Draft response by the secretariat of the Aarhus Convention to the Statement by Belarus at the fifth session of the Convention's Meeting of the Parties (agenda 7(a) Implementation of the work programme for 2012-2014)

Introduction

At the fifth session of the Meeting of the Parties to the Aarhus Convention (Maastricht, 30 June – 2 July 2014), Belarus delivered a statement under agenda item 7(a), Implementation of the work programme for 2012-2014, in which it, inter alia, sought clarification of how certain provisions of the Convention were to be interpreted.[1]

The Meeting of the Parties took note of the statement by the representative of Belarus with regard to interpretation of the Convention's provisions. It agreed with the Bureau's proposal in relation to the request by Belarus and, pursuant to paragraph 13(b) and 14 of the annex to decision I/7, agreed to follow a procedure that would also apply to similar requests, namely:

(a) The secretariat would prepare a draft response (taking into account the Implementation Guide, jurisprudence, Compliance Committee decisions, other relevant legislation, etc.) and consult on the draft response with both the Compliance Committee and the Bureau, taking into account their views, and then submit the response to the Party making the request;

(b) If it emerged that there were serious differences of opinion between or within the Compliance Committee, the Bureau and/or the secretariat, the Bureau would report on the matter to the Working Group of the Parties, which could entrust the Bureau (or establish an ad hoc committee), with input provided by the secretariat and Compliance Committee, to prepare a proposal on the subject matter for the consideration of the Meeting of the Parties.[2]

The present document is the secretariat's draft response as envisaged in paragraph (a) above. In accordance with paragraph (a) above, the present document is drawn from existing sources of interpretation developed under the auspices of the Convention, and in particular, the second edition of the Aarhus Convention Implementation Guide, the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, and relevant findings adopted by the Aarhus Convention Compliance Committee.

[1] Available at http://www.unece.org/env/pp/aarhus/mop5_docs.html#/
[2] ECE/MP.PP/2014/2, para. 53.

1. A definition "state"[3] is applicable to the lands in terms of the para. 3a) article 2 of the Aarhus Convention and means qualitative characteristics (for example, degree of degradation) or status of the lands, cadastral characteristics of the land parcels, their purpose of use, etc. Is the size of the land parcel environmental information?

Draft response by the secretariat:

Communication ACCC/C/2004/08 (Armenia) concerned requests for information concerning, inter alia:

- "the boundaries of Dalma Orchards, the category of land to which Dalma Orchards belonged, the administrative area the land was in, whether there were leases issued for the land on this territory (and, if so, their boundaries)…;"[4]
- "maps annexed to the decrees, and …the location of land plots allocated by the decrees for particular activities"[5]

In its findings, the Aarhus Convention Compliance Committee found:

> "the information referred to … above clearly falls under the definition of "environmental information" under article 2, paragraph 3."[6]

In the same paragraph of its findings, the Committee found that:

> "The issuing of government decrees on land use and planning constitutes "measures" within the meaning of article 2, paragraph 3 (b), of the Convention".[7]

2. According to para. 1a) article 4 of the Aarhus Convention each Party shall ensure that government agencies submit environmental information to the public "without an interest having to be stated". However, according to para. 3b) of above mentioned article that a request for environmental information may be refused if this request is "unreasonable".

Draft response by the secretariat:

The Implementation Guide explains that:

> "Under the Convention, public authorities shall not impose any condition for supplying information that requires the applicant to state the reason he or she wants the information or how he or she intends to use it. Requests cannot be rejected because the applicant does not have an interest in the information. This follows the "any person" principle". [8]

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee found that:

[3] The Russian language version of Belarus' statement uses the term «состояние» which is the same as found in article 2, paragraph 3(a) of the Convention, «состоянии». Therefore, for the purposes of the English language version of the present document, the secretariat will use the corresponding term in the English language of the Convention i.e. "state", rather than the term used in the English translation of Belarus' statement, which was "condition". The term "condition" is not found in article 2, paragraph 3(a) of the Convention.
[4] ECE/MP.PP/C.1/2006/2/Add.1, para. 13(a).
[5] ECE/MP.PP/C.1/2006/2/Add.1, para. 13(c).
[6] ECE/MP.PP/C.1/2006/2/Add.1, para. 20.
[7] Ibid.
[8] Implementation Guide, second edition, page 80.

> "The public authorities, including the developer, did not address the request of the members of the public and, in some instances, requested that a specific purpose for the use of the information be stated. The Committee notes that the statement of a specific interest is not included in the grounds that may justify the refusal of the public authorities to provide access to information, which are listed in article 4, paragraphs 3 and 4, of the Convention. Besides, article 4, paragraph 1 (a), of the Convention specifically provides that the requested information shall be available "without an interest having to be stated".[9]

In its findings on communication ACCC/C/2004/1 (Kazakhstan), the Compliance Committee found that:

> "The Committee has noted the information provided by the Party concerned that it is a general practice for an information request to include reasons for which such information is requested. Article 4, paragraph 1 (a), of the Convention explicitly rules out making such justification a requirement".[10]

With respect to when a request for environmental information may be refused on the basis of being "manifestly unreasonable", the Implementation Guide states:

> "Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it is clear that it must be more than just the volume and complexity of the information requested. Under article 4, paragraph 2, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable" as envisioned in paragraph 3 (b)."[11]

To date, no findings of the Compliance Committee have directly addressed what would constitute a "manifestly unreasonable" request within the meaning of article 4, paragraph 3(b).

