

**Current working draft of revised Implementation Guide
(in track changes)**

This document is the current working draft prepared by the secretariat for review by the team of authors revising the Implementation Guide.

This draft takes into account the comments received by 16 January 2011 from national focal points, NGOs and other stakeholders on the first draft revised text. It also contains a number of draft revisions proposed by the secretariat in order to make the text clearer and more user-friendly.

The document is circulated in track changes form showing all changes from the original text published in 2000.

All new changes made since the first revised draft are highlighted in pink with comment boxes identifying who proposed that change.

INTRODUCTION

A. A new kind of environmental convention

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted at the Fourth Ministerial Conference "Environment for Europe" in Aarhus, Denmark, on 25 June 1998. ~~Thirty-nine countries and the European Community have since signed it. It entered into force on 30 October 2001. As of [date of publication], it has [forty-four] Parties from the UNECE region, including [forty-three] countries from the UNECE region plus the European Union.~~

The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection. It focuses on interactions between the public and public authorities in a democratic context and it is forging a new process for public participation in the negotiation and implementation of international agreements.

The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency, and responsiveness.

The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation. It backs up these rights with access-to-justice provisions that go some way towards putting teeth into the Convention. In fact, the preamble immediately links environmental protection to human rights norms and ~~raises environmental rights to the level of other human rights. recognizes that every person has the right to live in an environment adequate to his or her health and well-being.~~

Comment [o1]: Deletion (Croplife)

Comment [o2]: Insertion (editorial team)

Whereas most multilateral environmental agreements cover obligations that Parties have to each other, the Aarhus Convention covers obligations that Parties have to the public. It goes further than any other convention in imposing clear obligations on Parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned. ~~This is reflected in the compliance review system under the Convention which allows members of the public to bring issues of compliance at the international level.~~

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

B. The road to Aarhus

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

~~The Aarhus Convention negotiations were themselves an exercise in public participation. The idea for a convention emerged from the "Environment for Europe" process — a process that had already included the public. It was a short step from there for forward-looking countries and non-governmental organizations to put their efforts and energy into the Aarhus Convention negotiations.~~ Yet the roots of the Convention go further back in the "Environment for Europe" process, in the development of international environmental and human rights law, and in the development of national law over the years.

Comment [FL3]: Text moved down and shortened (editorial team)

International declarations and resolutions as well as international legal instruments such as conventions played a decisive role in the creation of the 1998 Aarhus Convention (see box). ~~A significant early initiative in UN/ECE was the draft charter of environmental rights and obligations of 1990 (ENVWA/R.38, annex I). Although not adopted, the draft represents an early compilation of principles and themes similar to those ultimately found in the Aarhus Convention.~~

Comment [MSOffice4]: Deletion (Croplife)

One of the main stepping stones on the way to the Aarhus Convention was the UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making ("UNECE Guidelines" or "Sofia Guidelines"). The idea of the Guidelines originated at the Second Ministerial Conference in Lucerne, Switzerland, in April 1993. At that meeting, the Senior Advisers to ECE Governments on Environmental and Water Problems (which later became the Committee on Environmental Policy) identified public participation as one of seven key elements for the long-term environmental programme for Europe. Consequently, in paragraph 22 of their Declaration, the Ministers gathered in Lucerne requested UN/ECE, *inter alia*, to draw up proposals for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision-making.

Comment [M5]: Insertion (editorial team)

The Senior Advisers established the Task Force on Environmental Rights and Obligations, which in 1994 was given the task of drawing up draft guidelines and other proposals on effective tools and mechanisms promoting public participation in environmental decision-making. By January 1995 the UN/ECE Guidelines were developed and by May 1995 accepted by the Working Group of Senior Government Officials responsible for the preparation of the Sofia Conference. The UN/ECE Guidelines were endorsed at the Third Ministerial Conference "Environment for Europe" held in Sofia, in October 1995. The same Conference decided that the drafting of a convention should be considered.

At its meeting on 17 January 1996, the Committee on Environmental Policy established the Ad Hoc Working Group for the preparation of a convention on access to information and public participation in environmental decision-making. The Committee also decided that the future convention should reflect the scope of the UN/ECE Guidelines.¹ A "Friends of the Secretariat" group was formed to assist in drawing up a draft convention based on the Guidelines. The "draft elements" were then the starting point for negotiations among countries, which began in June 1996. Ten negotiating sessions under the chairmanship of Willem Kakebeke of the Netherlands were held through March 1998, nine of them in Geneva and one in Rome. The Aarhus Convention negotiations were themselves an exercise in public participation. These negotiating sessions involved an unprecedented level of participation on the part of NGOs, among them a coalition of environmental ~~citizens organizations~~ organizations, groups and associations established especially for the drafting sessions.

Comment [FL6]: Text moved to here (editorial team)

Comment [FL7]: Text moved to here (editorial team)

Comment [FL8]: Edit (editorial team)

Comment [FM9]: Edit (editorial team at request of Croplife)

The road to Aarhus in international and regional instruments

1966 International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly in New York on 16 December 1966.² Article 19 deals with the "freedom to seek, receive and impart information".

1972 Stockholm Declaration on the Human Environment: principle 1 linked environmental matters to human rights and set out the fundamental right to "an environment of a quality that permits a life of dignity and well-being".

1980 Salzburg Declaration on the Protection of the Right of Information and of Participation, adopted at the Second European Conference on the Environment and Human Rights at Salzburg (Austria) on 3 December 1980.³

1981 African Charter of Human and Peoples' Rights, adopted at Algiers on 26 June 1981. An early reference to the right to a satisfactory environment favourable to human development.

1981 Council of Europe Recommendation No. (81) 19 of the Committee of Ministers to member States on the access to information held by public authorities, adopted at Strasbourg (France) on 25 November 1981.

1982 World Charter for Nature:⁴ most relevant provisions for the Aarhus Convention can be found in chapter III, paragraphs 15, 16, 18 and 23, discussed in reference to the preamble, below.

1985 Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Its practice on public participation in EIA informed many of the Aarhus Convention negotiating parties.

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

1987 Our Common Future:⁵ *Report by the World Commission on Environment and Development (Brundtland Report)* was a catalyst for the 1992 United Nations Conference on Environment and Development (UNCED) and its Rio Declaration.

1988 Additional Protocol to the American Convention on Human Rights, adopted in San Salvador on 17 November 1988, established the right to a healthy environment.

1989 European Charter on Environment and Health, adopted at the First European Ministerial Conference on Environment and Health in Frankfurt (Germany), recognized public participation to be an important element in the context of environment and health issues.

1989 CSCE Environment Conference, Sofia. All countries present except Romania endorsed proposed conclusions and recommendations affirming the rights of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues, without legal and administrative impediments.

1990 General Assembly resolution 45/94 of 14 December 1990, recognized that individuals are entitled to live in an environment adequate for their health and well-being.

~~**1990 draft charter on environmental rights and obligations of individuals, groups and organizations,** adopted by a group of experts invited by the Netherlands Government at the Bergen Conference (Norway) on 11 May 1990 and the UNECE **draft charter of environmental rights and obligations,** adopted by the qualified intergovernmental meeting at Oslo on 31 October 1990. These early drafts had an influence on later instruments.~~

Comment [H10]: Deletion (Croplife)

1990 Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment. Its practice on access to environmental information informed many of the Aarhus Convention negotiating parties.

1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo (Finland) on 25 February 1991. The Espoo

Convention shows the link between public participation and environmental impact assessments. Its article 4, paragraph 2, is especially relevant for public participation.

1992 UNECE Convention on the Transboundary Effects of Industrial Accidents, adopted at Helsinki on 17 March 1992. Its article 9 deals with "information to, and participation of the public".

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

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

Comment [M11]: Edit (editorial team)

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

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

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

1994 draft principles on human rights and the environment.⁹ Document of the Economic and Social Council of the United Nations published on 6 July 1994. The draft principles were annexed to the final report of the Special Rapporteur on Human Rights and the Environment, Mrs. Fatma Zohra Ksentini, often referred to as the "Ksentini Report". Part III of the draft principles pertains to all three Aarhus pillars.

Comment [M12]: Footnote added (editorial team)

Comment [M13]: Insertion (editorial team)

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

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

C. Walking through the Convention

1. Preamble

The preamble to the Aarhus Convention sets out the aspirations and goals that show its origins as well as guiding its future path. In particular the preamble emphasizes two main concepts: environmental rights as human rights and the importance of access to information, public participation and access to justice to sustainable and environmentally sound development.

Making the connection to human rights

The preamble connects the concept that adequate protection of the environment is essential to the enjoyment of basic human rights with the concept that every person has the right to live in a healthy environment and the obligation to protect the environment. It then concludes that to assert this right and meet this obligation, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.

Promoting sustainable and environmentally sound development

The preamble recognizes that sustainable and environmentally sound development depends on effective governmental decision-making that contains both environmental considerations and input from members of the public. When governments make environmental information publicly accessible and enable the public to participate in decision-making, they help meet society's goal of sustainable and environmentally sound development.

2. Laying the groundwork-the general part

The first three articles of the Convention include the objective, the definitions and the general provisions. These articles lay the groundwork for the rest of the Convention, setting goals, defining terms and establishing the overarching requirements that will guide the interpretation and implementation of the rest of the Convention.

Objective

Article 1 of the Convention requires Parties to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in order to contribute to the protection of the right of every person of "present and future generations" to live in an environment adequate to his or her health and well-being.

Definitions

In article 2, the Convention defines "Party," "public authority," "environmental information," "the public" and "the public concerned". These definitions guide the reader's understanding of these terms as they are used throughout the Convention.

The Convention primarily sets out obligations for Parties (contracting Parties to the Convention) and public authorities (government bodies and persons or bodies performing government functions). In addition to national government bodies, "public authority" can also refer to institutions of regional economic integration organizations,

such as the European Community Union, although it explicitly does not apply to bodies acting in a judicial or legislative capacity.

Comment [MSOffice14]: Edit (EU)

The Convention also sets out rights for the "public" (natural or legal persons, as well as organizations) and "the public concerned" (those who are affected or likely to be affected by or having an interest in the environmental decision-making). Non-governmental organizations need only promote environmental protection and meet requirements under national law to be part of the "public concerned".

Finally, environmental information is a concept that runs throughout the Convention. The Convention gives "environmental information" a broad definition, including not only environmental quality and emissions data, but also information from decision-making processes and analyses.

Principles

The general provisions of the Convention—article 3—set the general principles that guide all the other, more detailed and specific provisions. They cover aspects important for the implementation of the Convention, such as compatibility among its elements, guidance to the public in taking advantage of ~~it~~ the rights it conveys, environmental education and awareness-building, and support to groups promoting environmental protection.

Comment [FL15]: Edit (editorial team)

The general provisions make it clear that the Convention is a floor, not a ceiling. Parties may introduce measures for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention. The Convention also makes it clear that existing rights and protection beyond those of the Convention may be preserved. Finally, the general provisions call for the promotion of the Aarhus principles in international decision-making, processes and organizations.

3. The three "pillars"

The Aarhus Convention stands on three "pillars": access to information, public participation and access to justice, provided for under its articles 4 to 9. The three pillars depend on each other for full implementation of the Convention's objectives.

Pillar I—Access to information

Access to information stands as the first of the pillars. It is the first in time, since effective public participation in decision-making depends on full, accurate, up-to-date information. It can also stand alone, in the sense that the public may seek access to information for any number of purposes, not just to participate.

The ~~access to~~ information pillar is split in two. The first part concerns the right of the public to seek information from public authorities and the obligation of public authorities to provide information in response to a request. This type of access to information is called "passive", and is covered by article 4. The second part of the information pillar concerns the right of the public to receive information and the obligation of authorities to collect and disseminate information of public interest without the need for a specific request. This is called "active" access to information, and is covered by article 5.

Comment [FL16]: Edit (editorial team)

Pillar II—Public participation in decision-making

The second pillar of the Aarhus Convention is the public participation pillar. It relies upon the other two pillars for its effectiveness—the information pillar to ensure that the public can participate in an informed fashion, and the ~~access_ to_~~ justice pillar to ensure that participation happens in reality and not just on paper.

Comment [FL17]: Edit (editorial team)

The public participation pillar is divided into three parts. The first part concerns participation by the public that may be affected by or is otherwise interested in decision-making on a specific activity, and is covered by article 6. The second part concerns the participation of the public in the development of plans, programmes and policies relating to the environment, and is covered by article 7. Finally, article 8 covers participation of the public in the preparation of laws, rules and legally binding norms.

Pillar III—Access to justice

The third pillar of the Aarhus Convention is the ~~access_ to_~~ justice pillar. It enforces both the information and the participation pillars in domestic legal systems, and strengthens enforcement of domestic environmental law. It is covered by article 9. Specific provisions in article 9 enforce the provisions of the Convention that convey rights onto members of the public. These are article 4, on passive information, article 6, on public participation in decisions on specific activities, and whatever other provisions of the Convention Parties choose to enforce in this manner. The ~~access to_~~ justice pillar also provides a mechanism for the public to enforce environmental law directly.

Comment [FL18]: Edit (editorial team)

Comment [FL19]: Edit (editorial team)

4. Final provisions: administering the Convention

A convention as an obligation on sovereign entities requires institutions and formal mechanisms (for example, secretariat, committees and other subsidiary bodies) to allow the Parties to confer and work together on implementation. The Aarhus Convention includes numerous provisions relating to such institutions and formalities, as do most international agreements. These provisions are found in articles 10 to 22. Among the more significant issues covered by the Convention's final provisions are its coming into force, the Meeting of the Parties, secretariat, compliance review and resolution of disputes.

While a UN/ECE convention, the Aarhus Convention is also open to Member States of the United Nations from outside the UN/ECE region following its entry into force. The Aarhus Convention therefore has global ambitions, justifiably so, as the rights are universal in nature. A number of other regions of the world show a strong interest in the Aarhus Convention and are discussing the development of similar obligations. However, to date, there has been no accession to the Convention by a country outside of the UN/ECE region!

Comment [H20]: Insertion (Croplife)

Comment [FM21]: (Comment by editorial team): After MOP-4, reference to the decision on accession by non-ECE States as adopted may be added here.

5. Annexes

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

D. Implementation and further development of the Convention

Several special issues are worth mentioning in the context of the Convention, because at the time of its adoption they were pressing issues. The Convention took them into account, but as is the case with matters in the early stages of development under

international law, it did so preliminarily. At the same time these issues were to some extent flagged as issues for further development by the Meeting of the Parties.

The first of these is genetically modified organisms (GMOs). In the case of decision-making on such organisms, the Convention ~~made~~ makes reference to them, for example in article 6, paragraph 11, which applies public participation provisions to certain decisions concerning GMOs, but ~~left~~ leaves the door open to future deliberations. Considering that the negotiation of a biosafety protocol under the Convention on Biological Diversity ~~has proved~~ is to be difficult, with sharp divisions among various groups of nations, the approach taken in the Convention is understandable. The Resolution of the Signatories called for the issue to be addressed at the first ~~session of the Meeting of the Parties~~ session of the Meeting of the Parties. NGOs meeting parallel to the first meeting of the Signatories (Chisinau, Moldova, April 1999) ~~to the Aarhus Convention in April 1999, in Chisinau, Republic of Moldova, also issued a statement calling for attention to GMOs. In light of these calls, the Meeting of the Parties, at its first session, (Lucca, 21-23 October 2002) adopted decision I/4 and the Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms. A new Working Group was established to explore options for a legally binding approach to further developing the application of the Convention in the field of GMOs. As a result of this work, the Meeting of the Parties, at its second session (Almaty, 25-27 May 2005) adopted decision II/1 on Genetically Modified Organisms, including an amendment to the Convention annexed to the decision.~~

Comment [FL22]: Edit (editorial team)

Comment [FL23]: Edit (editorial team)

Comment [FL24]: Edit (editorial team)

Comment [FL25]: Edit (editorial team)

The second issue specially mentioned in the Convention is the development of systems of pollution inventories or registers. These mechanisms for information gathering have been highly successful where they have been tried and are covered by article 5, paragraph 9. The Convention takes an affirmative approach to the development of such systems of inventories or registers. It goes so far as to establish the development of a possible instrument on pollution inventories or registers as one of the priorities for the first ~~session of the Meeting of the Parties when after the Convention comes~~ session of the Meeting of the Parties ~~into force, (article 10, paragraph 2(i)). In keeping with this, the Protocol on Pollutant Release and Transfer Registers was adopted at an extraordinary session of the Meeting of the Parties to the Aarhus Convention on 21 May 2003 in Kiev. The Protocol is the first legally binding international instrument on pollutant release and transfer registers. Its objective is "to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs)." The Protocol is designed to be an 'open' global protocol, and all States can participate in the Protocol, including those which have not ratified the Aarhus Convention and those which are not members of the UN/ECE. The Protocol entered into force on 8 October 2009. The Convention also gives special attention to new forms of information, including electronic information. This is referred to in the preamble and in article 3 on the general provisions and in articles 4 and 5 on access to information. The Convention takes into account the changing information technology, which is moving towards electronic forms of information, and the ability to transfer information over the Internet and other systems.~~

Comment [FL26]: Edit (editorial team)

Finally, in implementing any convention, Parties are concerned with ensuring compliance ~~and effective implementation~~. The Aarhus Convention acknowledges that the Parties need to work together to establish compliance mechanisms specific to its needs. Article 10, paragraph 2, of the Convention requires the Parties at their meetings to keep under continuous review the implementation of the Convention on the basis of regular reporting by the Parties. The Meeting of the Parties, through Decision I/8, agreed upon procedures for reporting and upon the reporting format itself. Each Party should prepare, for each ordinary meeting of the Parties, a report on the necessary legislative, regulatory or other measures that it has taken to implement the provisions of the Convention; and their practical implementation. Reports should be prepared according to the format set out in the annex to Decision I/8. In addition, its article 15 of the Convention requires the Parties to establish a compliance regime at their first meeting, but the particular form such a regime will take is left to further discussion. At the second meeting of the Signatories, it was accordingly decided to establish an open-ended intergovernmental working group to

draw up a text for a draft decision establishing a compliance mechanism. As a result of this work, the Meeting of the Parties, at its first session (Lucca, 21-23 October 2002) adopted decision I/7 on review of compliance, and in accordance with that decision, elected the first compliance committee for the Convention.

