UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

MP.PP/WG.1/2003/5
26 August 2003

ORIGINAL: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Working Group of the Parties to the Convention
(First meeting, Geneva, 23-24 October 2003)
(Item 8 of the provisional agenda)

PUBLIC PARTICIPATION IN STRATEGIC DECISION-MAKING*/

Prepared by the secretariat in consultation with the Bureau to the Convention

1. Through the Lucca Declaration, the Parties to the Aarhus Convention recognized the need to consider whether further work on public participation in strategic decision-making would be needed under the Aarhus Convention in the light of the then anticipated Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment (EIA) in a Transboundary Context. Paragraph 28 of the Declaration reads:

> "We recognize the need to integrate appropriately the Aarhus Convention's principles in the draft protocol on strategic environmental assessment to the Espoo Convention, expected to be adopted at the Kiev Ministerial Conference. We also recognize the need to consider, in the light of the content of the new protocol, if further work is needed under the Aarhus Convention on the issue of public participation in strategic decision-making."

2. The Protocol on Strategic Environmental Assessment (SEA) was adopted at the Kiev Ministerial Conference (21-23 May 2003) and signed by thirty-five States and the European Community.

*/ Owing to the workload of the secretariat, this document has been submitted late.

3. The purpose of this paper, which has been prepared at the request of the Bureau, is to assist the Working Group of the Parties in its discussion of these matters. By way of background, the paper begins with an outline of some relevant discussions and events which have taken place in the framework of the Economic Commission for Europe and the European Environment and Health Process. It then describes the public participation provisions in the Protocol on SEA in comparison with the Aarhus Convention in terms of the types of decision-making procedures covered, the scope of these decision-making procedures and the specific provisions for involving the public. The paper then explores some issues relevant to determining whether further work is needed and, finally, describes some procedural options for undertaking such further work should this be considered necessary or desirable.

I. BACKGROUND

4. The issue of public participation in strategic decision-making was raised within Aarhus Convention bodies back in 1999. The related issue of SEA was addressed at the first meeting of the Parties to the Espoo Convention (May 1998), where the Ministers recognized that EIA principles should be applied to the strategic level, and was also picked up at the London Ministerial Conference on Environment and Health the same year, at which a proposal to develop a protocol on SEA to the Aarhus Convention was put forward. Following this Conference, the Committee on Environmental Policy requested the Meeting of the Parties to the Espoo Convention and the Meeting of the Signatories to the Aarhus Convention to take the results of the Conference into account. Over the following months, several options for developing a legally binding instrument on SEA were considered, most notably as a protocol to either the Espoo or the Aarhus Convention or as a free-standing convention. At a meeting of the Espoo Convention's Working Group on Environmental Impact Assessment (May 2000), it was decided to propose to develop a protocol on strategic environmental assessment to the Espoo Convention. Following this decision, which was subsequently confirmed by the Meeting of the Parties to the Espoo Convention (February 2001), it was decided to "suspend" further work on public participation in strategic decision-making under the Aarhus Convention until the conclusion of the negotiations on the Protocol on SEA. The annex to this document provides the details of each of these decisions.

II. PUBLIC PARTICIPATION PROVISIONS IN THE PROTOCOL ON SEA

5. This chapter examines the public participation provisions in the Protocol on SEA and their relationship to those in the Aarhus Convention, first by comparing the type and scope of decision-making covered under the two instruments and then by comparing the public participation requirements which apply to such decision-making. Any conclusions presented or interpretations put upon the legal meaning of the texts of the two instruments should be considered as tentative. Other interpretations may be possible.

6. The Protocol on SEA requires its Parties inter alia to establish procedures for SEA with a view to integrating environmental concerns into measures and instruments designed to further sustainable development, thereby providing for a high level of environmental protection. SEA is an

internationally acknowledged system for assessing the environmental implications of proposed plans, programmes and policies, and in some cases legislation, in which public participation usually plays a central role.

7. The provision of public participation in SEA is listed as one of the objectives of the Protocol (see art. 1 (d)). In its operative provisions, the Protocol contains a special article on public participation in SEA of plans and programmes (art. 8) as well as various references to elements of public participation in other articles, including that on general provisions (art. 3).

