the Espoo Convention to examine the practical modalities of public participation in EIA.

62. The Parties endorsed a document on the links between the Espoo Convention and other UNECE conventions (ECE/MP.EIA/4, annex V, app. I). While examining the links with the Aarhus Convention, the paper concluded that a general updating of the Espoo Convention might be warranted to reflect the advances made by the Aarhus Convention. These include: bringing appendix I to the Espoo Convention in line with annex I to the Aarhus Convention; revision of the definition of “public”; importing the detailed public participation requirements of article 6 of the Aarhus Convention into the Espoo Convention; and adding access to justice provisions to the Espoo Convention in line with article 9, paragraph 2, of the Aarhus Convention. Other provisions of Aarhus which were of interest to the Espoo Meeting of Parties included those which pertain to amending the Convention (art. 14); allowing NGOs qualified in the field of the Convention to take part in the meetings of the Parties (art. 10, para. 5); compliance review (art. 15); and opening up the Convention to all States Members of the United Nations (art. 19, para. 3). It is interesting to note that nowhere did the analysis find any conflicts between the Espoo and Aarhus Conventions. Rather, the inquiry was where the Espoo Convention could benefit from advances and new ideas finding expression in the Aarhus Convention.

63. The 2001-2003 work plan includes an objective on strengthening cooperation with other ECE conventions (item 3), and makes specific reference to, inter alia, public participation. Item 9 of the work plan continues the work already undertaken on public participation in EIA in a transboundary context, with the intent to collect case studies and to finalize the draft guidance on public participation (ECE/MP.EIA/4, annex XI).

64. The delegations negotiating the draft protocol on strategic environmental assessment recognize this process as an important area for cooperation between the Espoo and the Aarhus Convention’s bodies. The Meeting of the Parties to the Espoo Convention is also concerned with the link to the Aarhus Convention and might consider amending the Espoo Convention in this light, inter alia to extend its application in non-transboundary contexts (CEP/2001/6, para. 7).

### **Implications of entry into force of the Aarhus Convention in the subject area**

65. The negotiation of the Aarhus Convention included the participation of many key persons involved in the Espoo Convention. There was thus a conscious effort to make use of the early implementation of the Espoo Convention, prior to its entry into force, and the existing practice with respect to implementation of similar provisions on the national level. Thus, the two Conventions can be considered to be complementary with respect to access to information, public participation and access to justice.

66. The Espoo Convention's primary focus is a transboundary one. Yet its article 2, paragraph 2, obliges Parties to establish an EIA procedure meeting certain requirements, and sets standards for national EIA. Article 6 of the Aarhus Convention builds upon this requirement by extending the requirement of an EIA-type procedure to all decisions on permitting proposed specific activities which may have a significant effect on the environment, regardless of a transboundary impact.

67. Moreover, the Aarhus Convention establishes more specific minimum standards for the public participation elements in EIA-type proceedings than found in the Espoo Convention. The latter does establish basic obligations to provide public participation in EIA (e.g. art. 2, para. 6, and art. 3, para. 8), but does not elaborate these. Beyond this, the Convention establishes that members of the public in areas likely to be affected by a proposed activity should have opportunities to participate which are equivalent to those provided to the public in the Party of origin. Thus, the Espoo Convention promotes harmonization across boundaries, which indirectly raises standards for public participation, whereas the Aarhus Convention sets such standards.

68. The Meeting of the Parties to the Espoo Convention has examined the developments under the Aarhus Convention in great detail and has made some preliminary findings with respect to possible amendments to the Espoo Convention. One of the most significant of these involves the overall scope of the Convention. The scope of the Espoo Convention could be expanded by bringing its appendix I in line with annex I to the Aarhus Convention. This would help to establish mandatory EIA for a wider range of activities. Moreover, the Parties to the Espoo Convention have considered amendments to clarify its application to national EIA systems, regardless of transboundary triggers, which would bring it further in line with article 6 of the Aarhus Convention. Other amendments would be useful in cases where one or more States are not a Party to the Aarhus Convention, for example revising the definition of "public" and importing certain detailed provisions of the Aarhus Convention into the Espoo Convention, such as the public participation requirements of article 6 and the access to justice provisions of article 9, paragraph 2.