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

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

Comment [FL27]: Edit (Croplife)

Comment [FL28]: Edit (editorial team)

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

The road from Aarhus

The Water and Health Protocol (London, 1999) to the UN/ECE Convention on the Protection and Use of International Watercourses and Transboundary Lakes was the first international instrument to take the provisions of the Aarhus Convention into account. Its article 10 includes provisions on public information based on articles 4 and 5 of the Aarhus Convention, and its article 5 (4) establishes the principles of access to information and public participation in its application. Also, its article 15 on compliance contains a requirement for appropriate public involvement, as in the corresponding article of the Aarhus Convention.

Comment [MSOffice29]: Edit (editorial team)

~~The Committee on Environmental Policy of UN/ECE has decided to review the consistency of the existing UN/ECE Conventions in force with the Aarhus Convention.~~

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

The Plan of Implementation adopted at the World Summit on Sustainable Development (Johannesburg, 2002), refers to the Aarhus Convention as one of the UNECE region's

ongoing efforts in furtherance of the UNECE region's its commitment to sustainable development (paragraph 80).

The Aarhus Convention has been cited by the European Court of Human Rights in several cases, including *Tatar v Romania*¹⁰ and *Branduse v Romania*¹¹.

The safeguard policies of the International Bank for Reconstruction and Development and the International Development Association (collectively the World Bank) as well as the International Finance Corporation have been strongly influenced by the principles of the Aarhus Convention. ~~The World Bank and~~ The European Bank of Reconstruction and Development ~~have reviewed~~ has also reviewed its ~~their~~ environmental policies in light of the Aarhus Convention.

The International Finance Corporation has revised its Safeguards Policy to incorporate the principles of the Aarhus Convention.

At its eleventh special session (Bali, 24-26 February 2010, the Governing Council of the United Nations Environment Programme (UNEP) adopted Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters. Representatives of the Aarhus Convention participated in consultations regarding the drafting of the guidelines.

Comment [FL30]: Edit (editorial team)

Comment [WX31]: Edit footnote (editorial team)

Comment [WX32]: Edit footnote (editorial team)

Comment [WX33]: Edit (editorial team)

The road from Aarhus

The Water and Health Protocol (London, 1999) to the UN/ECE Convention on the Protection and Use of International Watercourses and Transboundary Lakes was the first international instrument to take the provisions of the Aarhus Convention into account. Its article 10 includes provisions on public information based on articles 4 and 5 of the Aarhus Convention, and its article 5 (1) establishes the principles of access to information and public participation in its application. Also, its article 15 on compliance contains a requirement for appropriate public involvement, as in the corresponding article of the Aarhus Convention.

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

done at Aarhus, Denmark, on 25 June 1998

entered into force on 30 October 2001

Comment [FL34]: Insertion (editorial team)

Preamble

A preamble is the introduction to a treaty. It is an integral part of the legal agreement, but does not establish binding obligations. Instead it serves several functions, including placing the agreement in a wider legal and political context, establishing principles for guidance in interpretation, and setting progressive goals for implementation. The preambular paragraphs identify principles that may help in:

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

A preamble is usually constructed as a sequence of secondary clauses setting forth the motives for the conclusion of the treaty and by indicating the basis (shared principles underlying the text) and describing the state of past, present and future relations between the Contracting Parties. The preamble helps to denote not only the motives, but also the objective and purpose of the treaty.¹²

Comment [o35]: Edits (editorial team)

The preamble may be relied upon for interpretation purposes. Article 31, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties¹³ states that the preamble is part of the context and is the a primary source of interpretation. Therefore, the preamble can be of great importance for establishing the meaning of treaty provisions and clarifying their purport.¹⁴

Comment [o36]: Edit (editorial team)

By referring to declarations and other “soft law” instruments, and relating them to the specific obligations that follow in the text of a treaty, a preamble may also help to confirm the soft law provisions and contribute to their eventual development into hard law.

The implications of a preamble often go beyond the obligations in the substantive articles that follow. This is mainly because such paragraphs The articles of an instrument might leave open certain matters because the subject is not be yet ripe yet for specific obligations or because there is not yet a consensus among the contracting States. Nevertheless The relevant preambular paragraphs, therefore, they represent an important step in the development of customary international law may indicate directions for further work and may later be relied on in the development of future agreements.¹⁵ An example is preambular paragraph 20 referring to genetically modified organisms. The tendency of soft law provisions to develop into legally binding rules can be shown by principle 21 of the 1972 Stockholm Declaration, reaffirmed through principle 2 of the 1992 Rio Declaration, and enshrined in a binding instrument in article 3 of the Convention on Biological Diversity.¹⁴ This provision declared that States should be internationally responsible for the environmental consequences of activities under their jurisdiction or

Comment [MSOffice37]: Deletion (Croplife)

~~control. According to some scholars, this declaratory principle became legally binding through State practice and *opinio iuris* even before 1992.⁴⁵ In any case, by 1997 it was possible for the International Court of Justice to state:~~

~~"The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."⁴⁶~~

The preamble to the Aarhus Convention establishes a structure within the first few paragraphs. The first preambular paragraph sets out the fundamental right "to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being" by referring to principle 1 of the Stockholm Declaration. The second preambular paragraph recalls principle 10 of the Rio Declaration, which brings in the aspect of public participation in environmental issues. The third preambular paragraph further develops the concepts of fundamental rights in the field of the environment, and in the fourth and fifth preambular paragraphs these two linked concepts are placed in the context of human health and sustainable development.

This structure recognizes that public participation as laid down in the Aarhus Convention is a critical tool in guaranteeing the right to a healthy environment. The earlier preambular paragraphs present a kind of history of the parallel development of the recognition of environmental rights and the recognition of the role of public participation in the context of sustainable development. As later preambular paragraphs show the growing linkage between these concepts, they set the tone for the Convention as a whole. One of the most important paragraphs in the preamble is the seventh, which explicitly recognizes "that every person has the right to live in an environment adequate to his or her health and well-being". One of the means for enjoying the right and for observing the duty to protect the environment is through the Convention's guarantee of specific rights.

The preamble also sets out more practical policy considerations behind the Convention, such as its relationship to improved decision-making and greater social consensus. Transparency in government, freedom of information, and the role of non-governmental associations as powerful forces in society are all invoked. The preambular paragraphs emphasize the importance of education, capacity-building and the use of electronic media to improve communication. The sixteenth, seventeenth and twentieth preambular paragraphs touch upon the responsibilities of government and the relationship between the State and the people. The eighteenth preambular paragraph is an "access to justice" provision, noting the role of the judiciary in upholding the rules under which society is governed.

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

The Parties to this Convention,

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

The United Nations General Assembly first called for a conference on the human environment in December 1968.¹⁶ The Conference took place in Stockholm from 5 to 16 June 1972 and was attended by 114 States and a large number of international institutions and non-governmental organizations as observers. The Conference adopted three non-binding instruments: a resolution on institutional and financial arrangements, a declaration of 26 principles and an action plan.

Principle 1 of the Stockholm Declaration of Principles states that:

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."

The first sentence of principle 1 links environmental protection to human rights norms and raises environmental rights to the level of other human rights. The development of international human rights law traditionally proceeded independently of international environmental law, but increasingly these independent tracks have been intersecting.

This concept of environmental rights is echoed throughout the preamble by reference to other international texts, such as General Assembly resolution 45/94 of 14 December 1990 recognizing that individuals are entitled to live in an environment adequate for their health and well-being, and by referring specifically to the right to a healthy environment. Article 1 further includes this concept as a core objective of the Aarhus Convention.

[2] *Recalling also principle 10 of the Rio Declaration on Environment and Development,*

The Stockholm Conference in 1972 fostered the concern for environmental matters at a multilateral level. The 1987 Report by the World Commission on Environment and Development, "Our Common Future" (the so-called Brundtland Report, named after the Norwegian Prime Minister Gro Harlem Brundtland, who chaired the Commission), was a further catalyst for the 1992 United Nations Conference on Environment and Development (UNCED).

In December 1989, the United Nations General Assembly¹⁷ set the agenda for UNCED. UNCED was held in Rio de Janeiro (Brazil) from 3 to 14 June 1992 and was attended by 178-172 States including 108 Heads of State, more than 50 intergovernmental organizations and several hundred non-governmental organizations (NGOs). The European Union also attended the Conference. In addition to the signing by more than 150 States of the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, the Conference adopted three non-binding instruments: the Rio Declaration, the UNCED Forest Principles and Agenda 21. The Rio Declaration comprises 27 principles. Principle 10 states:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

Principle 10 was significant as a clear global expression of the developing concepts of public participation in relation to the environment. It provided an international benchmark against which the compatibility of national standards could be compared. It foresaw the creation of new procedural rights which could be granted to individuals through international law and exercised at the national and possibly international level.¹⁸

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

Comment [M38]: Edit (editorial team)

[3] *Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,*

Ten years after the Stockholm Conference the United Nations General Assembly adopted the World Charter for Nature.¹⁹ The Charter emphasizes the protection of nature as an end in itself, whereas previous instruments focused more on the protection of nature for the benefit of mankind. The Charter was proposed by Zaire and strongly supported by developing countries that had not been as active ten years earlier during the Stockholm process.²⁰

The most relevant provisions for the Aarhus Convention can be found in chapter III of the Charter. With respect to the first pillar, access to information, paragraphs 15 and 18 of the Charter underline the importance of the collection and dissemination of environmental information. Paragraph 15 emphasizes the importance of ecological education as an integral part of general education. Scientific research and the unimpeded dissemination of its results are stressed in paragraph 18.

Paragraph 16 of the Charter declares that "All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements shall be disclosed to the public by appropriate means in time to permit effective consultation and participation". It shows the important interdependence between the collection and dissemination of environmental information and effective public participation.

Paragraph 23 of the Charter further discusses public participation, while also stressing the importance of access to justice mechanisms: "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."

Finally, paragraph 24 states: "Each person has a duty to act in accordance with the provisions of the present Charter; acting individually, in association with others or through participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met", a clear statement of the individual obligation to protect the environment, which is concomitant to the enjoyment of a healthy environment.

In its resolution 45/94 of 14 December 1990, the General Assembly recognized that all individuals were entitled to live in an environment adequate for their health and well-being and called upon Member States and intergovernmental and non-governmental organizations dealing with environmental questions to enhance their efforts towards ensuring a better and healthier environment. It also called for the United Nations Commission on Human Rights to study the problems of the environment and its relation to human rights. This study resulted in the final report on human rights and the environment to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.²¹ For many years, this report is was the most detailed official UNUnited Nations (UN) document to date on the link between environment and human rights, and includes the draft declaration of principles appended to the report was a subject of much study and debate. It also contained a useful annex compiling national constitutional provisions relating to the environment.²² - In the 2000s discussions on the right to environment at the UN level moved towards specific aspects such as the "right to water", or the "right to food. In 2008 UNHCR appointed an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation.

Comment [MSOffice39]: Edit (editorial team)

Comment [FL40]: Full text footnote inserted (editorial team)

Comment [MSOffice41]: Moved to commentary on sixth and seventh preambular paragraph (editorial team)

[4] *Recalling the European Charter on Environment and Health adopted at the*

First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

The Charter recognized public participation to be an important element in the context of environment and health issues. It provides an interpretation of the relationship between environment and health. The term "environment and health" encompasses the health consequences of interactions between human populations and a whole range of factors in their physical (natural and man-made) and social environment. The two main aspects in this discussion are: how well can the environment sustain life and health, and how free is the environment of hazards to health.²³ The introduction to the European Charter on Environment and Health itself gives a definition of "environmental health" by stating that the term "comprises those aspects of human health and disease that are determined by factors in the environment." It also refers to the theory and practice of assessing and controlling factors in the environment that can potentially affect health. "Environmental health", as used by the WHO Regional Office for Europe, includes "both the direct pathological effects of chemicals, radiation and some biological agents, and the effects (often indirect) on health and well-being of the broad physical, psychological, social and aesthetic environment, which includes housing, urban development, land use and transport".²⁴

Health is explicitly referred to in many parts of the Aarhus Convention. Article 1, which sets out the objective of the Convention, refers to "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being," and this statement is supported by similar phrases in the preamble. Human health is also referred to in article 5, paragraph 1 (c). In article 2, the Aarhus Convention defines "environmental information" to include a qualified but explicit reference to human health and safety and the conditions of human life. By implication, these factors are included in the definition of "environment". Thus the entire Convention— not just its information provisions—should be interpreted as applying to health issues, to the extent that they are affected by or through the elements of the environment (see commentary to [article- 2](#), [paragraph- 3 \(c\)](#)).²⁵

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

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

"information and consultation on the state of the environment, and on plans, decisions and activities likely to affect both the environment and health;

"participation in the decision-making process."

In the eighth entitlement, the Charter also stresses the important role of NGOs "in disseminating information to the public and promoting public awareness and response".

"Environment and Health"

The European Conference on Environment and Health held in Frankfurt on 7-8 December 1989, which adopted the European Charter on Environment and Health, was the first in a series of meetings of ministers of health and environment in the WHO European Region. The process can be compared to the "Environment for Europe" process (see below, last preambular paragraph).

The Second European Conference on Environment and Health was held in Helsinki in June 1994. Working on a comprehensive assessment²⁶ which identified the common concerns in a number of environment and health issues across Europe, the ministers addressed these topics by endorsing the Environmental Health Action Plan for Europe (EHAP). Furthermore, the ministers committed their respective health and environment departments to developing joint national environmental health action plans (NEHAPs) to tackle these problems.²⁷ The recognition of public participation as an important element in the context of environment and health matters was reflected in the

emphasis given in the EHAP to the goal of strengthening the involvement of the public and NGOs in environmental health decision-making.²⁸

The linkage between "Environment for Europe" and the Environment and Health processes came to the forefront during the Third Ministerial Conference on Environment and Health, held in London, 16-19 June 1999. The London Conference provided a timely opportunity to offer some direction on the application of the Aarhus Convention, especially with respect to health issues, which could also be taken into account at a later stage by the Meeting of the Parties. Health issues as such were not central in the negotiation of the Aarhus Convention, although they were explicitly included in the definition of "environmental information". Article 30 of the Declaration of the Third Ministerial Conference on Environment and Health affirms the Ministers'

"commitment to giving the public effective access to information, improving communication with the public, securing the role of the public in decision-making and providing access to justice for the public in environment and health matters."²⁹

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

The Fourth Environment and Health Conference, which ~~is scheduled to take took place in Budapest in the year in 2004~~, [adopted the Children's Health and Environment Action Plan for Europe \(CEHAPE\)](#), and called for the establishment of "environment and health information systems" (EHIS) [ensuring timely access to information](#). [The conference declaration called upon international organizations, including through the relevant Aarhus Convention processes, to develop guidelines for risk communication as an important tool for heightening public awareness.](#)

~~At t~~[The Fifth Environment and Health Conference, which took place in Parma, Italy in March 2010, at which ministers confirmed the need for participation of the public and stakeholders in tackling environment and health issues and established a new institutional framework for the renamed European Environment and Health Process \(EEHP\).](#)

Comment [o42]: Edits (editorial team)

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

[5] *Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,*

The term "sustainable development"³² has been used to embody a set of values in which better account is taken of previously uncaptured environmental impacts arising from traditional forms of development. In general, it refers to an environmentally oriented approach towards economic development that meets the needs of the present generation without depriving future generations of the ability to meet their own needs. The definition found in the watershed Brundtland Report "[Our Common Future](#)" is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The Rio Declaration's principle 3 states "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Taken together with other Rio principles (2 and 4 in particular)³³

sustainable development requires the integration of environmental and developmental (social and economic) policies. ~~In the words of Nadendra Singh, "The right to development [has] certain limitations The imperative of sustainability has to be recognized in relation to any right to development."~~³⁴

The International Court of Justice has also taken under consideration notions related to sustainable development, particularly in the *Gabcikovo-Nagymaros (Hungary-Slovakia)* case (1997), in which Hungary had sought to abandon a project to build a system of barrages on the Danube partly on sustainable development grounds. The Court stated in paragraph 140 of the judgement:

"Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."

In *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (2010) the ICJ found that the existing river management agreement between the states reflected the "need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development."