A. Types and scope of decision-making procedures

8. The Protocol covers four types of decisions, which are divided into two different groups: (i) plans and programmes; and (ii) policies and legislation. In comparison, the Aarhus Convention effectively operates with three different groups: (i) plans and programmes; (ii) policies; and (iii) executive regulations/generally applicable legally binding normative instruments. The Protocol on SEA and the Aarhus Convention both establish significantly different obligations on public participation with respect to the different groups of decisions. To enable a detailed comparison of the provisions with respect to the three groups of provisions used in the Aarhus Convention, the following sections are structured around those three groups.

1. Plans and programmes

9. Both the Protocol on SEA and the Aarhus Convention contain criteria determining whether a specific plan or programme falls within its scope.

10. The Protocol covers 'plans and programmes' that are required by legislative, regulatory or administrative provisions, and that are subject to preparation and/or adoption by an authority or prepared by an authority for adoption through a formal procedure, by a parliament or a government (art. 2, para. 5). It is probably safe to assume that this covers authorities, parliaments and governments at national, regional and local levels.

11. For these plans and programmes, the Protocol requires that a strategic environmental assessment shall be carried out if the plan or programme:

- Is likely to have significant environmental, including health, effects;

- Is prepared for agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use; and

- Sets the framework for future development consent of projects listed in its annex I, or of projects listed in its annex II for which an EIA is required under national legislation (art. 4, paras. 1 and 2).

12. In addition, a Party shall carry out a strategic environmental assessment for other plans and programmes likely to have significant environmental effects that set the framework for future development consent of projects, if the Party determines to do so. This can be determined case by case or by specifying certain types of plans and programmes. In any event, the criteria set out in annex III to the Protocol are to be taken into account.

13. The Protocol provides for some exceptions to the regime described in paragraph 11 above: Parties are allowed not to carry out a strategic environmental assessment if the plan or programme concerns only small areas at the local level and for minor modifications to plans and programmes. Furthermore, plans and programmes serving national defence or civil emergencies and financial or budget plans and programmes are not covered by the Protocol.

14. Under the Aarhus Convention, all plans and programmes "relating to the environment" are covered under article 7. "Plans" and "programmes" are not further defined in the Convention; nor is the concept "relating to the environment". The term "relate" is a rather broad one: a plan or programme can "relate" to the environment in a positive or a negative way, i.e. have adverse effects or beneficial effects on the environment. As regards the term 'environment', some guidance might be provided by the definition of 'environmental information' in article 2, paragraph 3, of the Convention (Implementation Guide, ECE/CEP/72, p. 115).

15. The significance of effects or likely effects on the environment is at the outset not relevant when determining whether a plan or a programme falls within the scope of the Convention. Nor is the question of whether the plan or programme was required by legislative, regulatory or administrative provisions, or whether it must be developed by a public authority or by some other public body, though perhaps this last point could be taken to be implicit. The lack of any firm guidance in the Convention as to the scope of programmes and plans covered by of article 7 may have been one of the original reasons that the issue was raised under the Convention.

16. It would appear that the scope of the Protocol on SEA is more precisely defined than the scope of the Convention with respect to plans and programmes. This is perhaps not surprising given that the plans and programmes covered by the Protocol are subject to the additional requirement (which is indeed the major requirement of the Protocol) to carry out a strategic environmental assessment. However, the above comparison would suggest that the scope of plans and programmes covered under the Protocol on SEA is more limited than that under the Aarhus Convention, in the following ways:

(a) The definition of plans and programmes contained in the Protocol on SEA limits its scope in itself. Plans and programmes covered by the Aarhus Convention are not further defined in the text of the Convention;

(b) The Aarhus Convention refers to plans and programmes *relating to the environment*, whereas the Protocol on SEA establishes a list of sectors within which the plan or programme should fall;

(c) Only plans and programmes setting the framework for future development consent of activities *listed in its annexes* are directly covered by the Protocol. (Those which set the framework for future development consent of other activities may also be covered if so decided in accordance with the screening process described in article 5);

(d) Only plans/programmes likely to have *significant* environmental effects are covered by the obligation under the Protocol to carry out strategic environmental assessment and thus ensure public participation. Article 7 of the Convention contains no such "significance" threshold.