69. The Espoo Convention's requirements related to EIA can be examined point by point with respect to their further elaboration under the Aarhus Convention. Examples include the contents and procedure for notification, the timeliness of availability of EIA documentation to the public, and the requirement to take the results of public participation into account through a reasoned (motivated) decision in writing. The scope of the public with the right to participate is another important interlinkage between both Conventions. The Espoo Convention refers to the "public in the areas likely to be affected", whereas, the Aarhus Convention uses a definition of "public concerned" with respect to obligations to notify coupled with a more general reference to the "public" in connection with opportunities to participate. As the definition of "public concerned" includes the "public in the areas likely to be affected" the only inquiry is whether the Aarhus Convention goes beyond this. The Aarhus Convention arguably requires Parties to give notification of the decision-making to members of the public *not* in the areas likely to be affected, if such persons nevertheless have an interest in the matter. Thus, the Aarhus Convention could increase the scope of the public to be notified beyond that required under the Espoo Convention. The decision of the Parties at their second meeting to bring the definition of the "public" under the Espoo Convention in line with that found in the Aarhus Convention could bridge that gap.

## V. CONVENTION ON THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS

70. The Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) was adopted in 1992 and entered into force in 2000. A new legally binding instrument on civil liability to both the Industrial Accidents Convention and the Water Convention is currently being negotiated.

### **Relevant provisions and their implementation**

71. The relevant provisions of the Convention are found in its article 9.

### **Relevant activities**

72. The Parties of the Convention have established priorities for their work (decision 2000/7). The current work plan does not include specific elements relating to the information and participation provisions of the Convention (ECE/CP.TEIA/2, annex IX), although certain elements of the work plan refer indirectly to such matters. For example, the work undertaken on off-site contingency plans necessarily deal with public information.

73. Moreover, the public availability of information concerning hazardous facilities and activities is becoming a bigger concern, especially in view of terrorist threats. There has been reluctance on the part of some Parties to provide specific information about the location and characteristics of hazardous installations, as required by decision 2000/3. However, there is no initiative at present to amend or revoke that decision.

74. Questions 22 to 25 of a questionnaire developed by the secretariat as an aid to reporting obligations under the Convention (ECE/CP.TEIA/2, para. 29, and CP.TEIA/2000/11) pertain to the Convention's information and participation requirements.

75. An initiative for individual Parties to develop "industrial accident manuals" has also taken shape, based on a decision at the third meeting of the Signatories to the Convention. The outline for the manual includes a section on "policy and legislation," which provides that the information should outline in particular national policies for providing information to the public and allowing the public to participate in relevant procedures concerning preventive, preparedness and response measures for industrial accidents.

76. While the Convention's relevant provisions are not a priority for work, the Convention's bodies and secretariat themselves have a good record in promoting transparency and disseminating information. The Bureau is one of three UNECE convention bureaux that post the minutes of their meetings on their web sites.

77. Despite the Convention containing an article covering the three elements of access to information, public participation and access to justice, there seems to be a rather low political and public interest in the subjects covered by the Aarhus Convention, perhaps due to the fact that the Industrial Accidents Convention had only entered into force quite recently and was not yet fully operational pending the identification of hazardous industrial activities.

### **Implications of entry into force of the Aarhus Convention in the subject area**

78. The Aarhus Convention's article 5, paragraph 1 (c), concerning the obligations of States to disseminate certain information in the event of an imminent threat to human health or the environment is closely linked to the information provisions found in article 9, paragraph 1, of the Industrial Accidents Convention. The Industrial Accidents Convention refers to the dissemination of "adequate" information, whereas the Aarhus Convention elaborates on the meaning of adequate information by specifying that public authorities should disseminate "all information which could enable the public to take measures to prevent or mitigate harm." It is interesting to note that both instruments include the reasonable limitation of the scope of dissemination to the public who may be affected. The Aarhus Convention clearly contemplates the possibility that public authorities should disseminate information to the public that might take measures to prevent or mitigate harm *to the environment*, not just to human health. The Industrial Accidents Convention incidentally can be read the same way, since it talks about "areas capable of being affected."