The concept has steadily grown in scope and significance.³⁴ In 2002, on the tenth anniversary of the Rio Conference and the 30th anniversary of the Stockholm Conference, the World Summit on Sustainable Development was held in Johannesburg. At this summit a Declaration and Plan of Implementation were adopted that elaborates practical measures to achieve sustainable development, with a focus on poverty eradication. Paragraph 128 of the Plan of Implementation calls upon states to:

"Ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the Declaration."

The debate over sustainable development and environmental protection generally has helped to promote a shift towards longer term thinking in economics and other fields.

Sustainable development ~~is now one~~ became one of the main objectives of the European Union ~~of with the 1997 Amsterdam Treaty for European Union~~. Part one, article 1 (2) of the 1997 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, provides that the European Union nations shall take into account "the principle of sustainable development" while promoting economic and social progress for their peoples.³⁵

~~The Lisbon Treaty, adopted in 2010, amended article 3 (3) of the Treaty on European Union (TEU) to maintain an emphasis on sustainable development "based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."~~ It also calls for the EU to work on a global level to contribute to the sustainable development of the Earth and to work towards adoption of "international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources" (Art. 21.2 TEU). With the entry into force of the Lisbon Treaty on 1 December 2009, the European Union's Charter of Fundamental Rights was given binding legal effect equal to the Treaties. It makes reference in Article 37 to a high level of environmental protection and the requirement to integrate it into policies of the European Union in accordance with the principle of sustainable development.

Comment [M43]: Deletion (editorial team in light of EU comment below)

Comment [MSOffice44]: Edit (EU)

"Sustainable use" is defined in the Convention on Biological Diversity (CBD) as "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations-" (article 2).

Comment [WX45]: Edit (editorial team)

The Convention on Biological Diversity uses a special formulation of sustainable development by including the words "environmentally sound-" (CBD, articles 8 and 15.2). This clarification is in fact a repetition of a formulation found in other international instruments, made necessary by the tendency of some to enlist the term "sustainable development" in the cause of sustained economic growth with little regard for environmental considerations. The General Assembly resolution calling for the Rio Conference, for example, consistently included the term "environmentally sound."³⁶ It can also be found in the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan, 1981). If the Brundtland philosophy had been consistently followed, the use of "environmentally sound" would be redundant, but emphasis of the words heads off any backtracking by countries that wish to emphasize development over environment.

Comment [WX46]: Edit (editorial team)

Comment [WX47]: Edit (editorial team)

Comment [WX48]: Edit to footnote (editorial team)

The formulation used in the Aarhus Convention emphasizes that development, to be sustainable, must fully take the environment into account and must have a solid basis in environmental values. In the context of the Convention, this preambular paragraph establishes that not only are the three pillars important for the realization of the right to a healthy environment, but they also have a role to play in the attainment of sustainable development by helping to "protect, preserve and improve the state of the environment".

[6] Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

[7] Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

The sixth preambular paragraph is a more express statement of the link between human rights and environmental protection. This well-founded principle was established as early as 1968 by a General Assembly resolution,³⁷ by principle 1 of the Stockholm Declaration and other international instruments (see above). The seventh preambular paragraph goes a significant step further, however, by deducing from this linkage that the precondition of a healthy environment for the enjoyment of basic rights gives rise to a right in and of itself. This statement, even though contained in a preamble, is nonetheless the first express recognition of the right to a healthy environment in an international instrument in the European region (see commentary to article 1).³⁸ In comparison, the right has been recognised in human rights instruments in the African and Latin American regions since the 1980s.³⁹ The seventh preambular paragraph couples the right ~~it is coupled~~ with language pertaining to the duty to protect the environment, a duty that is often mentioned in national law and international instruments, including the Stockholm Declaration and the World Charter for Nature.⁴⁰ These two paragraphs together reflect constitutional and statutory developments and a growing jurisprudence worldwide giving substance and rights-based content to the previously aspirational goal of a basic right to a healthy environment.

Comment [FL49]: Edit (editorial team)

In the 2000s discussions on the right to environment ~~at~~ the UN level ~~moved~~ towards often focused on specific aspects of the right, such as the "right to water", or the "rights to food of indigenous peoples." In resolution 64/292 of 28 July 2010, the General Assembly for the first time expressly recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.⁴¹ In 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples.⁴² It was the first UN General Assembly declaration which explicitly recognised the conservation and protection of the environment and resources as a human right, albeit for indigenous people only. Article 29

Comment [FL50]: Text down from third preambular paragraph and edited (editorial team)

of the Declaration declares, inter alia, that indigenous peoples have the right to the conservation and protection of the environment and that States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

In addition, the right to a healthy environment has increasingly been recognized at the national level. Many countries in the UNECE region, especially in central and eastern Europe, the Caucasus and Central Asia and the newly Commonwealth of Independent States, have provisions recognizing the right in their constitutions or in domestic law.⁴³

Furthermore, the recognition of such rights is not an empty aim. Related provisions have been successfully used in the courts to defend rights of particular members of the public to a particular level of environmental protection. Cases have arisen in India,⁴⁴ Pakistan⁴⁵ and the Philippines⁴⁶. But they have also arisen in the UNECE region, one of the most notable being the "Protected Forests" case⁴⁷ of Hungary. This case was the first constitutional court case in former eastern Europe the UNECE region to give interpretation to the right to a healthy environment. It and others give help to elaborate upon the meaning of the right to so called third generation rights, in which the obligations of the State to provide a certain level of protection can be found, and in proper cases can give rise to individual actions. Concerning the question of the nature of the right to a healthy environment, the Supreme Court of the Philippines has said:

"Although the rights to a decent environment and to health were formulated as State policies, i.e. imposing upon the State a solemn obligation to preserve the environment, such policies manifest individual rights not less important than the civil and political rights enumerated under the Bill of Rights of the Constitution."⁴⁸

Other cases considering the existence of a right to a healthy environment can be found in include Belgium,⁴⁹ Latvia,⁵⁰ and Slovenia.⁵¹ and Spain.⁵² At the regional level, similar cases have been brought under to date all Parties to the Aarhus Convention are also Members of the Council of Europe, and thus Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁵³ which states that "Everyone has the right to respect for his private and family life, his home and his correspondence", has been interpreted by the European Court of Human Rights (ECHR) in a manner that approaches a right to a healthy environment. In the 2006 case of *Giacomelli v Italy*, which concerned a plant for the treatment of toxic industrial waste, the ECHR held:

"Breaches of the right to respect for the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home."⁵⁴

In that judgment, the ECHR noted that article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private-sector activities properly.⁵⁵ In its 1998 judgment in *Guerra v Italy*, the ECHR also found that article 8 could be breached by a public authority's failure to provide adequate environmental information. In that case, the public authority had failed to provide the local population with information about risk factors and how to proceed in event of an accident at the nearby chemical fertiliser factory. In *Giacomelli v Italy*, the ECHR summarised some of its previous environmental jurisprudence under article 8:

"...in *Powell and Rayner v. the United Kingdom* [...] the Court declared Article 8 applicable because "[i]n each case, albeit to greatly differing degrees, the quality of

Comment [MSOffice51]: Insertion (editorial team)

Comment [MSOffice52]: Edit(editorial team)

Comment [FL53]: Edit (editorial team)

Comment [WX54]: Inserted footnote (editorial team)

Comment [WX55]: Inserted footnote (editorial team)

Comment [WX56]: Inserted footnote (editorial team)

Comment [MSOffice57]: Edit(editorial team)

Comment [o58]: Edit (editorial team)

Comment [FL59]: Edit (editorial team)

Comment [FL60]: Edit (editorial team)

Comment [FL61]: Edit for clarity (editorial team)

Comment [MSOffice62]: Edited footnote (at request of Slovenia)

Comment [FL63]: Edits (editorial team)

the applicant's private life and the scope for enjoying the amenities of his home ha[d] been adversely affected by the noise generated by aircraft using Heathrow Airport". In *López Ostra* [...], which concerned the pollution caused by the noise and odours generated by a waste-treatment plant, the Court stated that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". In *Guerra and Others*[...] the Court observed: "The direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable." Lastly, in *Surugiu v. Romania* [...] which concerned various acts of harassment by third parties who entered the applicant's yard and dumped several cartloads of manure in front of the door and under the windows of the house, the Court found that the acts constituted repeated interference with the applicant's right to respect for his home and that Article 8 of the Convention was applicable.⁵⁶

While noting that article 8 contains no explicit procedural requirements, in *Giacomelli v Italy*, the ECHR held that article 8 nevertheless requires the consideration of environmental impacts before decision-making, the provision to the public of information generated through the environment impact studies, the opportunity for individuals to have their views taken into account,⁵⁷ and the opportunity to appeal against any decision in which they consider their interests or comments have not been given sufficient weight in the decision-making process:

"A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake (see *Hatton and Others*[...]). The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question (see, *mutatis mutandis*, *Guerra and Others*, [...], and *McGinley and Egan v. the United Kingdom*, [...]). Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis*, *Hatton and Others*, [...]*Taşkın and Others*, [...]).⁵⁸

The Court has made it clear that it may scrutinize the manner in which authorities protect the environment, establishing a threshold in human rights law where the consequences of a failure to protect the environment may be held to significantly impair the conditions of life of individuals.⁵⁹ Authorities were found to have violated article 8 in cases where they failed to provide adequate environmental information⁶⁰ or to enforce domestic environmental law.⁶¹ This article, by extension, applies to requires the consideration of environmental impacts before decision making as a means of protecting basic rights, and the provision to the public of information generated through an EIA in order for personthe public to have the necessary information to take decisionsexpress their opinions and views concerning proposed decisions about potential risks to which they are exposed.

The seventh preambular paragraph specifically recognizes the rights of "present and future generations." This phrase is also found in article 1. The need to take an intergenerational approach, in which actions taken today should not jeopardize the opportunities and benefits for future generations, was also recognized in principle 1 of the Stockholm Declaration, but has much earlier origins. The idea that as "members of the present generation, we hold the earth in trust for future generations"⁶² is well-known in international law. It can be traced back to the nineteenth century (in the 1893 Pacific Fur Seals Arbitration), even though the argument was rejected by the tribunal in that case.⁶³ This part of the paragraph also builds on the conclusions drawn by the World Commission on Environment and Development in the Brundtland Report, *Our Common*

Comment [FL64]: Edits (editorial team in light of comments by Chair of Task Force on Access to Justice)

Comment [o65]: Edit (editorial team)

*Future.*⁶⁴

While not the first international legal instrument to recognize the right to a healthy environment, the Aarhus Convention does appear to be the first hard-law text to recognize the rights of future generations. The International Court of Justice has used similar language in recognizing that the very health of generations yet unborn is represented by the environment.⁶⁵ The Aarhus Convention takes this jurisprudential recognition a step further into an international legal instrument.

The issue of intergenerational equity is increasingly important in the context of sustainable development. A much-discussed case globally is the *OPOSA Minors' Case*.⁶⁶ This was a 1993 case before the Supreme Court of the Philippines in which a group of minors formed an organization with their parents and brought a suit against the Secretary of the Department of Environment and Natural Resources aimed at cancelling all existing logging permits in order to protect the forests against deforestation.

In the *OPOSA* case, the plaintiff children claimed to represent their generation as well as generations yet unborn. The Supreme Court of the Philippines held that the principle of intergenerational responsibility was legally recognizable, and that the assertion of the children in *OPOSA* was a legitimate expression of their interest in protecting the rights of future generations.⁶⁷ The Court granted that the plaintiffs had the legal capacity to sue on behalf of succeeding generations "based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned."⁶⁸

[8] Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

The earlier paragraphs laid the groundwork for the linkage between public participation and basic human rights, including the right to a healthy environment, as well as the duty to protect the environment for the benefit of present and future generations. This linkage is made express in the eighth preambular paragraph. In particular, it specifies the three pillars of public participation which make up the fundamental structure of the Convention. These are access to information, public participation in decision-making, and access to justice. The Convention has determined that these three elements are essential to the achievement both of the right to a healthy environment, and also, no less important, of the possibility for individuals to fulfil their responsibilities towards others, including future generations.

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

Comment [FM66]: Edit (Croplife)

Basic human rights related to the environment and basic civic responsibilities are interwoven, but both the rights and the responsibilities may remain unfulfilled as long as persons do not have the capacity to act in civil society. This may involve the establishment of proper institutions, the guarantee by the State of clear and transparent frameworks for action, and in some cases affirmative assistance programmes to level the playing field.

[9] Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

The ninth preambular paragraph takes a more practical approach to the interaction of the public participation pillars with the right to a healthy environment and the attainment of sustainable development. It sets forth one of the core values of public participation, from the point of view of the public authority. It lists four separate practical benefits of public participation. The first is enhancement of the quality and implementation of decisions. The quality of decisions can be improved by the public's provision of additional information, as well as through the influence that advocacy of alternative solutions can have on the careful consideration of possible solutions. ~~Members of the public will often have a special knowledge of local conditions and of the practical implications of proposed activities.~~

Comment [o67]: Deletion (Croplife)

The implementation of decisions can be improved where the ~~members of the public~~ who are most interested in the result have been included in the process and have had their concerns considered. In such cases they can be expected to support the decision more strongly. Contribution to public awareness of issues is a side benefit of ~~particular procedures~~ public participation that results in an overall increasing sophistication of the public in terms of ~~the nature of its- their~~ involvement and in terms of ~~its- their~~ potential support for good decisions. ~~The opportunity of~~ Opportunities for the public to express ~~its their~~ concerns and to have those concerns taken into account is a matter of self-fulfilment that increases confidence in society generally. ~~The sincere desire of the public authorities to come to good decisions taking the concerns of the public into account as far as possible is reflected in the last element mentioned.~~

Comment [o68]: Deletion (Croplife)

Comment [o69]: Edit (editorial team)

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

This paragraph emphasizes the societal implications of the practical considerations discussed in the ninth preambular paragraph, and is echoed in the twenty-first. The elements in the ~~eighth~~ ninth preambular paragraph include the concept that the public and authorities often have a common interest in achieving an optimal result for the good of society, although there might be disagreement as to the means or as to the balancing of interests. But if the public actively participates in the process of decision-making, then one key question—whether the public authority has carried out its duties to the best of its ability—is answered in the affirmative.⁶⁹ The level of participation may be a measure of its effectiveness. Thus, the active involvement of the public in a transparent decision-making process confirms the accountability of the public authorities and increases respect for them and for their decisions, even among those members of the public who ~~may have had to suffer a loss as a result of~~ be adversely affected by the final decision. ~~In the absence of such confirmation, members of the public who may be adversely affected by a decision will think the worst, and assume that the public authority has been corrupted by special interests.~~ As most decisions to be effective require some measure of support from the public at large, ~~the absence of such confirmation may increase the likelihood of failed projects, the situation just mentioned is bound to result in a high degree of failed projects.~~

Comment [o70]: Edit (editorial team)

Comment [MSOffice71]: Edit (Croplife)

Comment [o72]: Edit (editorial team)

Comment [o73]: Deletion (Croplife)

Comment [o74]: Edit (editorial team in light of Croplife comments)

Comment [o75]: Deletion (Croplife)

Comment [o76]: Edit (editorial team)

Moreover, ~~those members of~~ the public who ~~have~~ had the possibility of substantially participating in the decision-making process could be the best advocates for the implementation of the given decision. They know the limitations and constraints the authority was facing, are able to see the consideration of the interests at stake including environmental protection, and they can ~~realize appreciate~~ that the decision ~~could may~~ be a justifiable one in the given situation, even if their particular point of view did not prevail.

Comment [o77]: Edit (editorial team)

[11] Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings.

This paragraph acknowledges that the general principles contained in the Aarhus Convention can help in developing public participation in other branches of power and in

assisting them in the discharge of their responsibilities. It is also one of the places in the preamble, along with its eighteenth and twenty-first paragraphs, that goes beyond a specifically environmental context and points to larger issues of democratization and the relationships among individuals, organizations and the State. Moreover, as the process of developing law may involve a collaboration between the legislative and executive branches of government, the Convention addresses the participation of the executive branch in such law-making in article 8. The Resolution of the Signatories emphasized that parliaments also have a key role to play in the implementation of the Convention. Article 2, paragraph 2, reflects the principle of respect for other branches of power in its definition of "public authority".

While many of the Convention's governmental negotiators were reluctant to interfere with the balance of powers by prescribing requirements for the legislative process, it should be noted that a certain group of parliamentarians did actively take part in the negotiations and made several proposals in this regard. A group of parliamentarians issued the "Stockholm Statement" in September 1997, in which they endorsed the applicability to parliaments of the information provisions of the Convention in particular, and developed principles for public participation in "legislative work".⁷⁰

[12] Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

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

Comment [o78]: Edits (editorial team)

Comment [o79]: Edits (editorial team)

The final part of the twelfth preambular paragraph takes a step further, to recognise the importance not only of the public knowing of their opportunities to participate but also how to effectively use those opportunities. This implies that the public should have a real practical understanding of the public participation procedures open to them, including various methods in which they may use them effectively and the nature of the results that might be expected from their participation.

Comment [o80]: Text moved up from below and amended (editorial team)

The twelfth preambular paragraph also mentions free access. Free access may be understood to mean free, open, unfettered and non-discriminatory access to procedures for public participation. It does not imply that the government should subsidize all the costs of any member of the public to participate in a given procedure. However, the costs borne by the member of the public should be the normal costs associated with participation in any procedure. The State should not impose financial constraints on members of the public who wish to participate. The issue of costs is further developed in the Convention.