17. Consequently, there may be plans and programmes, during the preparation of which public participation might be necessary or desirable, which fall outside the scope of the Protocol, e.g. because a full SEA is not desirable or not necessary, but inside the scope of the Aarhus Convention. For instance, plans developed on an hoc basis, e.g. following a political decision by an elected body, and not required by 'legislative, regulatory or administrative provisions', exist in the fields of transport, energy, agriculture, tourism and mining. Furthermore, plans and programmes related to combating or managing air pollution, to protecting biodiversity, including endangered species, or to biosafety, would not necessarily be covered under the Protocol, although the 'catch-all' provision in article 4, paragraph 3 (described above in para. 12), might help to ensure that a strategic environmental assessment is also carried out for these types of decisions.

18. It remains to be seen how significant the differences between the two regimes highlighted above are in practice. For example, a Party applying the Aarhus Convention to public participation in the preparation of plans and programmes would probably have to apply some criteria to determine which plans and programmes are covered, which might indirectly bring in the issue of significance. Furthermore, even though the field of application of the Aarhus Convention's article 7 seems to be broader than that of the Protocol on SEA with respect to plans and programmes, this does not automatically mean that the Aarhus Convention offers better rights for public participation in this field as this also depends on the requirements for involving the public which are analysed in section B 1 below.

2. Policies

19. Under the Protocol on SEA, policies are covered to the extent that they are "likely to have significant effects on the environment, including health". As it is not specified, it is assumed that the effects can be both negative or positive.

20. The Aarhus Convention, article 7, is phrased in similarly general terms, covering policies "relating to the environment". No "significance" threshold is included. As is the case for 'plans and programmes', the Convention does not offer much guidance on the scope of this provision as none of the relevant terms is defined in the Convention.

21. Again, it seems as though the scope of application is broader in the Aarhus Convention than in the Protocol on SEA, at least theoretically. However, the lack of precise limitation of the field of application in both instruments (neither of which provides a definition of "policies") should be

considered alongside the limited and flexible nature of the provisions for public participation with respect to policies. This issue is addressed in section B below.

3. Legislation

22. As for policies, the Protocol on SEA covers legislation that is "likely to have significant effects on the environment, including health". The term "legislation" is not defined in the Protocol and is therefore open to interpretation as to its scope, e.g. whether it covers not only laws adopted by parliaments but also regulatory measures put in place by the executive authority through decrees, statutory orders, etc.

23. The Aarhus Convention, article 8, covers the preparation by public authorities of proposals for executive regulations and generally applicable normative instruments. Probably "executive regulations and other generally applicable legally binding rules" may be understood to include "legislation" in its broadest sense, including decrees, regulations, instructions, norms and rules and not just laws adopted by parliaments (ECE/CEP/72, pp. 119-120). Although the language is different in the Protocol and the Convention, the intention in both cases would appear to be to cover governmental "law-making" without thereby interfering with the parliamentary process. The Convention covers legislation which "may have a significant effect on the environment."

24. It may be concluded that the scope of application with respect to legislation is therefore quite similar for the two instruments, noting that the "significance" threshold in the Convention appears to be slightly lower than that in the Protocol ("may" as compared with "likely to") and that there might be some uncertainty as to the extent to which proposals for regulatory measures other than parliamentary legislation are covered under the Protocol.

B. Requirement for public participation in the decision-making procedures

1. Plans and programmes

25. Article 8 and annex V of the Protocol on SEA set out the specific rules for public participation in strategic environmental assessment for plans and programmes covered by the Protocol. In addition, article 5, paragraph 3, contains rules concerning public participation in the screening process and article 6, paragraph 3, includes a provision related to public participation in the process of scoping (see para. 31 below). Article 11 sets out requirements related to the decision on a plan and programme. Finally, article 10 contains specific requirements for involving the public concerned in an affected Party other than the Party where the plan or programme is actually being developed.

26. The relevant provisions of the Aarhus Convention are included in article 7, through which the procedures set out in article 6, paragraphs 3, 4 and 8, as well as paragraph 2 (through a reference in para. 3)(ECE/CEP/72, p. 117) are to be applied in the preparation of plans and programmes.