79. Most specific information about hazardous installations and activities is exchanged between neighbouring countries on a bilateral basis. Parties only inform other Parties or the secretariat of the mere facts of notification, information exchange and consultations. Such information held by public authorities in a State Party to the Aarhus Convention may be requested by a member of the public. Parties to the Aarhus Convention have the option of providing in their national legislation that requests for information may be refused if the disclosure would adversely affect national defence or public security (see art. 4, para. 4 (b)), thus, addressing any concerns raised since 11 September, 2001.

80. However, if a particular Party to the Industrial Accidents Convention is concerned that information given to a *neighbouring* country might be made accessible to the public in that country, then there is a further possibility. The same subparagraph of the Aarhus Convention provides that an adverse impact on international relations may also be grounds for refusing to disclose information upon request. In practice, a State providing information about hazardous installations to a neighbouring State that is a Party to the Aarhus Convention should take affirmative steps to impose confidentiality requirements where it so desires on the neighbouring state in the name of international relations.

81. The Industrial Accidents Convention is based to a large degree on the development of plans, programmes and policies on the national level in order to implement its specific requirements. Examples can be found in all the main components of its regime – prevention, preparedness and response (e.g. the specific reference to “policies and strategies” in art. 3, para. 2; establishment of “policies” on siting in art. 7). The annexes to the Convention elaborate the public participation requirements to some degree (e.g. annex V, para. 2 (9); annex VI, para. 2).

82. The specific reference to the public’s opportunity to participate in “relevant procedures” concerning prevention and preparedness measures (art. 9, para. 2) supports the conclusion that such “procedures” fall under articles 6, 7 and/or 8 of the Aarhus Convention, depending on whether the matters are specific decisions, decisions on plans, programmes or policies, or decisions on normative instruments.

83. Secondly, the Industrial Accidents Convention obliges Parties to impose certain requirements on operators, which in many cases would be imposed through a permitting or approval procedure. Such procedures may in turn fall under Article 6 of the Aarhus Convention. Moreover, where the Aarhus, Espoo and Industrial Accidents Conventions are in force for the same transboundary matter, an EIA under the Espoo Convention (conducted in accordance with the Aarhus Convention’s requirements) can fulfil certain obligations under the Industrial Accidents Convention (art. 4, para. 4).

## VI. INSTRUMENTS IN PREPARATION

84. Two instruments are currently being negotiated: a protocol on strategic environmental assessment (SEA) to the Espoo Convention and a legally binding instrument on civil liability to the Water and Industrial Accidents Conventions.

85. Articles 7-8 and article 9, paragraph 2, of the Aarhus Convention establish one of the foundations in international law for the negotiation of the specific terms of the SEA protocol. The exact relevance of these provisions will depend on the final scope of the instrument. Nevertheless, at a minimum most of the provisions of article 7 (which in turn incorporates art. 6, paras. 3, 4 and 8) will be relevant. It appears that the scope of the instrument will include preparation of generally applicable legally binding rules, with respect to which the provisions of article 8 will be relevant. Finally, if negotiating States take this opportunity to act upon the indication made in article 9, paragraph 2, to apply that paragraph to provisions other than article 6, the most likely place to do so would be in the context of strategic environmental assessment. The draft provisions on access to justice indicate a possibility that they will do so, at least with respect to strategic decisions on plans and programmes.

86. The SEA protocol is an interesting example of parallel developments under various UNECE instruments. It is a means for importing Aarhus developments into the Espoo Convention regime, but also has the potential to take certain Aarhus-related matters further than they appear in the Aarhus Convention itself. An example is the definitions of plan, programmes, policies and legal acts which may in turn bear on the interpretation of these terms under the Aarhus Convention.

87. The Aarhus Convention's contribution to international legal developments in environmental justice has facilitated the work on the legally binding instrument on civil liability. At the same time, the new instrument deals with an access to justice matter outside the scope of the Aarhus Convention itself.