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

Comment [o81]: Text moved up and amended (editorial team)

[13] Recognizing further the importance of the respective roles that individual citizens, nongovernmental organizations and the private sector can play in environmental protection,

The Convention talks about the roles that individuals, NGOs and the private sector can play in environmental protection. Individuals may play a role in terms of their personal behaviour in protecting the environment and their interactions in society to convince others to do so, and may also act in association with others. NGOs and private business entities are two means for the latter. The term "non-governmental organization", while often connoting environmental protection organizations, is a generic term applying to not-for-profit organizations formed for any lawful purpose. The formation of an NGOs areis the-a common means to exercise the right of association of any group with a common purpose or common interests. The special recognition of environmental NGOs under the Convention is discussed in the commentary to article 2, paragraph 5, and article 9, paragraph 2.

Comment [o82]: Edit (editorial team)

~~The Rio Declaration specifically mentioned the roles that various groups could play in the protection of the environment and the attainment of sustainable development. While it specifically mentioned women (principle 20), youth (principle 21), and indigenous people and other local communities (principle 22), the Rio Declaration did not mention how these groups might organize for participation. Agenda 21, in its section 3: Strengthening the role of major groups, went further to include workers, trade unions, business and industry, the scientific community, and farmers among the enumerated groups, and included among the activities aimed at strengthening their role, promoting freedom of association and strengthening participation and consultation.⁷¹ In addition, Agenda 21 indirectly mentioned organizational capacities in the context of developing countries.⁷² There is no specific reference in Agenda 21 to environmental NGOs. It comes closest in chapter 36, where NGOs, among other entities, are specifically encouraged to train people in environmental management.~~

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

Comment [MSOffice83]: Deleted (editorial team in light of Croplife's comments)

~~The role of business and industry in environmental protection is increasingly being recognized. On the one hand, the environmental impact of some sectors of business and industry means it is critical that they are engaged and encouraged to meet their responsibilities for minimizing the adverse impacts of their activities. some sectors of industry may be subject to commercial pressures that put them in direct conflict with environmental protection objectives. On the other hand, industry, whether "green" or not, is a key player in the search for solutions. Furthermore, the notion of "corporate citizenshipsocial responsibility" is-has developed in recent years to require businesses to measure performance on a number of criteria, including environmental protection and social responsibility towards various publics, while CSR has been criticized in some eireles as opening the door to "greenwashing" of highly polluting activitiesing. Considering the environmental impact of the activities of business and industry, it is critical that they are engaged by all stakeholders in society and encouraged to meet their responsibilities for minimizing the adverse impacts of their activities. Business and industry also have an incentive to develop creative solutions to environmental problems, in order to minimize business losses. In this respect, at times they have the same practical interest in participation that motivates many other members of the public. Of course the scale of the environmental impact of their activities also means that irresponsible or negligent actors represent one of the biggest challenges for environmental protection and the attainment of sustainable development.~~

Comment [MSOffice84]: Edits (editorial team)

[14] *Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,*

The fourteenth preambular paragraph is related to the twelfth in that it deals in part with meta-information concerning decisions affecting the environment and sustainable development. It goes further, however, in that it expresses the desire of the negotiating

parties to promote environmental education on a more general level and to encourage widespread public awareness and participation. The link between environmental education and participation has been made in several international instruments, ~~most recently~~ including for the UNECE region, the UNECE Strategy for Education for Sustainable Development (2005). The Strategy, adopted by UNECE Ministers, vice ministers and other representatives of Environment and Education Ministries at their high-level meeting in Vilnius in March 2005, is intended as a practical instrument to promote sustainable development through education. They also adopted the Vilnius Framework for Implementation setting up a Steering Committee and an expert group on indicators in order to facilitate coordination and review of Strategy's implementation. UNESCO has declared the decade 2005-2014 the United Nations Decade on Education for Sustainable Development.

Comment [MSOffice85]: Edit (editorial team)

Earlier instruments include the 1997 Thessaloniki Declaration of the UNESCO Conference on Environment and Society: Education and Public Awareness for Sustainability,⁷³ which built upon declarations made at the Belgrade Conference on Environmental Education (1975), the Tbilisi Intergovernmental Conference on Environmental Education (1977), the Moscow Conference on Environmental Education (1987), and the Toronto World Congress for Education and Communication on Environment and Development (1992). Promoting education, public awareness and training are also a subject of Agenda 21, chapter 36.

[15] Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

The importance of information to the ~~whole edifice of public participation~~ all three pillars of the Convention cannot be ~~exaggerated~~ overstated. This paragraph indirectly takes note of the rapid advances made in information technology in recent years and declares their importance to the effective ~~use of information in public participation~~ implementation of the Convention. In particular, advances such as electronic means of storing and retrieving information and the possibility of instant access to worldwide information through the Internet have greatly improved the capacity of the public and public authorities to process and use information and to engage in public participation electronically. The Convention makes reference to information technology, in its article 2, paragraph 3 (information in electronic form), and in its article 5, paragraphs 3 (accessible electronic databases) and 9 (structured, computerized and publicly accessible database for pollutant releases).

Comment [MSOffice86]: Edit (editorial team)

[16] Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information.

A major tenet of sustainable development is the integration of environment and development. One means for achieving this is through the consideration of potential environmental impacts in decision-making and policy-making, ~~which has been called "biosphere reflection" or generally known as "environmental assessment."~~ Specific ~~sets of procedures for environmental assessment or biosphere reflection~~ in different contexts may be called include "environmental impact assessment", "ecological expertise" (with its OVOS element) or "strategic environmental assessment". In order to take proper account of environmental considerations, it is obviously necessary for information to be accurate, comprehensive and up-to-date. As stated ~~about in~~ previous preambular paragraphs, one of the functions of public participation is to assist public authorities in gathering high-quality information.

Comment [M87]: Edits (editorial team)

Comment [M88]: Edits (editorial team)

The Convention thus translates the idea that all of society must work together to solve environmental problems for the benefit of present and future generations into a

legal principle ~~with some~~ conveying definite responsibilities ~~for all on~~ public authorities, including not only environmental ones, as was the assumption in the past.⁷⁴ Agenda 21 provides some guidance, in chapter 40 on "Information for decision-making."

Comment [FL89]: Edits (editorial team)

As mentioned above, the European Court of Human Rights has discussed the necessity of environmental assessment as a means to ensure that the ~~Article 8~~ right to family and private life in Article 8 of the European Convention on Human Rights is respected.⁷⁵ ~~The ICJ~~ International Court of Justice has also referred to environmental assessment as a necessary mechanism in complex decision-making to enable the principle of sustainable development.⁷⁶ The European Union's Charter of Fundamental Rights, also mentioned previously, requires a high level of environmental protection and for the improvement of the quality of the environment to be integrated into policies of the European Union (article 37).

Comment [M90]: Edit (editorial team)

Comment [FL91]: Edit (editorial team)

Comment [FL92]: Endnotes inserted (editorial team)

Comment [FL93]: Edit (EU)

[17] Acknowledging that public authorities hold environmental information in the public interest.

The seventeenth preambular paragraph, along with the ninth, the tenth and the twenty-first, is an example of a preambular paragraph that places the Convention in the context of democratic principles. While the legislature establishes public policies and the government executes them, the system of rights and responsibilities in society acts as a further check on abuses of power. In a democracy, the government holds the public trust and discharges its duties on behalf of the public welfare. Openness in the sphere of public authority guarantees that the public at large can check the ways in which public authorities discharge their duties. A basic underlying principle that ensures openness is the notion that the information held by public authorities is held on behalf of the public. This includes information held by private persons and enterprises to the extent that they come within the definition of "public authority" under the Convention (see the commentary to the definition of "public authority" in article 2, paragraph 2 (b) and (c)). ~~In such contexts it is therefore~~ improper to talk of ownership of such information. Moreover, this principle includes the notion that public authorities must serve the needs of the public, including individual members of the public, so long as this does not interfere with the rights of others.

Comment [MSOffice94]: Edited (editorial team in light of Croplife's comments)

~~Other~~ Earlier international instruments with similar provisions include Council of Europe Recommendation No. (81) 19 of the Committee of Ministers to member States on the access to information held by public authorities (Strasbourg, 1981), and Council of Europe Recommendation No. 854 (1979) of the Parliamentary Assembly on access by the public to government records and freedom of information (Strasbourg, 1979).

Comment [FL95]: Edit (editorial team)

[18] Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

The eighteenth preambular paragraph contains several important points. The first is that judicial mechanisms should be effective. This includes the notion of the independence, impartiality and professional integrity of the judiciary, which in turn requires the judiciary to have a solid financial base and to be essentially self-regulating. It further requires that the judgments of the judicial authorities should be ultimately enforceable in society. Other issues in connection with the effectiveness of judicial mechanisms include the scope of remedies and the length of the process.

The next point in this paragraph is that judicial mechanisms for redress in the case of infringement of rights and for enforcement of the law should be accessible to the public. One major aspect of accessibility is cost, which is addressed several times in the Convention. The length of the process, to the extent that expected delay might bar certain

persons from using it, is an issue of accessibility as well as effectiveness. Finally, if there are technical barriers to access to the courts, such as unreasonable standing requirements, justice may not be accessible to the public. ~~Organizations are specifically mentioned.~~ Negotiators ~~hereby~~ expressed their concern that organizations as well as individuals should have standing in representing their rights and interests in the courts ~~and organizations are thus specifically mentioned.~~ This relates to the standing requirements found in article 2, paragraph 5, and article 9, paragraph 2.

Comment [FL96]: Edits (editorial team)

Finally, this preambular paragraph makes reference to the reasons for access to justice. Access to justice is necessary so that the public's legitimate interests—that is, those interests recognized by a particular society according to law, custom or practice—are protected and the law is enforced. The protection of the public's interests and the enforcement of the law stand behind the obligations contained in the rest of the Convention. Access to justice is the primary means for enforcement of the Convention, essentially protecting the other two pillars.

Comment [FL97]: Edit (editorial team)

[19] Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

~~In response to interest from consumers, particularly in Europe and North America in In both Europe and North America, the level of interest among consumers in environmentally friendly products, became so evident that producers and distributors started making increasingly make claims on product labels that the products were are, in some way, environmentally responsible, for example, that the products were are made from recycled or biodegradable material. To enable consumers to make informed environmental choices, it is important that the information provided be adequate and not false or deceptive. The United States Federal Trade Commission, responsible for regulating advertisements and product labelling in the United States, adopted regulations (see 16 C.F.R. 260) governing the use of environmentally friendly labelling, primarily with the goal of prohibiting any false or deceptive claims.~~

Comment [FL98]: Edits (editorial team)

Council Regulation No. 880/92/EEC of 23 March 1992 on a Community eco-label award scheme established ~~such a~~ regulated programme and procedures for adopting the specific ecological criteria ~~needed to that must~~ be met before ~~the an~~ eco-label may be awarded. Article 6 of the Regulation specifically provides that environmental organizations shall be consulted in defining the ecological criteria.⁷⁷ EC Council Resolution 93/C 138/01, dated 1 February 1993, adopted a policy to establish a Community-wide ecological labelling system as a component of product standards regulation. ~~The eco-label award scheme was amended by Regulation (EC) No. 1980/2000 and Regulation (EC) No. 66/2010.~~

Comment [FL99]: Edits (editorial team)

The International Organization for Standardization (ISO) has adopted four international standards on eco-labelling: ISO 14020:1998, ISO/DIS 14021:1999, ISO 14022, ISO/FDIS 14024:1998 and a technical report, ISO/WD/TR 14025.

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

[20] Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

The Aarhus Convention gives special treatment to information and decisions pertaining to genetically modified organisms (GMOs). In addition to the twentieth preambular paragraph, GMOs are addressed in article 6, paragraph 11, on public participation in decision-making. Article 5, paragraph 8, on product labelling, is also of

relevance to GMOs.

The fact that the drafting of the Convention had to take into account many different systems, interests and traditions among the countries in the UN/ECE region is nowhere more particularly apparent than in its dealing with genetically modified organisms (GMOs). During the negotiation of the Convention, the negotiating parties could not reach agreement on the extent to which its provisions should apply to the deliberate release of GMOs in the environment and agreed to keep the issue open for further determination in the light of future developments. Upon the Convention's adoption at the 4th Ministerial Conference "Environment for Europe" in Aarhus, Denmark (23-25 June 1998), the Signatories requested the Parties to further develop the Convention in the field of GMOs. At its first session (Lucca, Italy, 21-23 October 2002), the Meeting of the Parties adopted non-binding "Guidelines on access to information, public participation and access to justice with respect to genetically modified organisms"⁷⁸. These Guidelines are often referred to as the "Lucca Guidelines". At its second session (Almaty, 25-27 May 2005), the Meeting of the Parties adopted a new article 6 bis and annex I bis to the Convention, the so-called GMO amendment to the Convention (also sometimes called the "Almaty amendment").⁷⁹ The amendment addresses public participation in decisions on the deliberate release into the environment and placing on the market of GMOs. As of May 2011, the GMO amendment was not yet in force. These developments, together with relevant developments under the Cartagena Protocol on Biosafety, are discussed in more detail in the commentary on article 6, paragraph 11.

~~GMOs are considered here in the twentieth preambular paragraph and in article 6, paragraph 11. While recognizing the need for increased transparency and greater public participation in decision making relating to GMOs, the Convention nevertheless allows a lower specific standard for such public participation through article 6, paragraph 11. This provision implies that Parties may find it unfeasible or inappropriate to apply the provisions of article 6 to particular decisions to release GMOs into the environment, without explaining why this may be so. (See commentary to article 6, paragraph 11.) Meanwhile, the development of policies on GMOs is being played out in the media and in other forums.~~

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

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

Comment [FL100]: Insertion/deletion (editorial team in light of Croplife's comments)

[21] Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

This paragraph builds on the ninth, tenth and seventeenth preambular paragraphs. Participatory democracy has long been considered a way to increase public confidence in leaders and to reduce tensions within society. Environmental protection has been one of the main fields in which participation has developed.

At the first Meeting of Parties, states brought attention to the link between the Aarhus Convention and the concept of "good governance." Paragraph 2 of the Lucca Declaration states:

"Access to information, public participation and access to justice are fundamental

elements of good governance at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy.⁷²

The fourth Meeting of Parties in 2008 adopted the Riga Declaration, in which the Parties acknowledged that the Convention had promoted more democratic values and practices in the environmental field, but also stated that “it can and should serve as an inspiration for promoting greater transparency and accountability in all spheres of government.”

The links between the Convention and democratization are were also made clear by the Chairman's Summary of the Seventh Economic Forum of the Organization for Security and Cooperation in Europe (OSCE) (May 1999).⁸⁰ That document urged countries to ratify the Aarhus Convention to affirm their commitment to public participation. The meeting OSCE considered that the matters at the heart of the Aarhus Convention were important for security in Europe, and recommended that the principles of the Aarhus Convention should be incorporated into an OSCE charter on European security.

The report of the relevant working group was accepted even by States that had not signed the Aarhus Convention. In the midst of the democratic changes in 1989, the Organization for Security and Cooperation in Europe (OSCE), then known as The same organization, then called the Conference on Security and Cooperation in Europe (CSCE), held a significant meeting on the protection of the environment in Sofia, Bulgaria, in the midst of the democratic changes of 1989.⁸¹ The meeting was interrupted by accredited journalists telling of beatings of peaceful demonstrators (members of the environmental organization Ecoglasnost) taking place outside the hall. The response of all but one country present was to issue the following proposed⁸² conclusions:

"[The participating States] recall their commitment in the Vienna Concluding Document to acknowledge the importance of the contribution of persons and organizations dedicated to the protection and improvement of the environment, and to allow them to express their concerns. They reiterate their willingness to promote greater public awareness and understanding of environmental issues.

"The participating States reaffirm their respect for the right of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues, without legal and administrative impediments inconsistent with the CSCE provisions. These individuals, groups and organizations have the right to participate in public debates on environmental issues, as well as to establish and maintain direct and independent contacts at national and international level."

A decade later, at the OSCE Summit in Istanbul on 18-19 November 1999, OSCE Heads of State adopted the OSCE Charter of European Security, which at paragraph 32 declares:⁸³

“In the spirit of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, we will in particular seek to ensure access to information, public participation in decision-making and access to justice in environmental matters.”

UN/ECE is the forum at which 55-56 countries of North America, western, central and eastern Europe, and Central Asia come together to forge the tools of their economic cooperation. The membership includes Canada, Israel and the United States, as well as countries of Central Asian and Cau casian territory of the former Soviet Union. Its main purpose is to harmonize the policies and practices of its member countries. Through these activities, UN/ECE reduces the risk both of cross-border tensions and of disagreements

Comment [M101]: Text moved further down in same section (editorial team)

Comment [M102]: Deletion as outdated (editorial team)

Comment [FL103]: Edits (editorial team)

Comment [E104]: Edit footnote (editorial team)

Comment [M105]: Insertion (editorial team)

within or between such regional institutions and bodies as the European Union, the North American Free Trade Agreement (NAFTA) and the Commonwealth of Independent States (CIS), which embody the dynamism of subregional integration movements. Through its cooperation with all United Nations organs, it is one of the instruments by which the region assumes its responsibilities towards the rest of the world.