27. A close comparison between these two sets of provisions suggests that they are quite similar in at least the following ways:

(a) Public participation procedures must be early and take place when all options are open and public participation can be effective, i.e. have an impact on the end result;

(b) Reasonable time frames for the public to participate must be established;

(c) The public concerned by the plan or programme must be identified;

(d) A list of specific information should be made available to the public early in the decision-making process – this list is almost the same in the two instruments (annex V to the Protocol and article 6, paragraph 2, of the Convention);

(e) The comments made by the public or the outcome of the public participation must be taken into due account in the final decision.

28. The *notification* of the public concerned of the draft plan or programme seems to be handled differently in the two instruments. The Protocol on SEA requires "the timely public availability of the draft plan or programme and the environmental report" and that "detailed arrangements for informing the public and consulting the public concerned are determined and made publicly available" (Art. 8, paras. 2 and 5). Furthermore, the Protocol requires "effective opportunities for public participation" (Art. 8, para. 1). Article 7 of the Convention, on the other hand, through its reference to article 6, paragraph 3, includes an indirect reference to article 6, paragraph 2, which requires that 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 a list of specific information. The "notification" requirement therefore seems to be less detailed and less explicit in the Protocol on SEA.

29. With respect to the *list of specific information* that should be made available at the initial stage of the decision-making process, the Protocol requires that each Party "take into account to the extent appropriate" the elements listed in the annex V, whereas the Convention requires that a more or less similar list of information be made available at the time of the notification. This might be explained by the fact that the Aarhus Convention's provisions were developed with specific projects in mind, but it does not alter the fact that, if one considers that the indirect reference in its article 7 to article 6, paragraph 2, through paragraph 3, constitutes a legally binding requirement to ensure notification, the information listed in paragraph 2 should be provided as part of the notification.

30. The Protocol on SEA requires each Party to ensure that *the public concerned* is identified for the purpose of the public participation requirements in article 8, paragraphs 1 and 4 (Art. 8, para. 3). The notion of *public concerned* is not further defined in the Protocol. The Aarhus Convention places an obligation on each Party to identify *the public which may participate*, taking into account the objectives of the Convention. According to the Implementation Guide, the most reasonable interpretation of this particular provision is that the Convention places a responsibility on the public authority to make efforts to identify interested members of the public (ECE/CEP/72, p. 118). This

interpretation makes the two provisions fairly similar and whether one or the other will lead to a more inclusive participation is probably a fairly theoretical question.

31. In addition to the above, the Protocol on SEA requires Parties to endeavour, to the extent appropriate, to provide for opportunities for participation of the public concerned in the process of "*screening*" a plan or a programme (Art. 5, para. 3). Screening is the process of determining whether a plan or a programme is likely to have significant environmental effects, which according to article 5, paragraph 1, of the Protocol is used to determine whether certain plans and programmes will undergo an SEA. A similar requirement applies for determining the relevant information to be included in the environmental report, the *scoping* process (art. 6, para. 3).

32. Article 7 of the Aarhus Convention does not include a reference to article 6, paragraph 7, which requires that public participation procedures must "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…" This may indicate that some flexibility in defining the exact procedures for participation is left to the Parties (ECE/CEP/72, p. 117). This flexibility seems to have been continued in the Protocol on SEA, article 8, paragraph 4, which merely states that the public concerned as identified must have the opportunity to express its opinion on the draft plan or programme and the environmental report but not how this opinion should be expressed. However, the above-mentioned requirement that detailed arrangements shall be determined and made publicly available is a step in that direction, and on this point, it seems that the Protocol on SEA is slightly stronger than the Convention.

33. Furthermore, the Protocol explicitly requires that the public is informed when a plan or a programme is adopted and made publicly available alongside a statement summarizing how the environmental considerations have been integrated and how comments received have been taken into account (art. 11, para. 2). These requirements are similar to the ones included in article 6, paragraph 9, of the Convention, to which article 7 does not refer. The Protocol on SEA therefore seems to be more specific and somewhat stronger than the Convention in this particular respect.