3. What does it mean "residues" in the context of para. 6a) article 6 of the Aarhus Convention?

Draft response by the secretariat:

Article 6, paragraph 6 of the Convention states that "Each Party shall require the competent public authorities to give the public concerned access for examination…to all information relevant to the decision-making…that is available at the time of the public participation procedure….The relevant information shall include at least, and without prejudice to the provisions of article 4:

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
(b) ….

With respect to residues, the Implementation Guide states:

[9] ECE/MP.PP/2011/11/Add.2, para 71.
[10] ECE/MP.PP/C.1/2005/2/Add.1, para 20.
[11] Implementation Guide, second edition, page 84.

> "The description must include an estimate of the residues and emissions expected as a result of the proposed activity. This establishes a link between these physical and technical characteristics and the potential environmental impact of the proposed activity".[12]

To date, no findings of the Compliance Committee have directly addressed what constitutes "residues" for the purposes of article 6, paragraph 6(a).

4. According to para. 2d) in the Annex I to the Guidelines on access to information, public participation and access to justice in GMOs matters it defines 'Deliberate release' is defined[13] as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment.

The proving ground which is used for GMO's tests has a number of above mentioned control measures (barriers, security, security cameras, etc.).

Is a planting of GMO at the proving ground an intentional introduction of GMOs in the environment?

Draft response by the secretariat:

The preamble of the 2002 Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms recognizes that "the deliberate release of GMOs into the environment and the accidental release of GMOs from certain types of contained use may have significant adverse effects on the environment, and pose risks to human health".[14] Annex I to the Lucca Guidelines states that:

> "Deliberate release is defined as any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment."[15]

In contrast, annex I to the Lucca Guidelines states that.

> "Contained use means any activity, undertaken within a facility, installation or other physical structure, which involves genetically modified organisms that are controlled by specific measures that effectively limit their contact with, and their impact on, the external environment."[16]

To date, no findings of the Compliance Committee have directly considered the "deliberate release" or "contained use" of GMOs).

[12] Implementation Guide, second edition, page 151.
[13] Sic.
[14] MP.PP/2003/3 KIEV.CONF/2003/INF/7, second preambular paragraph.
[15] MP.PP/2003/3 KIEV.CONF/2003/INF/7, Para 2 (d) of the Annex I.
[16] MP.PP/2003/3 KIEV.CONF/2003/INF/7, Para 2 (f) of the Annex I.

5. One issue is still remains unclear, how to apply provisions of the Aarhus Convention devoted to public participation in decision-making by concrete activities in terms of new (innovative) activities?

Draft response by the secretariat:

The Convention's exact requirements for public participation in decision-making on a new (innovative) activity will depend on the type of decision under consideration. For example, whether the decision in question is a draft policy (see article 7), a draft plan or programme (see article 7), a draft executive regulation or legally binding rule (see article 8), or a decision to permit a specific activity (see article 6).

With respect to a decision to permit a specific new (innovative) activity, paragraph 20 of annex I requires the provisions of article 6 to be applied to:

> "Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation."

In addition, article 6, paragraph 1(b) of the Convention stipulates that each Party:

> "Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;"

With respect to the implementation of article 6, paragraph 1 (b), the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations), states that:

> "Article 6, paragraph 1 (b) of the Convention requires a mechanism to be established within the national legal framework to determine whether a decision on a proposed activity which is not listed in annex I may yet have a significant effect on the environment and thus require public participation in accordance with the requirements of article 6. The mechanism for such a determination may be related to the system of EIA or may be independent from it, or a mixture of both approaches may be applied." [17]

Finally, if the innovative activity is being undertaken exclusively or mainly for research, development or testing, paragraph 21 of annex I of the Convention provides that:

> "The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health."

In relation to paragraph 21 of annex I of the Convention, the Implementation Guide states:

> "With respect to paragraph 21 of annex I, under very special circumstances the authorities may avoid public participation if their decision concerns activities listed in annex I that are

[17] Maastricht Recommendations, para. 43.

performed within various kinds of research. Research must be the primary goal of the activity and the period of the project may not exceed two years. If the research project may cause a significant adverse effect on the environment or health, article 6 automatically applies."[18]

6. According to para. 1a) article 6 and List of Activities contained in the Annex I to Aarhus Convention the implementation of procedures for public participation in airports construction with a basic runway length of 2,100 m or more is obliged.

Questions:

Is it necessary to conduct procedures for public participation if it is panned[19] to construct the second (not basic) runway with length of more than 2,100 m?

Is a length of runway specified in the Annex I taking into account in run and running-down zones or not?

Draft response by the secretariat:

With respect to whether it is necessary to conduct a public participation procedure if it is planned to construct a second runway (not basic) runway with a length of more than 2,100 metres, paragraph 22 of annex I to the Convention states that:

> "Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1(a) of this Convention."