~~The Resolution of the Signatories expressly acknowledged that the Convention's ratification would "further the convergence of environmental legislation and strengthen the process of democratization" in the UN/ECE region. At the first Meeting of Parties (Lucca, October 2002), states the Parties brought attention to the link between the Aarhus Convention and the concept of "good governance." Paragraph 2 of the Lucca Declaration states:~~

Comment [FL106]: Edit (editorial team)

~~"Access to information, public participation and access to justice are fundamental elements of good governance at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy."~~

~~In the Riga Declaration, adopted at the ~~The fourth~~ third Meeting of Parties in (Riga, June 2008), adopted the Riga Declaration, in which the Parties acknowledged that the Convention had promoted more democratic values and practices in the environmental field, but also stated that "it can and should serve as an inspiration for promoting greater transparency and accountability in all spheres of government."~~

Comment [FL107]: Edit (editorial team)

Comment [M108]: Text moved from start of preambular paragraph down to here (editorial team)

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

Comment [FL109]: Edit (editorial team)

[22] *Conscious of the role played in this respect by ECE and recalling, *inter alia*, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,*

UN/ECE has played a major role in the democratization of Europe through environmental protection mechanisms, in the form of international agreements, projects and charters, and involvement in the "Environment for Europe" process. A review of the UN/ECE environmental conventions reveals a pro-gression towards greater rights and opportunities in access to information, public participation in decision-making and access to justice in environmental matters, culminating in the Aarhus Convention.

One of the main stepping stones on the way to the Aarhus Convention was the UN/ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making ~~endorsed by ministers at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria in October 1995 ("the Sofia Guidelines"). For an overview of the development of the Sofia Guidelines and how they in turn contributed to the development of the Convention itself, see "The Road to Aarhus" above. The idea of the Guidelines originated at the Second Ministerial Conference~~

Comment [FL110]: Condensed text to avoid duplication (editorial team)

"Environment for Europe" in Lucerne Switzerland, in April 1993. There, public participation was indicated as one of seven key elements for the long-term environmental programme for Europe suggested by the Senior Advisers to ECE Governments on Environmental and Water Problems (which later became the Committee on Environmental Policy). As a consequence, in paragraph 22 of the Lucerne Ministerial Conference Declaration, the ministers requested UN/ECE, *inter alia*, to draw up proposals for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision-making. The Senior Advisers established the Task Force on Environmental Rights and Obligations, which in 1994 was given the task of drawing up draft guidelines and other proposals on effective tools and mechanisms promoting public participation in environmental decision-making. By January 1995 the Guidelines were developed and by May 1995 accepted by the Working Group of Senior Government Officials responsible for the preparation of the Sofia Conference. They were endorsed at the Third Ministerial Conference "Environment for Europe" held in Sofia, in October 1995. The same Conference decided that consideration should be given to the development of a convention. The Committee on Environmental Policy in January 1996 decided that the scope of the future convention should reflect the scope of the Guidelines.⁸⁴ In the Resolution of the Signatories to the Aarhus Convention, adopted by The ministers at the Fourth Ministerial Conference "Environment for Europe" in Aarhus, Denmark, on 25 June 1998 Aarhus specifically recommended that the Sofia Guidelines (see Introduction) should be taken into account in the early implementation of the Aarhus Convention in the Resolution of the Signatories.

Comment [FL111]: Deleted as duplicates text in "The Road to Aarhus" section (editorial team)

The "Environment for Europe" process is one of the main political frameworks for cooperation on environmental protection in Europe. It brings together environment ministers as well as many organizations and institutions working with the environment in the region, including citizen non-governmental organizations, at pan-European conferences to formulate new environmental policies. Those conferences allow the environment ministers from approximately 55-56 countries to meet and to share experiences and ideas. (See box.)

Comment [FL112]: Edit (Croplife)

Comment [FL113]: Edit (editorial team)

"Environment for Europe"

Ministerial conferences within the "Environment for Europe" process have been held in 1991 at Dobris, Czechoslovakia, in 1993 at Lucerne, Switzerland, in 1995 in Sofia, Bulgaria, and in 1998 in Aarhus, Denmark, in 2003 in Kyiv, Ukraine, and in 2007 in Belgrade, Serbia. The seventh ministerial conference will be held in Astana, Kazakhstan in September 2011.

At Dobris (1991) the ministers set out basic guidelines for a pan-European cooperation strategy and called for a report describing the state of the environment in Europe, which became "Europe's Environment: the Dobris Assessment" of 1995. At Lucerne (1993), the ministers endorsed a broad strategy codified in the Environmental Action Programme for Central and Eastern Europe (EAP). The agenda of the Sofia Conference (1995) included a review of the implementation of the EAP and the further development of the Environmental Programme for Europe (EPE). Furthermore, the Conference decided that a regional convention on public participation should be developed with appropriate involvement of NGOs, which became the negotiations for the Aarhus Convention.⁸⁵

The fourth Ministerial Conference pan-European conference of environment ministers within the "Europe for Environment" process was held in June 1998 in Aarhus. This Conference marked the signing of the Aarhus Convention.⁸⁶ Other results included the signing of Protocols to the Convention on Long-range Transboundary Air Pollution on Heavy Metals and on Persistent Organic Pollutants, endorsement of the Pan-European Strategy to Phase Out Leaded Petrol, and acknowledgement of the Guidelines on Energy Conservation in Europe.

In Kyiv (2003), the fifth "Environment for Europe" conference marked the adoption of the Kyiv Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention, as well as the Protocol on Strategic Environmental Assessment to the Espoo Convention, a civil liability protocol related to the UNECE Water and Industrial Accidents Conventions, and in parallel the Carpathian countries adopted the Carpathian Convention.

At the sixth Ministerial Conference "Environment for Europe" in Belgrade (2007), ministers agreed to undertake a reform of the "Environment for Europe" process in order to ensure that it remained

Comment [FL114]: (Edit (editorial team))

Comment [FL115]: Edit (editorial team)

Comment [FL116]: Edit (editorial team)

Comment [FL117]: Edit (editorial team)

Comment [FL118]: Edit (editorial team)

Comment [FL119]: Edit (editorial team)

Comment [FL120]: Edit (editorial team)

relevant and valuable, and to strengthen its effectiveness as a mechanism for improving environmental quality and the lives of people across the region. Following the reform, the UNECE Committee on Environmental Policy became the convening body for the preparatory process.

The seventh ministerial conference will take place in Astana, Kazakhstan on 21-23 September 2011. The two main themes for the conference will be "Sustainable management of water and water-related ecosystems" and "Greening the economy: mainstreaming the environment into economic development". The main output of the Belgrade Conference was the adoption of documents related to the future of the Environment for Europe process.

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

Comment [FL121]: Insertion (editorial team)

Comment [FL122]: Deletion (editorial team)

Comment [FL123]: Deletion (editorial team)

[23] Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Countries in the UN/ECE region have been very active over the past 20-40 years in concluding a series of environmental treaties on subjects such as transboundary environmental impact assessments, transboundary effects of industrial accidents, transboundary watercourses. All of these conventions have addressed access to information and public participation to some degree and several have even addressed access to justice in environmental matters. The Aarhus Convention was based in part on the experience of applying these conventions. Its article 10, paragraph 2 (b), requires the Parties to consider the experiences of other multilateral agreements in its implementation as well.

The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) obliges Parties to assess the environmental impact of certain activities at an early stage of planning and lays down the general obligation of States to notify and consult each other on all major projects that are likely to have a significant adverse environmental impact across boundaries.⁸⁷ It includes the most advanced public participation provisions in any UN/ECE convention before the Aarhus Convention, in recognition of the importance of including the public concerned on all sides of the borders in relevant decision-making. Following the adoption of the Aarhus Convention, other UN/ECE instruments have included public participation provisions modeled on the Convention, including the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Waters and International Lakes. The following table below lists the main provisions of three UN/ECE conventions that relate to access to information, public participation in decision-making and access to justice in environmental matters.

Comment [FL124]: Edit (editorial team)

Comment [FL125]: Edit (editorial team)

Name of convention	Purpose	Aarhus-related provisions
Convention on Environmental Impact Assessment in a Transboundary Context	Stipulates the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning, to prevent, reduce and control significant adverse trans-boundary environmental impact from proposed activities.	1(x), 2.2; 2.6; 3.8; 4.2 and appendices III and IV (11)
Convention on the Transboundary Effects of Industrial Accidents	Prevention of, preparedness for and response to industrial accidents capable of causing transboundary effects, including the effects of such accident caused by natural disasters, and international cooperation concerning mutual assistance, research and development, exchange of information and exchange of technology in the area of prevention of, preparedness for and response to industrial accidents.	1(f), 3.1, 3.2, 9
Convention on the Protection and Use of Transboundary Watercourses and International Lakes	Prevention, control and reduction of any transboundary impact relevant for the protection and use of transboundary watercourses.	11.3;16

[24] Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

The "Environment for Europe" process has been described above (see twenty-second preambular paragraph, box). The signing of the Aarhus Convention by 35 countries and the European Community-Union⁸⁸ was one of the central events of the Fourth Ministerial Conference. The Declaration by the Environment Ministers stated:

"We regard the Aarhus Convention, which provides recognition for citizens' rights in relation to the environment, as a significant step forward both for the environment and for democracy. We encourage all non-signatory States to take appropriate steps to become Parties to the Convention."⁸⁹

Comment [WX126]: Edit and footnote inserted (editorial team)

Have agreed as follows:

GENERAL PART

The General Part of the Aarhus Convention consists of the objective (article 1), the definitions (article 2) and the general provisions (article 3). The objective of the Convention establishes its overall goal and places it within the context of the greater body of international environmental law and the international law ~~of~~ on sustainable development. It should be kept in mind at all times in the interpretation and implementation of the more specific provisions of the Convention.

Comment [FL127]: Edit (editorial team)

Definitions also play an important role in the interpretation and implementation of the Convention. Because of the wide variety of legal systems in the UN/ECE region, it is important to define as precisely as possible terms that are at the heart of the Convention. By doing so, a more consistent implementation of the Convention in the framework of the domestic legal systems of all the Parties can be assured.

Finally, the Convention states rules and principles that must be applied in its application. These general provisions have more effect than the preamble, since they are ~~firm-binding~~ obligations found in the body of the Convention. They provide an overall structure for its implementation and express certain values that must be ~~taken into account in implementation~~ respected in doing so.

Comment [FL128]: Edit (editorial team)

Taken as a whole, the General Part establishes the foundation of a convention that is an instrument of good governance, respect for basic rights, and public empowerment. At the first Meeting of Parties of the Convention Convention (Lucca, 21-23 October 2002), the Lucca Declaration was adopted by the ministers and heads of delegations. Paragraph 2 of the Declaration states: "Access to information, public participation and access to justice are fundamental elements of good governance at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy." The same link is made in paragraph 4 of the Johannesburg Plan of Implementation of the 2002 World Summit on Sustainable Development.

Comment [FL129]: Edit (editorial team)

Comment [FL130]: Insertion (editorial team)

Article 1

OBJECTIVE

This provision sets the overarching goals and values of the Convention. Because it is part of the Convention's main text, it has even more weight than the preamble in shedding light on the interpretation of the remaining provisions. It has the advantage of being strongly rooted in pre-existing international and domestic environmental and human rights law, ~~while at the same time pulling these together~~ together from various trends in international law into a succinct new formulation. In spite ~~or perhaps because~~ of its brevity it is densely packed with language significant not only to the Convention itself but to the overall development of the international law of environment and sustainable development.

Comment [FL131]: Edit (editorial team)

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The most remarkable thing about article 1 is that it clearly states that the Aarhus Convention is about basic human rights —the rights of every person. It is one of the clearest statements in international law ~~to date~~ of a fundamental right to a healthy environment.⁹⁰ Whereas the Rio Declaration states that human beings "are entitled to a healthy and productive life in harmony with nature," this concept is continually being built upon by a succession of domestic and international legal and political developments linking well-established rights, such as the right to life and the right to health, with the

requirement of a healthy and well-conserved environment.⁹¹ While the Convention does not expressly state that the right exists, it does refer to it as an accepted fact. ~~This may be optimistic, given the debate concerning whether such a right does in fact exist. However, when the Convention is in force, it will be a fait accompli,~~ although the exact formulation and meaning of the right will be a matter of debate for some time to come. ~~For more about the link between environmental protection and human rights, see the commentary to the preamble, especially the first, fifth, sixth and seventh paragraphs. Now that the Convention is in force, this means that the Parties are under a legal obligation to work towards guaranteeing the right of every person to an environment that is adequate to health and well-being.~~

Comment [MSOffice132]: Deletion (editorial team)

Comment [FL133]: Reinsertion (editorial team)

Comment [FL134]: Text moved up to here from paragraph below (editorial team)

Comment [FL135]: Deletion (Denmark)

The concept of intergenerational equity—that the impact of current actions on the well-being of future generations must be taken into account—significantly is mentioned here. Taking future generations into account is one of the fundamental tenets of sustainable development. The basic human responsibility to protect and improve the environment for the benefit of present and future generations was expressed on the global level as early as 1972, in principle 1 of the Stockholm Declaration, but the Aarhus Convention is the first international legal instrument to extend this concept to a set of legal obligations. ~~Forging the link between environmental and human rights puts into a larger perspective the interpretation and possible implementation of the Convention. See also commentary to preamble, especially its first, fifth, sixth and seventh paragraphs.~~

Comment [FL136]: Deletion for clarity (editorial team)

Comment [FL137]: Text moved up to previous paragraph (editorial team)

Basically, the Convention is not primarily about the right to a healthy environment, but about the (mostly) procedural rights of access to information, access to decision-making and access to justice. Rather than stating the right to a healthy environment in aspirational terms, as has so often been the case in the past at the national level, article 1 instructs Parties in how to take steps to guarantee the basic right of present and future generations to live in an environment adequate to their health and well-being. In so doing it establishes the linkage between practical, easily understandable rights, such as those relating to information and decision-making, and the harder-to-grasp complex of rights included in the right to a healthy environment.⁹² As seen in the preamble, the Aarhus Convention forges links between the development of one set of human rights, in particular those relating to the basic conditions of life, including the environment, and another set of human rights, those relating to human self-fulfilment, expression and action. By harnessing the energy of public participation, society can do more to stop environmental degradation and can work towards sustainability.

Comment [FL138]: Insertion (editorial team)

Article 1 also ~~concretizes-spells out~~ the role of the State in helping to reach this goal. Under the framework of the Aarhus Convention, it is up to the Party to provide the necessary administrative, legal and practical structures to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters. This represents a new approach to the role of the State. Instead of solving all of society's problems itself, the State acts as a sort of referee in a process involving larger societal forces, leading to a more home-grown and complete result. This notion of the role of the State is increasingly replacing the discredited notion that society's problems can be solved through engineering by experts.

Comment [FL139]: Edit (editorial team)

According to this view, once transparent and fair processes have been worked out, the main role of the State is to provide the necessary guarantees to maintain the framework. The Aarhus Convention provides a set of minimum standards to Parties to guide them in how to protect the right to a healthy environment. The obligations of the Convention must be considered in this light—not as commitments among nations for the promotion of good neighbourly relations, but as ~~valuable tools~~ helpful benchmarks for contributing to the basic welfare of the ~~people~~ public.

Comment [FL140]: Edit (editorial team)

Authorities should not look at the Convention as a set of strict and burdensome obligations to be minimized if not avoided altogether, but rather as a valuable and user-friendly tool to support them help in discharging their ~~awesome~~ responsibility to help the people public to overcome the ~~formidable~~ challenges of the times.

Comment [FL141]: Edit (editorial team)

Comment [FL142]: Edits (editorial team)

The Aarhus Convention and the Council of Europe

To date aAll Aarhus Convention Parties are also members of the Council of Europe. In the Council of Europe's 2005 Warsaw Declaration and Action Plan, member States referred to the entitlement to live in a balanced, healthy environment. A condition for membership in the Council of Europe is the ratification of the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Council of Europe member States agree to submit to the jurisdiction of the European Court of Human Rights with respect to questions relating to the protection of rights under the ECHR.

Article 8 of the ECHR concerns the right to respect for private and family life, home and correspondence. As discussed in the commentary to the seventh preambular paragraph, the European Court of Human Rights has interpreted Article 8 of the ECHR to approximate a right to a healthy environment in a series of cases. Member sStates in the 2005 Warsaw Declaration and Action Plan referred to the entitlement to live in a balanced, healthy environment. The shape that has been given by the Court to Article 8 assists in the interpretation of the Aarhus Convention and has been used by the Aarhus Convention Compliance Committee. The European Court of Human Rights has also recognized a right of access to information under Article 10 (freedom of expression). It has referred specifically to the Aarhus Convention in some of its decisions. Particular cases under the The jurisprudence of the European Court of Human Rights are is also discussed later in this Guide (see the commentary on in the relevant sections related to articles 4 and 9).

In 2008, the Council of Europe adopted the Council of Europe Convention on Access to Official Documents, the first international treaty on the right of access to information in general. The Convention will enter into force once it attains ten ratifications. As at June 2011 it had three ratifications.