## VII. IMPACT ON INTERNATIONAL PROCESSES 2/

88. The legal meaning of article 3, paragraph 7, which requires Parties to “promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment,” is not easy to determine. In international forums, one incontrovertible operative value would arise when all participant countries would be Aarhus Parties. Yet, even in that case it would be difficult to establish what concrete outcome would adequately reflect the “promotion of Aarhus principles.” Naturally, in most international situations some non-Parties can be expected to be present. As international negotiations proceed by consensus for the most part, a Party to the Aarhus Convention can be obliged to do no more than “try.” Of course, a Party can be criticized for not

trying hard enough, and can certainly be condemned if its positions controvert Aarhus principles, but the difficulties in holding Parties to a particular standard in this regard are plain to see.

89. Within the framework of international organizations, this provision may have a more definite legal meaning. It may reasonably be read to require the Parties to the Aarhus Convention to work towards the reform of governing bodies of conventions and other international bodies in the direction of greater access to information, public participation and access to justice. Needless to say, the appropriateness of applying these pillars in particular international contexts will vary. To the extent that international organizations and bodies have characteristics in common with public authorities, analogous rules can be applied. The provisions of the Convention, drafted primarily with regard to national contexts, may thus remain relevant and applicable at international level. Internal regulations such as rules of procedure and bureau practices could be influenced by the Aarhus Convention’s principles.

90. A distinction should be made between the operative effect of article 3, paragraph 7, of the Aarhus Convention on the procedural law of international organizations and the substantive law in terms of the obligations deriving from the multilateral environment agreement. That is, article 3, paragraph 7, operates on the level of the internal workings of the organization, in terms of greater transparency, clearer procedures, and capacity-building for the public, through rules of procedure, decisions taken in meetings, etc. But it also operates in the substantive sphere with respect to the development of the instruments themselves, in terms of decisions on interpretation of provisions, amendments, and the development of protocols. Convention bodies could take a proactive approach and adopt internal policies to anticipate this trend.

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2/ See also MP.PP/2002/18 - CEP/2002/13.

## VIII. ACCESS TO JUSTICE

91. The third pillar of the Aarhus Convention provides for access to justice. Its article 9 is intended to make the implementation of the other UNECE environmental instruments more effective by bringing additional legal tools to bear to ensure access to information and public participation, and by empowering the public to assist in the enforcement of environmental law.

92. Access to justice is barely treated in the other UNECE environmental instruments. The earliest reference is in the Industrial Accidents Convention, which requires that Parties in accordance with their legal systems give “equivalent” access to justice to people who could be adversely affected by an industrial accident in the territory of another Party to the Convention as compared to persons within its own jurisdiction (art. 9, para. 3). This includes the possibilities of starting a legal action and appealing a decision affecting their rights. It does not, however, oblige Parties to provide access to justice to the public within its own jurisdiction if it has not already done so. The Protocol on Water and Health, adopted after the Aarhus Convention, establishes a principle that access to information and public participation should be supplemented by appropriate access to judicial and administrative review of relevant decisions (art. 5, subpara. (i)).

93. Two of the operative provisions of the Aarhus Convention concerning access to justice deal with precise remedies for breaches of the Convention’s information and participation pillars (art. 9, paras. 1-2). When a person considers that his or her request for environmental information, irrespective of the type of information, has not been treated in accordance with the Aarhus Convention, he or she should have access to a review procedure before a court of law or another impartial and independent body established by law. The remedies available pursuant to article 9, paragraph 1 should be available to members of the public of the States Parties to the Convention with respect to any environmental information held by public authorities pursuant to the other UNECE environmental instruments to which they are Parties.

94. Similarly, in cases where the other UNECE environmental instruments require the taking of specific decisions falling under article 6 of the Aarhus Convention, access to justice to persons fulfilling certain criteria must be provided in accordance with article 9, paragraph 2, of the Aarhus Convention. Thus, members of the public having a sufficient interest or, where applicable, maintaining impairment of a right, must be granted access to a review procedure before a court of law or another independent and impartial body to challenge the substantive and procedural legality of a decision, act or omission subject to article 6.