34. Finally, the Protocol on SEA contains a specific requirement for public participation in a neighbouring country when it is considered that the implementation of the plan or programme is likely to have significant effects in this other country. The Protocol requires the two States to agree on detailed arrangements to ensure that the public concerned in the affected country is informed and given the opportunity to forward its opinions on the draft plan or programme within a reasonable time frame. As the Protocol includes the same provision on non-discrimination as the Convention, it may be considered that the Protocol goes a bit further than the Convention in this aspect, at least in laying down the procedures which are to be followed in transboundary cases. While the public in a neighbouring country might have more or less the same rights under both instruments, the more detailed procedures set out in the Protocol may increase the chances that the public concerned in a neighbouring State is given a real opportunity to participate in a decision-making process taking place in the other State.

2. Policies

35. In the Protocol on SEA, there are no explicit requirements for public participation in the preparation of proposals for policies. Parties must endeavour to ensure that environmental concerns are considered and integrated to the extent appropriate in the preparation of their proposals for policies and in this process, the Parties must "consider the appropriate principles and elements" of the Protocol (art. 13, para. 2). In addition, Parties must determine, where appropriate, practical arrangements for integrating environmental concerns taking into account the need for transparency in decision-making (art. 13, para. 3). Finally, the Protocol requires each Party to report to the governing body of the Protocol on its application of the provisions related to legislation and policies (art. 13, para. 4).

36. With respect to policies, the Aarhus Convention merely includes a requirement for each Party to endeavour to provide, to the extent appropriate, opportunities for public participation in the preparation of policies relating to the environment.

37. While the language in the Convention is clearly very soft and leaves considerable discretion to Parties to decide what they consider to be appropriate, and while the specific reporting requirement in the Protocol on SEA on the application of the provision suggests that Parties cannot ignore the obligations entirely, it would appear that the Convention goes somewhat further than the Protocol on this point. In both cases, these provisions should be interpreted in the light of the preambles and the objectives of the respective instruments.

3. Legislation

38. Under the Protocol on SEA, public participation in the formulation of legislation is treated in exactly the same way as public participation in the formulation of policies, as described in paragraph 35 above.

39. According to article 8 of the Aarhus Convention: "Each Party shall *strive to promote* effective public participation at an appropriate stage". Although this is not an explicit legally binding obligation to ensure public involvement in such processes, a Party is required to make efforts towards the attainment of public participation goals in order to fulfil its obligations under the Convention (ECE/CEP/72, p. 119). For this purpose, the Convention sets out three steps:

(a) Sufficient time frames should be fixed;

(b) Draft rules should be publicized or otherwise made publicly available; and

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

40. The conclusion seems to be that while neither of the instruments spells out clear legally binding obligations to provide for public participation in the preparation of legislation, the Convention goes slightly further than the Protocol in the direction of establishing such obligations.

III. ISSUES RELEVANT TO DETERMINING THE NEED FOR FURTHER WORK

A. The importance of public participation in strategic decision-making

41. In determining whether there is a need for further work on public participation in strategic decision-making, perhaps the first thing to consider is how important this issue is in comparison with the many other issues which arise under the Convention. This is clearly an essential question in the light of the need to prioritize the use of limited resources.

42. One argument for giving high priority to this area is that strategic decisions – those covered by articles 7 and 8 of the Convention – tend to have the most far-reaching effects on society and on the environment. They tend to be the most relevant to protecting the "right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (article 1 of the Convention). The effects of decisions at the project level tend to be more limited both in time and in space.

43. Given that the Convention is based on the assumption that public participation improves the quality of decision-making and that the public has rights to participation, it could be regarded as somewhat anomalous that the public participation provisions applicable to the higher levels of the decision-making hierarchy tend to be weaker than those applicable at the project level. If strategic decisions are more important, it might be argued that it is also more important that the public may participate in them. This could be put forward as an argument for strengthening articles 7 and 8 of the Convention. Alternatively, it could be seen as an argument for finding ways to support the more effective implementation of those articles.