- Comment [M143]: Edit (editorial team)
- Comment [MSOffice144]: Text moved to here from lower in text box (editorial team)
- Comment [M145]: Edit (editorial team)

- Comment [MSOffice146]: Edit (editorial team) (Warsaw Declaration sentence moved up text box)
- Comment [o147]: Insertion (Greenpeace)
- Comment [o148]: Insertion (Greenpeace)
- Comment [MSOffice149]: Edit (editorial team)
- Comment [H150]: Insertion (Greenpeace)
- Comment [MSOffice151]: Edit (editorial team)

Article 2

DEFINITIONS

Definitions play an important role in the interpretation and implementation of any convention. As the Aarhus Convention deals in part with the development of international standards for domestic legal systems, definitions are exceptionally important. Because of the wide variety of legal systems in the UN/ECE region, it is important to define as precisely as possible the terms that are at the heart of the Convention. By doing so, a more consistent implementation of the Convention in the framework of the domestic legal systems of all the Parties can be assured.

The terms whose definition is important under the Convention include "public authority", "public", "public concerned" and "environmental information". They help to define the scope of the Convention, in terms of the persons who should be made bound by its obligations, as well as those who should be allowed to use the rights described. While the Convention does not attempt a definition of the term "environment" or of "environmental matters", some indication of the meanings of these terms in the sense of the Convention can be deduced from the definition of "environmental information".

In reading any definition, it is important to distinguish between the core of the definition and the use of elements, lists or explanation. The Convention uses both exhaustive and non-exhaustive lists. Words such as "including", "such as" or "inter alia" indicate that the elements following are non-exhaustive. Furthermore, "such as" and "inter alia" also suggest that there are known elements not named, whereas "including" is less specific on this count.

Every convention includes terms that one wishes had been defined. The Aarhus Convention is no exception (see box).

Terms not defined in article 2

"In the framework/in accordance with (national legislation)"—These and similar phrases can be found at several instances in the Convention. Among them are article 2, paragraph 4, and article 6, paragraph 1 (b) ("in accordance with national legislation"), article 4, paragraph 1, article 5, paragraphs 2 and 5, article 9, paragraphs 1 and 2 ("within the framework of national legislation"), and article 4, paragraph 4 (d) ("within this framework"). These expressions are open to interpretation, and the manner in which they are interpreted is of the utmost importance to the overall implementation of the Convention. During the Convention's negotiations, these phrases were regarded by some as having a moderating effect on specific obligations, while by others as pertaining only to the method of implementation, though their meaning was never agreed. Given this background, the best that can be done at present is to express some hopefully well founded suggestions about interpretations of these terms, taking into account the principles and objectives of the Convention. In the end, it is the Parties that must take responsibility for its full implementation. Note that in the case of the European Union as a Party, EU legislation has the characteristics of national legislation. As noted by the Compliance Committee in its findings in ACCC/C/2006/18 (Denmark), for EU Member States, EU directives should be considered as part of those States' national legislation also.⁹³

One possible interpretation is that the terms pertain primarily to flexibility in the means of implementation but not to the extent to which the basic obligation in question must be met. This interpretation owes much to the notion that the obligations of international agreements should, as far as possible, be certain. According to this interpretation, the failure to introduce legislation cannot excuse the Party from the basic obligation, nor would a Party be excused from applying the particular provision if there were a pre-existing national law on the subject. The language merely introduces some flexibility in the means that Parties may use to meet the obligation and apply the principles of the Convention, taking into account different national systems of law. While legislation may have to be introduced to cover the obligation, specifications of the law can be spelled out differently, Party to Party, taking national systems into account. This flexibility is not unlimited, however. It does not give Parties a licence to introduce or maintain national legislation that undermines or conflicts with the obligation in question.

A second possible interpretation is that the terms introduce flexibility, not only in the means of implementing obligations, but also as to the scope and/or content of the obligations themselves. In some instances, it is more or less clear that differences in national legislation or in legal systems may have an effect on the scope of a particular provision. An example is the determination of "significant" environmental effect. Under article 6, paragraph 1, Parties are obliged to apply the provisions of article 6 to decisions on proposed activities which may have a significant effect on the environment. For those proposed activities not listed in annex I, Parties must determine whether a proposed activity has a significant effect on the environment in accordance with its national law. Thus, differences in the rules or criteria for determining what is significant among Parties might lead to a different scope in the application of the Convention to activities, though such differences might be ironed out over time through the Meeting of the Parties. It should be mentioned that the term "in accordance with national legislation" is particularly applicable in this kind of situation.

The term "within the framework of national legislation" may also be interpreted as an instruction to the Parties that they should provide more detailed provisions than the general ones presented in the Convention. This takes into consideration the legal system of many countries in the UNECE region according to which international agreements are directly applicable within the country in cases where legislation is silent. International agreements operate to override contrary domestic legislation and even to displace it systematically. It may therefore be necessary to include such language to indicate that the Convention should only qualify and not displace the existing national legislation on the subject. This type of problem was considered by the Compliance Committee in its findings on communication ACCC/C/2005/11 (Belgium). The Committee noted that where international agreements have direct applicability and are superior to national law, a Party must still take the necessary legislative and other measures to ensure the effective implementation of the Convention.⁹⁴

Comment [FL152]: Edit (editorial team)

Comment [FL153]: Deletion (editorial team)

Comment [E154]: Edited footnote (at request of Germany)

Comment [FL155]: Text moved down (editorial team)

Comment [E156]: Edited footnote (at request of Germany)

The idea that the phrases "in accordance with national legislation" or "within the framework of national legislation" might introduce flexibility in the content of the basic obligations of the Convention is more problematic. Allowing Parties to avoid certain obligations on this basis would result in uneven implementation of the Convention and promote basic differences in interpretation. It would allow some Parties to take provisions less seriously than others and would thereby undermine the Convention as a whole. This does not alter the fact that this interpretation would give Parties slightly more flexibility in interpretation and implementation.

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

Comment [MSOffice157]: Edit (editorial team in light of comments by Chair of Task Force on Access to Justice)

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

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

Under the "flexibility in method" interpretation above, the phrase "in accordance with national legislation" refers to a more direct link with a matter that may already be covered by national legislation. It is a way of carrying along with the Convention a matter that may evolve independently through national law. Besides the example given above about "significant" environmental effect, another example might involve NGO qualifications. Where NGOs are granted particular rights in a proceeding there may be a reference to those NGOs that meet requirements "in accordance with national legislation". Country A might require an NGO to have a minimum of 10 members with a certain geographical distribution. In the future the requirements for NGOs might be reduced to a minimum of eight members or the geographical distribution requirement might be dropped. So long as the change did not run afoul of some other provision of the Convention, it would automatically be incorporated under the regime of the Convention. The words are thus similar to such formulations as "provided under national legislation" or "where laid down in national legislation".

Note that in the case of the European Union as a Party, EU legislation has the characteristics of national legislation. As noted by the Compliance Committee in its findings on communication ACCC/C/2006/18 (Denmark), for EU Member States, EU directives should be considered as part of those States' national legislation also.⁹⁵

Comment [E158]: Edited footnote (at request of Germany)

Comment [FL159]: Text moved down to here (editorial team)

For the purposes of this Convention,

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

A State or regional economic integration organization that has formally indicated its intent to be bound by a convention becomes a Party to it once the convention enters into force. (For a discussion of regional economic integration organizations, see the commentary to article 17.) Intent to be bound by a convention can be indicated in various ways, that is ratification, acceptance, approval or accession, depending on the constitutional order of the subject State or regional economic integration organization and whether it had already signed the convention before the latter entered into force. It should be noted that it is the whole State, and not just the administrative or executive branch of government, that is bound by the international obligations of a treaty. The Aarhus Convention was open for signature to States and to regional economic integration organizations in the UN/ECE region ~~through~~ until 21 December 1998 (see article 17). In accordance with a Article 20, of the Convention establishes that it entered into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession, that is, on 30 October 2001. For States that have deposited or will deposit their instruments of ratification, acceptance, approval or accession after the sixteenth one 30 October 2001, the Convention enters into force on the ninetieth day after the date of their deposit. (For more on signature, deposit, ratification, acceptance, approval or accession, and entry into force, see commentary to articles 17-20). ~~The Aarhus Convention website includes up-to-date information on the status of ratification of the Convention, see <http://www.unece.org/env/pp/ratification.htm>. (For more on signature, deposit, ratification, acceptance, approval or accession, and entry into force, see commentary to articles 17-20).~~

Comment [FL160]: Edits (editorial team)

Comment [FL161]: Edits (editorial team)

The term should not be confused with "party" in the usual legal sense. For example, article 4, paragraph 4 (g), refers to a "third party", that is, a person not a party to a particular agreement or transaction but who may have rights or interests therein. The commentary sometimes uses the term "party" when referring to a legal or natural person who takes part in a particular proceeding (for example, see the commentary to article 6, paragraph 9) or whose interest is otherwise affected. In the Convention text and the commentary, the term in its defined sense is always capitalized, whereas the term used in its ordinary legal sense is not capitalized.

Comment [FL162]: Edit (editorial team)

2. "Public authority" means:

The definition of public authority is important in defining the scope of the Convention. While clearly not meant to apply to legislative or judicial activities, it is nevertheless intended to apply to a whole range of executive or governmental activities, including activities that are linked to legislative processes. The definition is broken into three parts to provide as broad a coverage as possible. Recent developments in "privatized" solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such innovations cannot take public services or activities out of the realm of public involvement, information, and participation or justice.

Comment [FL163]: Edit (editorial team)

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

"Public authority" includes "government"—a term which includes agencies, institutions, departments, bodies, etc. of political power at all geographical or administrative levels. In a typical situation, national ministries and agencies and their regional and local offices, State, regional or provincial ministries and agencies and their regional and local offices, as well as local or municipal government offices, such as those found in cities, towns or villages, would be covered.

It must be emphasized that public authorities under the Convention are not limited

to "environmental authorities" within government. It is unimportant whether a particular public authority works in an environmental ministry or inspectorate, or even understands that his or her responsibilities have links to the environment. All governmental authorities of whatever function are covered under sub-paragraph (a).

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

"Public authority" also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities as determined according to national law. What is considered a public function under national law may differ from country to country. However, reading this subparagraph together with subparagraph (c) below, it is evident that there needs to be a legal basis for the performance of the functions under this subparagraph, whereas subparagraph (c) covers a broader range of situations. As in subparagraph (a), the particular person does not necessarily have to operate in the field of the environment. Any person authorized by law to perform a public function of any kind falls under the definition of "public authority", although references in the environmental field are provided as examples of public administrative functions and for emphasis.

A natural person is a human being, while "legal person" refers to an administratively, legislatively or judicially established entity with the capacity to enter into contracts on its own behalf, to sue and be sued, and to make decisions through agents, such as a partnership, corporation or foundation. While a governmental unit may be a person, such persons would already be covered under subparagraph (a) of the definition of "public authority". Public corporations established by legislation or legal acts of a public authority under (a) fall under this category. The kinds of bodies that might be covered by this subparagraph include public utilities and quasi-governmental bodies such as water authorities.

For example, in its findings on communication ACCC/C/2004/01 (Kazakhstan), the Compliance Committee held that a state-owned enterprise with responsibilities for the atomic power industry was a legal person performing administrative functions under national law, including activities in relation to the environment, as this fell under this subparagraph of the definition.⁹⁶

Comment [E164]: Edited footnote (at request of Germany)

While the Convention is not entirely clear on this point, it ~~may be considered~~ would seem that a single body may perform public administrative functions with respect to a part of its activities, ~~and~~ while other of its activities will be of a private nature. It would be reasonable, therefore, to apply the Convention only to those activities that fall under the definition.

Comment [MSOffice165]: Edit (editorial team)

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

In addition to government and persons performing public administrative functions, the definition of public authority also includes other persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of the other categories of public authorities. There are two key differences between this subparagraph and the others.

One key difference between subparagraph (c) and (b) is the source of authority of the person performing public functions or providing public services. It can be distinguished from subparagraph (b) in that the bodies addressed derive their authority not from national legislation, but indirectly through control by those defined in subparagraphs (a) and (b). The difference is also reflected in the terminology used, since this subparagraph uses the term "public responsibilities or functions", a broader

designation than "public administrative functions" used under subparagraph (b) to denote the connection between law and State administration. The provision is similar to that of article 6 of the old Council Directive 90/313/EEC, which refers to bodies with public responsibilities and under the control of public authorities. However, article 2, paragraph 2 (c) fills a gap found in the Directive, because it includes not only persons under the control of governmental authorities but also persons that might not be under the control of governmental authorities but are under the control of those persons referred to in article 2, paragraph 2 (b). Such persons might ~~can~~ be service providers or other companies that fall under the control of either public authorities or other bodies to whom public functions have been delegated by law. For example, water management functions might be performed by either a government institution or a private entity. In the latter case, the provisions of the Convention would be applicable to the private entity insofar as it performs public water management functions under the control of the governmental authority. When Council Directive 90/313/EEC was replaced by Directive 2003/4/EC, the definition of "public authority" was made to conform to the Convention.

Comment [WX166]: Correction (editorial team)

Comment [FL167]: Edit (editorial team)

The second key difference distinguishes subparagraph (c) from both previous subparagraphs. While subparagraphs (a) and (b) define as public authorities bodies and persons without limitation as to the particular field of activities, this subparagraph (c) does so limit the scope of the definition expressly includes such a limitation. Only persons performing ~~having~~ public responsibilities or functions or providing public services in relation to the environment can be public authorities under this subparagraph.

Comment [FL168]: Edit (editorial team)

At a minimum, this subparagraph covers natural or legal persons that are publicly owned, for example, community-owned public service providers. In its findings mentioned above, ACCC/C/2004/01 (Kazakhstan), the Aarhus Convention Compliance Committee held that the state-owned enterprise with responsibilities for the atomic power industry fell under this subparagraph of the definition, since it was also a legal person performing public functions under the control of a public authority.⁹⁷

Comment [E169]: Edit footnote : at request of Germany

The provision ~~it~~ may also cover publicly or privately owned entities providing public services where the service provider can oblige residents to pay fees or engage in particular activities, such as those relating to waste collection or privately operated landfills. Furthermore, it may cover entities performing environment-related public services that are subject to regulatory control. Environmental funds would fall under this definition as well.

Comment [H170]: Deletion: Croplife

The provision also reflects certain trends towards the privatization of public functions that exist in the UN/ECE region. During the Convention's negotiations, Belgium, Denmark and Norway issued an interpretative statement relating to this definition. They considered that an entity for which policy and other major issues were subject to approval or decision by the public authorities would be considered under the control of such authorities for the purposes of this article. Some of these entities are government-created and/or -financed corporations that perform certain functions normally within the sphere of public authority competence. For example, the Netherlands Energy and Environment Enterprise has been officially delegated grant making authority in energy conservation, while practically being a part of the Netherlands Government's energy policy.⁹⁸

Comment [MSOffice171]: Deletion : Netherlands

An example from the United Kingdom may help to illustrate the relevance of this provision. There, public functions previously carried out by governmental authorities had been taken over through a privatization process by public corporations. These included major providers of natural gas, electricity, and sewerage and water services. In the case of the water providers, they were highly regulated by the Government and kept financial accounting for these services separate from their other activities. In 1995, a court case in the United Kingdom about the applicability of European Community directives to such a water services company, the judge determined that such a service provider was an "emanation of the State" and therefore covered by the directive.⁹⁹ However, since that time opinions have changed as a result of amendments to water services regulation, and, in the latest infollowing a series of ongoing cases relating to water and sewerage services, the Upper Tribunal concluded that such companies do not carry out public functions.¹⁰⁰

Comment [o172]: Insertion/deletion : UK

~~On the other hand, in a more recent UK case a court found that a railway company was not a public authority under the Aarhus Convention, the Environmental Information Regulation, the Freedom of Information Act, or the Human Rights Act.¹⁰¹ It is questionable, however, whether this case interprets the provisions of the Convention correctly.~~

Comment [o173]: Deletion : UK

~~There may be some overlap between subparagraphs (b) and (c) of the definition, but it is clear that any person providing public services in relation to the environment under the control of a body or person falling within subparagraphs (a) or (b) is a “public authority.” Implementation of the Convention would be improved if Parties clarified which entities are covered by this subparagraph. This could be done through categories or lists made available to the public.~~

Comment [o174]: Deletion : UK, Croplife

Comment [MSOffice175]: Deletion (editorial team)

Comment [o176]: Insertion : UK, Denmark

~~As noted with respect to subparagraph (b) above, while the Convention is not entirely clear on this point, it may be considered would seem that a single body may fall under this definition with respect to a part of its activities, and while other of its activities will be of a private nature. It would be reasonable, therefore, to apply the Convention only to those activities that fall under the definition.~~

Comment [MSOffice177]: Edit (editorial team)

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

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

Comment [MSOffice178]: Edit (editorial team)

Comment [M179]: Edit (editorial team)

~~The Aarhus Convention had a major impact on the transparency of EU decision-making marking a big step forward from the provisions of Council Directive 90/313/EEC, which, although mandatory for all EU member States, did not apply to the institutions of the EU itself, which instead were governed by voluntary codes of conduct. The EU adopted Regulation No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the so-called “Aarhus Regulation”) to meet some of its obligations as a Party to the Convention. Added transparency of EC decision-making is a big step forward from the provisions of Council Directive 90/313/EEC, which, although mandatory for all member States, does not apply to the institutions of the EC itself. They have up to now been governed by voluntary codes of conduct. Such change would confirm a positive trend towards more transparency of and participation in decisionmaking in the EC institutions established through provisions of the Amsterdam Treaty allocating more power to the European Parliament and more accountability to the Commission, as compared with the Maastricht Treaty. The fact that the EC has become a Signatory to the Convention indicates its determination to follow this trend. The Community stated at the signing of the Aarhus Convention that its institutions would be covered, alongside national authorities.⁸⁰ This is also consistent with the Amsterdam Treaty, which mandates a review of the Commission’s and Council’s rules on access to documents held by them.~~

The Aarhus Convention and the institutions of the European ~~Community~~ Union

The European ~~Community~~ Union signed the Aarhus Convention in June 1998 and submitted its instrument of approval on 17 February 2005, becoming a Party 90 days later. The Convention required the EU to adopt new legislation concerning the application of the Convention to EU institutions and bodies. To this end, the European Parliament and Council adopted Regulation No 1367/2006 on 6 September 2006 (the so-called “Aarhus Regulation”). Some of the major provisions of the Aarhus Regulation are as follows.