95. Moreover, Parties to the Aarhus Convention may decide that the access to justice provisions of article 9, paragraph 2, may apply to other Aarhus Convention provisions, the most obvious being decisions under articles 7 or 8. Thus, where a Party has so opted, in cases where the other UNECE environmental instruments require the taking of decisions on plans, programmes or policies falling under article 7 of the Aarhus Convention, or during the preparation of executive regulations and other generally applicable legally binding rules falling under article 8, the same access to justice guarantees would apply.

96. Another provision of potentially great relevance to the implementation of other UNECE environmental instruments is article 9, paragraph 3, of the Aarhus Convention. This paragraph obliges Parties to provide access to administrative or judicial proceedings to members of the public meeting the criteria laid down in national law in order to challenge “acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.” This potentially powerful enforcement tool could go a long way towards increasing the effectiveness of the implementation of provisions of such other UNECE instruments where the public has an interest. Of course, article 9, paragraph 3, can apply only to provisions of such instruments that have been implemented through legislative measures, that is, that have been transposed into national legislation.

97. Finally, the provisions of article 9, paragraphs 4 and 5, of the Aarhus Convention address some of the obstacles to access to justice, including inadequate remedies, timeliness, cost and lack of information about opportunities for access to justice. These provisions, by improving access to justice, further assist in the overall implementation of all relevant provisions of UNECE environmental instruments.

98. The major significance of these provisions vis-à-vis other instruments is the “self-executing effect” of the Aarhus Convention. The main beneficiaries of the Aarhus Convention are members of the public. The access to justice provisions provide a mechanism (even an incentive) for the beneficiaries to enforce the instrument on the national level. This is a force to be reckoned with, also on the international level, insofar as the implementation of the Convention relies not only on the goodwill of nations backed up by international legal principles, but also on the substantial employment of national institutions backed up by domestic law. This gives the Aarhus Convention the added boost of harnessing resources and penetration of principles into everyday life.

99. The draft legally binding instrument on civil liability and the draft protocol on SEA may mark substantial contributions to the development of access to justice in the UNECE context.

## **IX. CONCLUSIONS**

100. It should be emphasized that no provisions of the Aarhus Convention are in conflict with any provision of any other UNECE environmental legal instrument. The Aarhus Convention may indeed add obligations to those found in such other instruments, and may do so in closely linked ways. As such it may have a profound impact on and may require substantial changes in national legislation that has been adopted to implement those other instruments. Even apart from this, the Aarhus Convention may have an impact on State practice with respect to the implementation of provisions of other instruments, insofar as it sets particular procedural and other requirements relating to information, participation and justice. Nevertheless, these impacts do not substantially differ from similar impacts resulting from other developments in international or relevant domestic law that may modify the manner in which international obligations are met. Moreover, acting in the same way, the Aarhus Convention may result in differences between its Parties and non-Parties in their implementation of other multilateral environmental agreements.

101. Provisions of the Aarhus Convention are relevant to the other UNECE environmental instruments in several ways:

(a) In the interpretation and implementation of provisions touching upon the three Aarhus pillars (public information, participation, justice);

(b) In the way in which certain operative provisions are implemented (information held by authorities, development of plans, programmes and policies or rules);

(c) In the application of Aarhus principles by the convention bodies themselves (e.g. rules of procedure).

102. In all three ways the Aarhus Convention contributes to the development of a significant body of international law on the environment and sustainable development under UNECE auspices. It does so by reducing into concrete legal obligations the subsidiary principles found in principle 10 of the Rio Declaration, which in turn fleshes out the nascent concepts of the three Aarhus pillars present in earlier UNECE instruments. The application of the Aarhus Convention will help to make the implementation measures taken by Parties to the other instruments more effective. Finally, the Aarhus Convention is applicable indirectly to the UNECE convention bodies themselves, through its provision requiring States Parties to apply its principles in the international context.