B. Relation to Protocol on SEA

44. Given that strategic decisions tend to be the ones with the most far-reaching effects on the environment, there can be no doubt that the adoption of the Protocol on SEA represents a significant step forward in the direction of sustainable development by introducing a requirement for environmental assessment at the strategic level. In this respect, it adds substantial value to the body of international law. However, from the previous chapter, one may draw the general conclusion that the Protocol on SEA does not significantly extend the rights to public participation provided under article 7 of the Aarhus Convention, and does not extend the rights provided under article 8 of the Convention at all. This general conclusion is based upon the following:

(a) The scope of the decision-making covered by the Protocol on SEA is more limited than the scope of decision-making covered by the Aarhus Convention. Significant strategic decisions covered by articles 7 and 8 of the Aarhus Convention fall outside the scope of the Protocol on SEA, or at least its mandatory requirements;

(b) In several respects, the public participation provisions of the Protocol on SEA relating to plans and programmes fall short of the Aarhus Convention's provisions relating to plans and programmes. This could be explained by the fact that the primary focus of the Protocol is on

strategic environmental assessment (albeit with public participation included as an integral elements of the SEA process). Furthermore, the Protocol introduces a new element in the decision-making process, namely the requirement for assessment of environmental implications, in which the public may also participate. However, it means that, even with respect to those strategic decisions on plans and programmes which are covered by the Protocol, the Convention tends to provide the stronger participation requirements;

(c) In a few cases, the public participation provisions of the Protocol with respect to plans and programmes go slightly further than article 7 of the Convention (for example by requiring the public notification of the decision and by specifying the procedures to be followed in transboundary cases);

(d) Whereas the Convention's provisions on public participation in the formulation of policies and legislation are not particularly strong, there is virtually no requirement for public participation in the formulation of policies and legislation under the Protocol on SEA;

(e) The differences between the two instruments do not appear to present significant problems of consistency. More specifically, States which are Party to both instruments would not be faced with any contradictory obligations, principally due to fact that both instruments only seek to establish minimum standards (through article 3, paragraph 5, of the Convention and article 3, paragraph 4, of the Protocol).

45. One consequence of the fact that the Protocol's provisions relating to public participation in the formulation of plans and programmes are broadly similar to those under the Convention could be that work undertaken under the Aarhus Convention to support the implementation of article 7 could also be useful to support the implementation of the public participation provisions of the Protocol on SEA.

C. Possible obstacles in undertaking further work on or under articles 7 and 8

46. It is worth considering why articles 7 and 8 of the Convention are less prescriptive than its article 6, as this can give an indication of the type of problems that might be encountered in attempting to promote public participation in strategic decision-making. Historically, it may have simply been the case that the two-year time frame for negotiating the Convention was not sufficient to allow the negotiators to address some of the complexities involved. However, even if the availability of more time had resulted in more progress, the experience with the subsequent negotiations over the Protocol on SEA, although under similar time constraints, suggests that there are some substantive reasons which make it more difficult to establish international norms for public participation at the level of strategic decision-making. The following are some possible factors:

(a) Greater differences from one country to another in the procedures for strategic decision-making (as compared with project-level decision-making), making it difficult to develop international norms;

(b) More members of the public being affected by the higher levels of decision-making, raising logistical concerns about how to deliver participation rights and pointing to the possible need for a differentiated approach (e.g. distinguishing between procedures open to all members of the public and additional procedures open to representative bodies such as NGOs);

(c) Difficulty in drawing up common definitions of the main categories of strategic decision (neither instrument defines 'policies', 'legislation' or 'ge nerally applicable legally binding rules', and the definitions of 'plan' and 'programme' under the Protocol were drawn up for the specific context of SEA and are not necessarily applicable to article 7 of the Convention);

(d) With respect to legislation, sensitivity about taking measures which might be seen as interference by the executive with the legislature.

IV. PROCEDURAL OPTIONS

47. If it is determined that there is a need for further work, the procedural options will vary according to the character and the type of activities that are undertaken. Three types of options are identified in the following paragraphs. Further suggestions regarding possible actions in this area are contained in a background document prepared jointly by the European ECO Forum and the Regional Environmental Center for Central and Eastern Europe (REC) for the second meeting of the Signatories (CEP/WG.5/2000/10, paras. 37 to 42).