- Public authorities are defined in a “broad and functional” way in order to meet Convention requirements.
- The Regulation applies to any public institution, body, office or agency established by, or on the basis of, the Treaty, except when acting in a legislative or judicial capacity.
- Environmental information provisions also apply to EU institutions acting in a legislative capacity.
- The rules pertaining to access to documents under the “Transparency Regulation” (1049/2001) are extended to information in any form, at least with respect to environmental information.
- The grounds for excluding information from disclosure under the Transparency Regulation are incorporated by reference but a public interest test in conformity with the Convention’s requirements is added.
- Opportunities are provided for a minimum 8 week period for commenting in applicable public participation procedures.
- The Regulation establishes a threshold of two years of existence for NGO standing.
- Opportunities are provided for application/appeal to the European Court of Justice.

Comment [MSOffice180]: Edit : EU

~~Legal analysis of the EC legal framework would indicate the following:~~

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

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

Bodies or institutions acting in a legislative or judicial capacity are not included in the definition of public authorities. This is due to the fundamentally different character of such decision-making ~~either in~~ from many other kinds of decision-making by public authorities. ~~—Regarding decision-making in~~ a legislative capacity, ~~where~~ elected representatives are ~~more in theory~~ directly accountable to the public through the election process. ~~—or Regarding decision-making in~~ a judicial capacity, ~~where~~ tribunals must apply the law impartially and professionally without regard to public opinion. Many provisions of the Convention ~~should not apply~~ are not suitable to be applied directly to bodies acting in a judicial capacity, ~~given the need in order to~~ guarantee an independent judiciary and to protect the rights of parties to judicial proceedings. (See also the commentary to article 9.)

Comment [o181]: Deletion : Greenpeace

Comment [MSOffice182]: Edits (editorial team)

Comment [o183]: Insertion/deletion : Greenpeace

Comment [o184]: Insertion/deletion : Greenpeace

This exception applies not only to parliaments, courts or local councils, but also to executive branch authorities, when they perform legislative or judicial functions. An example of the former can be found in municipal councils, which sometimes serve in both legislative and executive capacities. Where they are acting in an executive capacity they are covered by the Convention; where they are acting in a legislative capacity they are

not.

The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in law-making is recognized in article 8. As the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the Convention. Conversely, if legislative branch authorities engage in activities outside their legislative capacity, they might fall under the definition of "public authority" under the Convention. For example, when the European Parliament adopts resolutions on environmental questions or in relation to international environmental agreements, it is possibly not acting in a legislative capacity, and some provisions of the Convention might apply.

It should be mentioned that there is nothing in the Convention that would prevent ~~bodies or institutions acting in a legislative or judicial capacity~~ ~~parliaments or other legislative bodies~~ from voluntarily applying the rules of the Convention *mutatis mutandis* to their own proceedings. ~~Likewise, Parties can still decide to extend legislation to cover these bodies and institutions, even if they are not obligated by the Convention to do so.~~ ~~At the same time as~~ While legislative activities are excluded from the ~~scope of definition of public authorities under~~ the Convention, the preamble, in its eleventh paragraph, invites legislative bodies to implement the Convention's principles. A group of parliamentarians issued the "Stockholm Statement" in September 1997, in which they endorsed the applicability to parliaments of the information provisions of the Convention in particular, and developed principles for public participation in "legislative work".¹⁰² ~~Finally~~ Similarly, the 1998 Resolution of the Signatories to the Aarhus Convention emphasized the key role to be played by parliaments, regional and local authorities, and NGOs in the implementation of the Convention. ~~Regarding bodies acting in a judicial capacity,~~ ~~the national access to information laws of many Parties to the Convention apply equally to the judiciary.~~ In 2009, the European Court of Human Rights issued a judgement finding Hungary in breach of Article 10 of the European Convention on Human Rights (freedom of expression) because the Constitutional Court had denied an NGO access to a complaint filed before it by an MP and other individuals.¹⁰³

Comment [o185]: Insertion/deletion : Greenpeace

Comment [A186]: Insertion : Greenpeace

Comment [MSOffice187]: Edits (editorial team)

Comment [MSOffice188]: Edits (editorial team)

Comment [o189]: Insertion : Greenpeace

It should be remembered that, while bodies or institutions acting in a legislative or judicial ~~bodies~~ capacity do not fall under the definition of "public authorities," a number of the Convention's obligations, in particular those found in articles 3 and 9, are placed ~~not on public authorities but rather upon the Party itself.~~ ~~Legislative or judicial bodies frequently need to take action as a part of each Party's obligation of States to take measures to implement the Convention.~~ ~~Obviously, legislative bodies will~~ may need to enact the legislation necessary to adjust a particular Party's legislative framework ~~towards implementation to comply with the Convention.~~ ~~But also,~~ ~~Judicial bodies play an important role in the administration of access to justice to enforce national law related to under article 9 of the Convention and to enforce national law related to the Convention more generally.~~ ~~Moreover,~~ In addition, legislative bodies and judicial bodies may need to take steps to address the incorrect or inconsistent application of the law by public authorities, including judicial bodies and administrative tribunals. ~~control over the inconsistent application of the law, or inconsistent judgements of judicial bodies, is a necessary matter for action by those bodies.~~ In its findings on ACCC/C/2008/33 (United Kingdom), the Compliance Committee noted "the numerous calls by judges suggesting that the Civil Procedure Rules Committee take legislative action." The Committee endorsed the calls by the judiciary and suggested that the Party concerned amend the Civil Procedure Rules in the light of the standards set by the Convention.¹⁰⁴ The Compliance Committee, in its findings on communication ACCC/C/2005/11 (Belgium), noted that inconsistent application of the law by various review bodies might, in an appropriate case, constitute a violation of the requirement to provide "clear, transparent and consistent" framework for implementation of the Convention under article 3, paragraph 1.¹⁰⁵

Comment [MSOffice190]: Edits (editorial team)

Comment [E191]: Edit footnote : at request of Germany

3. "Environmental information"

~~The definition of environmental information is of central importance to article 4 on access to environmental information and article 5 on the collection and dissemination of environmental information. What constitutes environmental information. Taken as a whole, the definition of environmental information is the closest that the text of the Convention gets to determining a scope of what relates to the environment, and thus is of central importance to the overall scope of the Convention. Its main application is in the term "environmental information" is expressly used in the preamble, in article 4 on access to environmental information, and article 5 on the collection and dissemination of environmental information and article 6, paragraph 2(d)(iv) regarding public participation on decisions on specific activities. However, because of the interlinkages between the Convention's provisions, but by implication its description of what constitutes environmental information the term is by implication relevant to the rest of the Convention as well.~~

Comment [MSOffice192]: Deletion as duplicates final paragraph of this section (editorial team)

~~The term is explained. The definition does not attempt to define "environmental information" in an exhaustive manner but rather breaks down its rather indirectly in terms of what environmental information can be about. The subjects scope of environmental information are broken into three categories and within each category provides an illustrative lists are set forth. These lists are likewise non-exhaustive, and so they require a degree of interpretation on the part of authorities in a given case. The clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.~~

Comment [M193]: Edits (editorial team)

Comment [M194]: Edit (editorial team)

In any case, the definition of environmental information is, of course, a minimum requirement; Parties may use a broader definition. Several countries in the UNECE region have not differentiated between environmental information and other kinds of information held by public authorities. In these countries, legislation or administrative tradition provides that all information with certain limitations held by public authorities is accessible to the public. Finland, the Netherlands and Sweden, Ukraine, and United Kingdom and the United States are among the countries with general access to information laws that make the question of whether information is "environmental" or not unnecessary. In contrast, Denmark has both a general information law and a specific law on environmental information. Where both kinds of laws exist, attention should be paid to consistency. For example, the Aarhus Regulation in the EU provides access to environmental information in any form, whereas the Transparency Regulation, which applies also to non-environmental information, only provides access to "documents."

Comment [MSOffice195]: Confirmed : Finland

Comment [MSOffice196]: Confirmed : Sweden

Comment [o197]: Deletion : UK

Comment [M198]: Edit (editorial team)

Comment [o199]: Confirmed : Denmark

The Aarhus Convention does not contain a definition of "environment". Article 2, paragraph 3, is important, not only for its obvious relation to the Convention's provisions concerning information, but also because it is the closest that the Convention comes to providing a definition of the scope of the environment. It is logical to interpret the scope of the terms "environment" and "environmental" accordingly in reference to the detailed definition of "environmental information" wherever these terms are used in other provisions of the Convention.

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

Environmental information may be in any material form, which specifically includes written, visual, aural and electronic form. Thus, paper documents, photographs, illustrations, video and audio recordings, and computer files are all examples of the material form the information can take. Any other material forms, not mentioned, existing

now or developed in the future, also fall under this definition. See also the fifteenth preambular paragraph about electronic or other, future means of communication.

Comment [M200]: Edit (editorial team)

It is also important to distinguish between documents and information. The Convention guarantees access to *information*. The "material form" language is not meant to restrict the definition of environmental information to finished products or other documentation as that may be formally understood. Information in raw and unprocessed form is obtainable as well as documents.

In Case T-264/04, WWF-EPO v. Council of the European Union (Court of First Instance, 25 April 2007), the European Court of First Instance ruled that the 'concept of document must be distinguished from that of information'. Thus, under the Transparency Regulation, the Community institutions were only obliged to disclose information held in the form of a formal document, as opposed to "... any information in written, visual, aural or electronic or any other material form" as defined in article 2, paragraph 3 of the Aarhus Convention (and Article 2(d) of the Aarhus Regulation). At the time the case was brought, the Aarhus Regulation had not yet been promulgated and today this defect narrow interpretation of document/information should no longer apply.¹⁰⁶ The Aarhus Regulation and Transparency Regulations are discussed further in the commentary to article 4, paragraph 4.

Comment [W201]: Edit : WWF

Comment [MSOffice202]: Insertion (editorial team)

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

Under the Convention, environmental information includes any information in any material form relating to the state of the elements of the environment. The Convention lists examples to illustrate what is meant by "elements of the environment". The elements in this non-exhaustive list include "air and atmosphere", "water", "soil, land, landscape and natural sites", and "biological diversity and its components, including genetically modified organisms". Some of these terms have common sense definitions and it is not necessary to develop technical definitions. However, it is worth noting that some international agreements may be relevant in delineating the scope of the elements of the environment. For example, with respect to "air and atmosphere," it may be useful to compare the definition of "ambient air" found in EU Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management EU Directive 2008/50/EC on ambient air quality and cleaner air for Europe. The directive defines "ambient air" as "... outdoor air in the troposphere, excluding work places".¹⁰⁷ By implication, the Aarhus Convention's definition, which is broader, invites Parties to include both indoor and workplace air as well as all levels of the atmosphere. Furthermore, "soil, land, landscape and natural sites" are grouped together under the Convention to ensure a broad application and scope. The whole complex of these descriptive terms might be used in connection with, for example, natural resources, territory and protected areas. "Natural sites" may refer to any objects of nature that are of specific value, including not only officially designated protected areas, but also, for example, a forest, a tree or a park that is of localized significance, having special natural, historic or cultural value. Landscape and natural site protection have become important elements in conservation for many reasons, including aesthetic appeal, protection of unique historical or cultural areas, or preservation of traditional uses of land.

Comment [M203]: Edit (editorial team)

"Biological diversity and its components, including genetically modified organisms" requires a more complex explanation. Article 2 of the Convention on Biological Diversity gives the following definition of biological diversity: "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems". Biodiversity includes, but is not limited to, ecosystem diversity, species diversity and genetic diversity. In addition, tangible entities identifiable as a specific ecosystem (a dynamic complex of

plant, animal and micro-organism communities and their non-living environment interacting as a functional unit¹⁰⁸), are considered components of biodiversity.¹⁰⁹

~~While genetically modified organisms are explicitly included as one of the components of biodiversity under the Aarhus Convention, they are not defined. At the international level, the Cartagena Protocol on Biosafety uses the term "living modified organism", rather than "genetically modified organism". The Cartagena Protocol defines "living modified organism" as "any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology" and "living organism" to mean any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids".¹¹⁰ Article 3 of EU Directive 2001/18/EC¹¹¹ The Council Directive of 23 April 1990, on the deliberate release into the environment of genetically modified organisms (90/220/EEC) provides the following definition of genetically modified organism: "an organism ... in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination". (It may be that the term "genetically modified organism" as defined in EU Directive 2001/18/EC is potentially broader than that of "living modified organism" under the Cartagena Protocol but the extent of any difference in scope has not been resolved in practice. (For more on GMOs see commentary to article 6, paragraph 11.)~~

Comment [M204]: Edit (editorial team)

Comment [M205]: Edit (editorial team)

Comment [M206]: Insertion (editorial team in light of Croplife and PRRI comments)

Comment [FL207]: Footnote inserted (editorial team)

Comment [o208]: Insertion (editorial team)

The list of "elements of the environment" is non-exhaustive ~~and as the use of "such as" in the text to introduce the list indicates that there may be others in addition to those specifically s may exist without being mentioned.~~ For example, radiation, while being mentioned in subparagraph (b) as a "factor", may also be considered as an element of the environment. ~~Otherwise, the effect of radiation on human health would be covered by the definition only if it acted through an environmental medium (see commentary under subparagraph (c), below).~~

Comment [M209]: Edit (editorial team)

Comment [MSOffice210]: Deletion (editorial team)

Finally, the subparagraph includes "the interaction among these elements". This provision ~~reflects the approach taken to integrated pollution prevention and control (IPPC), recognizing~~ recognizes that the interactions among environmental elements are as important as the elements themselves. ~~Instruments such as the European Union's The goal of the European Community's~~ IPPC Directive,¹¹² for example, ~~is to~~ achieve integrated prevention and control of pollution arising from a wide range of activities by means of measures to prevent or, where that is not practicable, to reduce emissions from industrial facilities to air, water and land, including measures concerning waste, in order to achieve a high level of protection of the environment as a whole.

Comment [M211]: Edit (editorial team)

Comment [M212]: Revised text already in previous draft, but erroneously not shown in track changes

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a)above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

Environmental information under the Convention goes beyond information on the elements of the environment and their interaction to include information on human and non-human factors and activities or measures that affect or are likely to affect the elements of the environment. Furthermore, the definition also includes economic analyses and assumptions used in environmental decision-making.

At the outset, an important issue of the translation of the text into the three official languages of UN/ECE must be discussed. ~~The effect of the factor, activity or measure does not have to be immediately evident. It is enough if there is some probability that an effect on the environment might happen in the future.~~ In the English version of the text, the words "likely to affect the elements of the environment" are used. The literal translation of the Russian ~~and French~~ versions of the text is ~~the lower standard of, rather,~~ "that may affect". ~~The The degree of probability expressed in this provision is already~~

rather vague, but there is a distinct difference in the two formulations. "Likely to affect" may be interpreted to mean "more likely than not", which requires a certain degree of probability. The Russian and French text of the Convention wording would appear to be more inclusive definitions, covering any factors, activities or measures that possibly "may" affect elements of the environment, even those not "likely" to do so. Given that article 22 of the Aarhus Convention states that the English, French and Russian texts are equally authentic, this situation at first sight creates some lack of clarity for those seeking to implement the provision. However, the 1969 Vienna Convention on the Law of Treaties 1969 establishes a framework for how to proceed in such situations.

Comment [MSOffice213]: Edits (editorial team)

Under article 33 of the 1969 Vienna Convention on the Law of Treaties, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.¹¹³ The terms of the treaty are presumed to have the same meaning in each authentic text. Except where the treaty provides or the parties agree that a particular text prevails, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. Article 31 of the Vienna Convention (somewhat paraphrased) states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 32 (also paraphrased) provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure.

Comment [MSOffice214]: Edits (editorial team)

Applying the Vienna Convention's framework to the current situation, it may be that given the object and purpose set out in article 1 of the Convention, and the context provided by the preamble, the meaning which best reconciles the texts is the more inclusive approach found in the Russian and French versions. There has been no determination on this point by the Meeting of the Parties, however.