103. With respect to the first item above, examples can be found in the Protocol on POPs and the Gothenburg Protocol to the LRTAP Convention, the public information provisions of the Water Convention and the Protocol on Water and Health, the provisions on notification, decision-making and final decision of the Espoo Convention, and the information and participation provisions (including the annexes) of the Industrial Accidents Convention. Further examples can be expected in the draft protocol on SEA and possibly the legally binding instrument on civil liability.

104. For the most part the relevant requirements of the Aarhus Convention augment those found in the earlier instruments, but in specific cases, there may be a need to ensure that the Aarhus Convention is applied in a manner consistent with the intentions of Parties to the other instruments, especially when Parties and non-Parties to the Aarhus Convention are involved in the same transaction. An example of this is Industrial Accidents Convention where a Party may wish to impose confidentiality obligations on a neighbouring State with which it is sharing sensitive information about hazardous installations.

105. With respect to the second item above, numerous examples can be found throughout the other UNECE instruments studied. These include provisions requiring Parties to gather and exchange information (e.g. LRTAP Convention, arts. 4, 8, 9; Water Convention, art. 6), to make specific decisions on environmentally significant matters (e.g. Espoo Convention, arts. 2-6), to adopt plans, programmes or policies (e.g. VOC Protocol, art. 7; monitoring programmes, Water Convention, art. 4; response “policies and strategies,” Industrial Accidents Convention, art. 3, para. 2; “policies” on siting, Industrial Accidents Convention, art. 7; procedures concerning prevention and preparedness, Industrial Accidents Convention art. 9, para. 2), or to establish executive regulations and/or generally applicable legally binding normative instruments (e.g. setting emission limits, Water Convention, art. 3, para. 2). In each of these cases, where a particular State takes national implementation measures that involve the holding of information by public authorities, or decision-making with respect to specific activities, plans, programmes, policies, or the preparation of normative regulations, the relevant provisions of the Aarhus Convention will govern the rights of the public with respect to such information and such decision-making procedures.

106. Concerning the potential impact of the Aarhus Convention on the convention bodies themselves, the situation is less clear. The Convention acts on such bodies indirectly, by placing obligations on its States Parties, which may or may not have the power to influence collectively the bodies in particular ways. At least in the UNECE context, however, where the Aarhus Convention represents a fundamental building block within a developing body of international law, convention bodies might be under a greater obligation to take the Aarhus Convention into account. Convention bodies could be proactive in incorporating Aarhus principles into their internal operations.

107. The Aarhus Convention is highly significant in the developing area of access to justice. Article 9 gives it “teeth”, meaning that with respect to certain specifically defined areas of operation (primarily procedures in relation to information and participation), the Aarhus Convention is self-executing (in the sense of empowering the instrument’s main beneficiaries) on the national level. Its consequences are less apparent with respect to article 9, paragraph 3 (the so-called direct enforcement provision). Nevertheless, the relevant provisions of the Aarhus Convention lay the groundwork for further developments.

108. This analysis has focused on the legal implications of the entry into force of the Aarhus Convention. It cannot go into depth with respect to some of the practical implications of its entry into force vis-à-vis the other UNECE instruments. In every case where links are found there are structural opportunities and substantive options for enhanced implementation of the instruments. Whether these opportunities are taken advantage of or which of various options are employed does not depend overmuch on the strict legal linkages between instruments but on political will and other factors.

109. Finally, the pace at which Aarhus principles can be integrated into various processes and into the work of various bodies will vary greatly. The extent to which the State actors involved in such processes and bodies have themselves integrated the Aarhus principles is partly determinative. States upholding the Aarhus principles ought to be ready and willing to show concrete results to assist in a gradual building of consensus with those States that are more reluctant to embrace them. In the context of the Espoo Convention, for example, the advantages of amending the Convention to take Aarhus into account are being considered, not due to a need to correct conflicting provisions, but rather to “update” the pan-European EIA regime to reflect the latest developments. Moreover, the links between the Aarhus Convention and the other UNECE instruments need to be continuously explained, discussed and reinforced to ensure the full integration of Aarhus principles throughout the body of UNECE environmental legal instruments.