A. "Soft" options

48. One option for effectively enhancing public participation in strategic environmental decision-making is to collect and disseminate information on national experience and good/best practice in the countries of the region. Various activities may be envisaged under this heading:

(a) Workshops/seminars on issues related to public participation in strategic decision-making, combined with the publication and dissemination of their proceedings;

(b) Publications on public participation in strategic decision-making, such as a handbook of good practices;

(c) Communication and sharing of information and experience through electronic means, including through the Aarhus Convention information clearing-house mechanism, which is due to be launched at the end of the year;

(d) A task force could be established to coordinate or provide input to the above activities. Such a tas k force could consist of governmental and non-governmental, including academic, experts. Its mandate could include the development of systems and tools aimed at assisting Parties in providing effective opportunities for public participation at the strategic level, including the preparation of draft legislation. Such systems and tools could also address the communication with and education and motivation of the public in decision-making procedures at the strategic level.

B. Recommendatory measures

49. Another option could be to draw up guidelines or recommendations on public participation in strategic decision-making, to assist Parties in implementing articles 7 and 8 of the Convention in the most effective manner (CEP/WG.5/2000/10, paras. 38-39, contains some ideas on the possible content of such guidelines). Such guidelines or recommendations could be prepared either through an intergovernmental negotiation process or by a small group of experts. The former option has the advantage of ensuring political acceptance at the highest level and possibly endorsement by ministers. The second option would have the advantage of not being limited to the minimum of what can be accepted by all governments but can go further and set a benchmark at a high level of public involvement which States can work towards as they see fit. Guidelines or recommendations could be developed on the basis of identified best practices and could therefore be a 'second' step following the soft options mentioned above.

C. Legally binding measures

50. If it is determined that new legally binding measures are needed to ensure public participation in strategic decision-making, these could take the shape of an amendment to the Convention or a protocol. In any case, such legally binding measures could only be developed in an intergovernmental negotiation process and would most likely require the establishment of an intergovernmental working group. Any such process should take account of practical experience acquired with public participation at the strategic level both under the Convention and the Protocol.

V. PRELIMINARY CONCLUSIONS

51. The importance of strengthening public participation in strategic decision-making must be viewed in the light of the actual prospects for reaching agreement on measures. It goes almost without saying that whichever procedural options are pursued should have a good prospect of gaining broad acceptance.

52. As regards legally binding measures, the fact that the Protocol on SEA did not take significant steps forward on public participation issues could be seen as an indication that the regime provided by the Convention was already an accurate reflection of the general level of willingness to enter into international obligations in this area. Alternatively, it might be argued that the Convention did not go further because there was insufficient time, that the Protocol did not go further in public participation because its focus was on strategic environmental assessment and that further work on strengthening articles 7 and 8 of the Convention could be fruitful.

53. Whether or not that is the case, measures to support or guide countries in implementing the legal obligations that they have already taken on through articles 7 and 8, as outlined in paragraphs 48 and 49, rather than extending those obligations, could be a good starting point. This would not rule out the possibility that those articles might be strengthened at a later stage if considered appropriate.

54. As regards the time frame, given that public participation in strategic decision-making is not one of the main elements of the work programme for 2003-2005 adopted by the Meeting of the Parties, the immediate task for the Working Group should be to develop proposals for the second meeting of the Parties. In other words, the implementation of the options set out above would occur after, and on the basis of a mandate from, the second meeting of the Parties. If the Working Group wishes to initiate some activities in this field before the second meeting of the Parties, these should be limited to those which can be fitted under other areas of the work programme and are self-financing or not resource-intensive.

55. Under each type of option, opportunities for cooperation with the Espoo Convention in its activities related to the Protocol should be sought, with a view to maximizing synergies and avoiding unnecessary duplication of efforts. With this in mind, focal points to the Aarhus Convention may wish to consult on this topic with the focal points for the Espoo Convention.

Annex

MAIN STEPS IN THE CONSIDERATION OF THE ISSUE OF PUBLIC PARTICIPATION IN STRATEGIC DECISION-MAKING

1. At their first meeting, the Signatories to the Aarhus Convention (April 1999) discussed articles 7 and 8 and the need for further guidance in implementing these provisions, and

> "requested NGOs to collect information on good practices in public participation in programmes, plans, policies and legislation, which would be distributed at its second meeting so that it could decide on what should be done next" (CEP/WG.5/1999/2, para. 72(b)).