As to whether the length of the runway specified in annex I includes the in-run and running-down zones, neither the Implementation Guide nor the Compliance Committee have to date addressed this point.

In accordance with footnote 2 of annex I, for the purposes of the Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (annex 14).

Annex 14 to the Chicago Convention provides the following definitions:[20]

> "Aerodrome"[21] is "a defined area on land or water (including any building, installations and equipment) intended to be used either wholly or in part for the arrival, departure and movement of aircraft".
>
> "Runway" is "a defined rectangular area, on a land aerodrome selected or prepared for the landing and take-off run of aircraft along its length."
>
> "Taxiway" is "a defined path, on a land aerodrome, selected or prepared for the use of taxying aircraft."

[18] Implementation Guide, second edition, page 240.
[19] Sic.
[20] Annex 14, Part I, Chapter 1.
[21] The term "aerodrome" rather than "airport" is used in Annex 14 to the Chicago Convention.

In annex 14 to the Chicago Convention, the length of any taxiways is not included in basic runway length.[22]

7. According to para. 7 article 6 of the Aarhus Convention "Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or enquiry with applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity". Does it mean that government agency shall give public a right for verbally expression its opinion during public hearing?

Draft response by the secretariat:

In its findings to communications ACCC/C/2010/45 and ACCC/C/2011/60 (the United Kingdom of Great Britain and Northern Ireland), the Compliance Committee found that:

> "Nevertheless, the Committee notes that article 6, paragraph 7, of the Convention gives any member of the public the right to submit comments, information, analyses or opinions during public participation procedures, either in writing or, as appropriate, orally at a public hearing or inquiry with the applicant. The fact that some local authorities only provide for participation of members of the public at planning meetings via written submissions, as stressed in communication ACCC/C/2011/60, is not as such in non-compliance with article 6, paragraph 7, of the Convention."[23]

With respect to when a public hearing or enquiry may be appropriate, the Maastricht Recommendations recommend that:

> "With respect to the selection of the most appropriate tools and techniques for public participation, experience has shown that:
>
> (a) For activities subject to the Convention of high potential environmental significance or affecting a large number of people, more elaborate procedures may be appropriate to ensure effective public participation. For example, in addition to opportunities for the public to submit written comments, public inquiries or hearings (more formal, including submission of formal evidence and the possibility for cross-examination in many countries) or public debates or meetings (less formal, possibly with facilitated group processes), may be appropriate;
>
> (b) For activities subject to the Convention with less significant environmental effects, access to all relevant information and the opportunity to submit written comments and to have due account taken of them may sometimes be sufficient. Nevertheless, the public authority should have the power to organize a hearing in any case it considers it appropriate to do so, including upon request from the public".[24]

[22] Annex 14, Part III, Chapter 1.
[23] ECE/MP.PP/C.1/2013/12, para 78.
[24] Maastricht Recommendations, ECE/MP.PP/2014/2/Add.2, para. 11.

8. According to the definition which specified in the on[25] Implementation Guide of the Aarhus Convention "The measurement of the extent to which Parties meet their obligations under article 8 is not based on results, but on efforts". What does it mean "to take efforts"? If the Party "took efforts", but nothing happened and a goal was not achieved, is it implementation of the Aarhus Convention?

Draft response by the secretariat:

Article 8 of the Aarhus Convention states that "Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment."

Article 8 then sets out a list of steps that should be taken, namely:

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

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

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

Lastly, article 8 requires that "the results of the public participation shall be taken into account as far as possible".

With respect to the three steps set out in paragraphs (a)-(c) of article 8, the Implementation Guide explains:

> The Convention sets forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation in the preparation of executive regulations and other generally applicable legally binding rules. These elements establish a basic procedural framework for public participation, including time frames, access to information and opportunity for commenting.

With respect to the final sentence of article 8, requiring the result of the public participation to be taken into account as far as possible, the Implementation Guide states:

> While the specific modalities of public participation in the preparation of rules are not prescribed by the Convention, it is mandatory for the Parties to ensure that the outcome of public participation is taken into account as far as possible. As discussed above under article 6, paragraph 8, this provision establishes a relatively high burden of proof for public authorities to demonstrate that they have taken into account public comments in processes under article 8.[26]

In its findings on communication ACCC/C/2010/53 (United Kingdom), the Compliance Committee found that:

> "The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner, pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e., effective public participation at an early stage, when all options are open; publication of a draft early enough; sufficient timeframes for the public to consult a draft and

[25] Sic.
[26] Implementation Guide, second edition, page 185.

comment). Parties are then left with some discretion as to the specificities of how public participation should be organized."[27]

In the same findings, the Committee found:

"The Committee also examines whether the result of public participation was taken into account as far as possible. This is mandatory under article 8 and in practice it means that the final version of the normative instrument…should be accompanied by an explanation of the public participation process and how the results of the public participation were taken into account."[28]

[27] ECE/MP.PP/C.1/2013/3, para 84.
[28] ECE/MP.PP/C.1/2013/3, para 86.