2. At the London Ministerial Conference on Environment and Health (June 1999), discussions took place on the issue of access to information, public participation in decision-making and access to justice in environment and health matters, and there was strong support for extending these principles and provisions into the sphere of health. Furthermore, several countries supported the idea of a protocol to the Aarhus Convention on strategic environment and health impact assessment (Report of the Conference, EUR/ICP/EHCO 02 02 05/19, p. 4).

3. During the discussions on the issue of environment and health at the sixth session of the Committee on Environmental Policy (20-24 September 1999), the Committee

> "agreed that the relevant outcome of the Third European Ministerial Conference on Environment and Health should be considered by the Meeting of the Parties to the Espoo Convention and the Meeting of the Signatories to the Aarhus Convention at its second meeting, as should the possibility of drawing up a protocol on strategic environmental impact assessment. The secretariat should prepare a paper to facilitate the discussions" (ECE/CEP/69, para. 38).

4. Following this and in the preparations for the second meeting of the Signatories to the Aarhus Convention and the second meeting of the Parties to the Espoo Convention, a background document on options for developing a legally binding UNECE instrument on strategic environmental assessment was prepared in April 2002 by a consultant to the secretariat (MP.EIA/WG.1/2000/16 – CEP/WG.5/2000/9). The document describes and analyses the various options for developing a legally binding UNECE instrument on strategic environmental assessment.

5. At its second meeting (29-31 May 2000), the Working Group on Environmental Impact Assessment under the Espoo Convention decided "that a protocol on SEA should be developed" under the Convention and recommended to the Meeting of the Parties "that the preparation of a protocol should start for possible adoption at the fifth 'Environment for Europe' Ministerial Conference" (MP.EIA/WG.1/2002/2, paras. 19-21).

6. At their second meeting, the Signatories to the Aarhus Convention (July 2000) noted the decision of the Working Group on EIA, emphasizing the importance of the provisions of the Aarhus Convention being taken fully into account in the process of developing the protocol as well as the need for expertise of officials and NGOs involved in public participation issues to be made available to the process. The Meeting was presented with a background document prepared jointly by the European ECO Forum and the Regional Environmental Center for Central and Eastern Europe (REC), which proposed inter alia the establishment of a task force to support the implementation of articles 7 and 8. Taking into account the need to avoid duplication of efforts, the Meeting decided to defer consideration of the proposal to establish a task force. However, it agreed that a workshop on the issue should be held in order to develop ideas and make suggestions regarding public participation under articles 7 and 8, with a view to supporting the expected development of a protocol on strategic environment assessment to the Espoo Convention (CEP/WG.5/2000/2, paras. 48-54).

7. As agreed by the Meeting of the Signatories to the Aarhus Convention, an international workshop on public participation and health aspects in strategic environmental assessment took place (23-24 November 2000). The workshop was hosted by REC, which also published the proceedings, and involved the participation of focal points from both the Aarhus and Espoo Conventions (Proceedings of the international workshop on public participation and health aspects in strategic environmental assessment, Regional Environmental Center for Central and Eastern Europe).

8. The decision to start the preparation of a protocol on strategic environmental assessment was formally adopted at the second meeting of the Parties to the Espoo Convention (February 2001). The decision recalled the Oslo Ministerial Declaration in which it was recognized that "a systematic analysis of the environmental impact of proposed policies, plans and programmes was enabled by the application of EIA principles and recommended that the principles of EIA in a transboundary context should also be applied to the strategic level…" In the decision (II/9, ECE/MP.EIA/4, annex IX), the Parties to the Espoo Convention urged the Meeting of the Signatories to the Aarhus Convention to contribute to the preparation of the protocol and called on the secretariat to ensure that invitations to the negotiation meetings would be extended to the focal points of the Aarhus Convention.

9. The draft protocol was prepared between May 2001 and January 2003 during eight sessions of an ad hoc working group and adopted at an extraordinary meeting of the Parties to the Espoo Convention held within the framework of the fifth "Environment for Europe" Ministerial Conference (Kiev, 21 May 2003), at which it was signed by 35 States and the European Community.