Comment [MSOffice215]: Edits (editorial team)

Turning to consider the other parts of subparagraph (b), it may be that its require a much lower degree of probability ("possibly may affect"). The French formulation is closer to the Russian one ("may have an impact"). The difference between these two formulations is potentially significant. It is not clear how this difference might be resolved in the practical application of the Convention. It is interesting to note, however, that the Russian formulation is more consistent with the formulation found at other points in the Convention, for example in article 6, paragraph 1(b), which refers to activities "which may have a significant effect on the environment".

Article 22 of the Convention states that the English, French and Russian texts are equally authentic. Under article 33 of the 1969 Vienna Convention on the Law of Treaties, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.¹¹⁴ The terms of the treaty are presumed to have the same meaning in each authentic text. Except where the treaty provides or the parties agree that a particular text prevails, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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

~~inappropriate in the definition of "environmental information".~~

The complex formulation of ~~subparagraph (b)~~ requires some deconstruction. It can be diagrammed as follows:

<p>[Factors (such as substances, energy, noise and radiation), and</p> <p>activities or measures (including administrative measures, environmental agreements, policies, legislation, plans and programmes),</p> <p>affecting or likely to affect the elements of the environment within the scope of sub-paragraph (a) above,] and</p> <p>[cost-benefit and other economic analyses and assumptions used in environmental decision-making;]</p>
--

Comment [M216]: Existing text put into box (editorial team)

It can thus be seen that the subjects of information covered by subparagraph (b) can be broken down into two major categories: (i) factors and activities or measures, and (ii) economic analyses and assumptions. The first category is further qualified in that only those factors and activities or measures likely to affect the environment as defined under subparagraph (a) can be considered. The second category is further qualified by reference to the context in which the economic analyses and assumptions are made—that is, they must be used in environmental decision-making. Thus, the second category is the ~~most particularly~~ relevant to the scope of information determined under the requirements of article 6, for example, the contents of the notification to the public concerned in a particular decision-making procedure (article 6, paragraph 2) and the information that must be made available to the public concerned (article 6, paragraph 6).

Comment [M217]: Edit (editorial team)

Within the first category, several examples are given to explain what is meant by the terms. "Factors" likely to affect the environment include "substances, energy, noise and radiation". These may generally be categorized as physical or natural agents. "Activities or measures" likely to affect the environment include "administrative measures, environmental agreements, policies, legislation, plans and programmes". These terms imply human action. While the examples given can be seen to be primarily acts of public authorities, although environmental agreements may involve private actors as well, there is no logical reason to limit the activities or measures covered in such a way.

The definition certainly includes decisions on specific activities, such as permits, licences, permissions that have or ~~might may~~ have an ~~y (in the Russian and French texts), or have or are likely to have an (in the English text)~~ effect on the environment. Again, the activities or measures do not need to be a part of some category of decision-making labelled "environmental". The test is whether the activities or measures may have ~~(in the Russian and French texts) or are likely to have (in the English text)~~ an effect on the environment. So, for example, information related to planning in transport or tourism would in most cases be covered by this definition. Many countries' national legislation contains lists of environmental information, which includes applications for permits, decisions on whether to permit an activity, conclusions of environmental expertise, EIA documentation, etc. Under the definition, any such lists in national legislation may not be considered exhaustive.

Comment [M218]: Edits (editorial team)

Comment [MSOffice219]: Edits (editorial team)

Comment [MSOffice220]: Edits (editorial team)

Comment [MSOffice221]: Insertion (editorial team)

The definition makes specific mention of environmental agreements, which are also mentioned in article 5, paragraph 3 (c). This phrase applies to voluntary agreements such as those negotiated between government and industry, and may also apply to bilateral or multilateral environmental agreements among States. In the case of voluntary agreements or "covenants", ~~designating them as measures likely to affect the environment included within the definition of "environmental information" may help to make them more accessible. Voluntary agreements these~~ result from the government's power to make rules regulating a certain subject area, for example, the content of detergents or a prohibition on the use of volatile chlorinated hydrocarbons. These agreements are sometimes published, and sometimes not published, and may be negotiated by committees dominated by either representatives of the regulated industry or by the officials who will

Comment [M222]: Text moved to end of paragraph and reworded (editorial team)

be responsible for enforcing the regulations, a situation that has led to some criticism.¹¹⁵
The Convention's listing of them under article 2, paragraph 3 (b) creates a presumption that they will be publicly accessible.

Comment [M223]: Text moved down to here and reworded (editorial team)

Finally, the second category covered by subparagraph (b) includes the economic analyses and assumptions used in environmental decision-making, such as cost-benefit analyses. This category establishes the relevance of economic analysis to environmental issues. As the results of the economic analysis may have a great impact on whether or not a particular project will go ahead, it is important to be able to examine the thinking that went into it. The quantification of environmental values and the "internalization" of environmental costs are among the most difficult of questions for economists. It is therefore also important to be able to analyse the assumptions behind economic modelling used in environmental decision-making.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Aarhus Convention Compliance Committee found that rental contracts for lands administered by the State Forestry Fund fell under the Convention's definition of environmental information in article 2, paragraph 3 (b).¹¹⁶

Comment [WX224]: Inserted (editorial team)

In its findings on communication ACCC/C/2004/08 (Armenia), the Compliance Committee found that stand-alone government decrees relating to land use and planning constitute "measures" and therefore fall under the definition of "environmental information" in article 2, paragraph 3 (b).¹¹⁷

Comment [M225]: Edit (editorial team)

Comment [E226]: Edit footnote : at request of Germany

Comment [M227]: Edit (editorial team)

The Compliance Committee considered whether financing agreements fall under the definition in its findings on communication ACCC/C/2007/21 (European Community). The Committee held that financing agreements, even though not listed explicitly in the definition, may sometimes amount to "measures ... that affect or are likely to affect the elements of the environment" under article 2, paragraph 3 (b). For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis.¹¹⁸

Comment [M228]: Edit (editorial team)

Comment [E229]: Edit footnote : at request of Germany

Comment [M230]: Edit (editorial team)

In its findings on communication ACCC/C/2004/01 (Kazakhstan), the Compliance Committee considered that a feasibility study related to draft legislation that would allow the import and disposal of low- and medium-level radioactive waste fell under this subparagraph of the definition.¹¹⁹

Comment [E231]: Edit footnote : at request of Germany

Comment [E232]: Edit footnote : at request of Germany

At the national level, radio waves that pass through the atmosphere from a cellular base station to any solid component of the natural world have been found to fall under the Convention's definition of "environmental information" by a UK court the United Kingdom's Information Tribunal (*Office of Communications v. Information Commissioner and T-Mobile*, United Kingdom Information Tribunal EA/2006/0078, 4 September 2007). The court found that the names of mobile network operators for each cellular base station also fell under the definition of "environmental information" under the Convention.

Comment [M233]: Edit (editorial team)

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

The Convention takes note of the fact that the human environment, including human health and safety, cultural sites, and other aspects of the built environment, tends to be affected by the same activities that affect the natural environment. They are

explicitly included here to the extent that they are or may be affected by the elements of the environment, or by the factors, activities or measures outlined in subparagraph (b). The Convention ~~clearly~~ requires a link between information on human health and safety, conditions of human life, etc. and the elements, factors, activities or measures described in subparagraphs (a) and (b), in order to impose a reasonable limit on the vast kinds of human health and safety information potentially covered. ~~The negotiating parties~~ Those involved in the negotiation of the Convention were faced with a situation in which looser language would have brought a whole range of human health and safety information unrelated to the environment under the definition, such as information relating to specific medical procedures or safety rules for the operation of specific tools.

Comment [M234]: Edit (editorial team)

Comment [M235]: Edit (editorial team)

Human health and safety are not identical to the terms "environmental health" or "environment and health", as used, for example, in the context of the WHO European Region ministerial meetings on environment and health (see commentary to the fourth preambular paragraph). For example, human health may include a wide range of diseases and health conditions that are directly or indirectly attributable to or affected by changes in environmental conditions. Human safety may include safety from harmful substances, such as chemicals, factors, such as radiation, or other natural or man-made conditions that affect human safety through manipulation of environmental elements.

Discussions about the existence of a right to a healthy environment often refer to a healthy environment as a basic condition for human life. The Convention echoes this notion when it includes "conditions of human life" as one of the things that may be included as environmental information. "Conditions of life" in a general sense may include ~~air quality of air, and quality and availability of water and food~~, housing and workplace conditions, relative wealth, and various social conditions.

Comment [M236]: Edits (editorial team)

The term "cultural sites" covers specific places or objects of cultural value. The Convention Concerning the Protection of the World Cultural and Natural Heritage gives the following definition: "works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view" (article 1). "Built structures" refers to man-made constructions. It is not limited to large buildings and objects such as dams, bridges, highways, etc. but also covers small constructions, and even landscaping or other transformation of the natural environment.

The things covered by subparagraph (c) depend upon a linkage with the matters found in sub-paragraphs (a) and (b). If the subparagraph (c) matters are potentially affected by the elements in (a) or their interaction, they qualify as subjects of environmental information. If the subparagraph (c) matters are potentially affected by the factors, activities or measures in (b), they also qualify as subjects of environmental information, so long as the effects pass through an environmental filter or medium in the form of subparagraph (a) elements. For example, if decisions about what land to conserve and what land to develop affect social conditions as described above in a particular area by changing the quality of air or water:

- ~~Information relating to the decision making would be environmental information under subparagraph (b);~~
- Information relating to the quality of air or water would be environmental information under subparagraph (a); ~~and~~
- ~~Information relating to the decision-making would be environmental information under subparagraph (b); and~~
- Information about the affected social conditions would be environmental information under subparagraph (c).

Comment [MSOffice237]: Reordered in alphabetical order (editorial team)

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

The definition of "public" applies the "any person" principle (for an explanation of natural and legal persons, see comment to article 2, paragraph 2). For emphasis, the Aarhus Convention also explicitly mentions associations, organizations and groups. By way of comparison, the definition of "public" in article 1 (j) of the Convention on the Transboundary Effects of Industrial Accidents(x) of the Espoo Convention, for purposes of comparison, is simply "one or more natural or legal persons." The same definition can currently be found in article 1(x) of the Espoo Convention, although the 2004 amendment to the Espoo Convention, once in force, adopts the Aarhus Convention approach and will extend the definition to explicitly include associations, organizations and groups. ~~(j) of the Convention on the Transboundary Effects of Industrial Accidents. For emphasis, the Aarhus Convention also explicitly mentions associations and groups.~~ The term "public" under this definition in article 2, paragraph 4, is not in itself subject to any conditions or restrictions. Thus, where the Convention conveys rights on "the public" without expressly adding any further qualifications on who of the public may enjoy those rights, the public are entitled to exercise those rights irrespective of whether they personally are "affected" or otherwise have an interest. Articles 4, 5, 6, paragraph 7 and 9, and article 8 are examples of provisions which follow this approach. the issue of whether a particular member of the public is affected or has an interest is not significant where rights under the Convention apply to the "public".

Comment [M238]: Edit (editorial team)

Comment [M239]: Insertion (editorial team)

Comment [M240]: Deletion (editorial team)

Comment [M241]: Insertion (editorial team)

Comment [M242]: Insertion (editorial team)

Comment [M243]: Insertion (editorial team)

Comment [M244]: Edits (editorial team)

Comment [M245]: Deletion (editorial team)

Moreover, applying article 3, paragraph 9, requires that no person be excluded from the definition on the grounds of nationality, domicile, citizenship, or place of registered seat. Under certain circumstances, therefore, persons who are non-citizens may have rights and interests under the Convention. For example, the rights under article 4 relating to requests for information apply to non-citizens and non-residents as well as citizens and residents.

Further explanation may be needed to ensure consistent application of the Convention. Where it talks about the obligation of public authorities to act in a certain way towards the public, for example by providing information, the term does not mean "one or more natural or legal persons" in the sense that the public authority has met the obligation by providing information to any one person of its choosing. Each individual natural or legal person enjoys all the substantive and procedural rights covered by this Convention. For example, where a particular member of the public makes a request for environmental information under article 4, paragraph 1, it is insufficient for the public authority to make, or to have made, the requested information available to one or several individuals or organizations, selected randomly or because they are best-known to the public authority. If there is any doubt about this, it is only necessary to examine article 9, paragraph 1, which provides that it is the *applicant* who has the right to seek independent review of the public authority's response to the request for information.

Along the same lines, the active distribution of information, under article 5, will not be sufficient if the information is distributed to a few natural and/or legal persons. And, when a public hearing, or meeting-enquiry or other opportunity for the public to comment is held under article 6, paragraph 7, it is not sufficient to allow one or several organizations, selected randomly or because they are best-known to the governmental officials, to submit comments. Any member of the public must be granted the right to submit comments. Thus, those Parties that traditionally allow for the public to be considered in representative fashion—that is, where certain persons have been granted authority to act as representatives of the opinion of the public or a part of it—must adopt a different approach towards the rights of the public.

Comment [M246]: Edit (editorial team)

As mentioned above, the Convention's definition of "public" differs from that of earlier UN/ECE conventions in the addition of language referring to associations, organizations or groups of natural or legal persons (although notably as noted above, the Espoo Convention's 2004 amendment when in force will follow the wider Aarhus Convention's approach). In most cases, an association, organization or group of natural or legal persons will itself have legal personality, and therefore will already fall under the

Comment [M247]: Edit (editorial team)

Comment [M248]: Edit (editorial team)

definition. The language can only be interpreted, therefore, to provide that associations, organizations or groups *without legal personality* may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice. Thus, ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply ~~While this provision is qualified by a reference to the requirements of national legislation or practice, the Parties must apply this definition in a manner consistent with the Convention's objective of securing broad access.~~

Comment [M249]: Original text reinserted (editorial team)

Comment [MSOffice250]: Edits (editorial team)

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

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

The term "public concerned" refers to a subset of the public at large with a special relationship to a particular environmental decision-making procedure. To be a member of the "public concerned" in a particular case, the member of the public must be likely to be affected by the environmental decision-making, or the member of the public must have an interest in the environmental decision-making. This definition applies to the second pillar of the Convention — public participation in environmental decision-making. The term can be found in article 6 on public participation in decisions on specific activities, and the related access-to-justice provisions (article 9, paragraph 2).

Comment [MSOffice251]: Edit (editorial team)

As mentioned ~~above under article 2, paragraph 4~~ previously, applying article 3, paragraph 9, requires that no person should be excluded from the definition on the grounds of nationality, domicile, citizenship, or seat. Under certain circumstances, therefore, persons who are non-citizens may have rights and interests under the Convention. For example, in cases where the area potentially affected by a proposed activity crosses an international border, members of the public in the neighbouring country might be members of the "public concerned" for the purposes of article 6. In its findings on communication ACCC/C/2004/03 (Ukraine), the Committee observed that the "communicant is a non-governmental organization working in the field of environmental protection and falls under the definitions of the public and the public concerned as set out in article 2, paragraphs 4 and 5, of the Convention." Foreign or international nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions as well.¹²⁰

Comment [MSOffice252]: Edit (editorial team)

Comment [MSOffice253]: Deletion (editorial team)

~~The very concept of the term "public concerned" seems to have been stemming from them~~ may originate from the original version of the EU's Environmental Impact Assessment Directive. The definition itself is based on the concept of 'being affected' which is well known in some jurisdictions and was already employed inhas been used since 1991 by the Espoo Convention for the purpose of defining the public which should be allowed to participate in the transboundary EIA. This concept is supplemented with the concept of 'interest' which again is well known for in many jurisdictions. By doing this In this way, the definition combines somehow two major approaches used in various legal systems in the ECE region to define standing in administrative procedures in various legal systems in the ECE region. Finally, the definition is supplemented with a phrase aiming to ensure proper recognition of environmental organizations, which in some countries have not traditionally had not always been considered accepted as being among 'the public concerned'.

Comment [MSOffice254]: Edit (editorial team)

While narrower than the "public," the "public concerned" is nevertheless still very broad. In relation to the criterion of "being affected" it is very much related to the activity in question. Some of the activities subject to article 6 of the Convention by their very nature may affect a large number of people. For example in the case of pipelines the public concerned is usually in practice counted in the thousands, while in recent cases of procedures related to the case of nuclear power stations the competent authorities may considered the public concerned to count as many as several hundred thousand million people across several countries.

Comment [WX255]: Edited (editorial team)

Comment [MSOffice256]: Edit (editorial team)

In relation to the criterion of "having an interest", the definition ~~it~~ appears to go well beyond the kind of language that is usually found in legal tests of "sufficient interest" (see commentary below). In particular it should be read as including not only the members of the public who are likely to be affected, but also the members of the public who have an interest in the environmental decision-making. This definition includes members of the public whose legal interests or rights guaranteed under law might be impaired by the proposed activity. Potentially affected interests rights vary depending on the domestic legislation, but may include interests related to material and property rights, as well as social rights such as the right to be free from injury or the right to a healthy environment. It also applies, however, to a category of the public that has an unspecified interest in the decision-making procedure.

It is significant that article 2, paragraph 5, does not require that a person must show a legal interest to be a member of the public concerned. Thus, the term may encompass both "legal interest" and "factual interest" as defined under continental legal systems, such as those of Austria, Germany and Poland. Under national law, persons with a mere factual interest do not normally enjoy the full panoply of rights in proceedings and judicial remedies accorded to those with a legal interest under these systems. In contrast, the Convention appears to accord the same status (at least in relation to terms of article 6 procedural rights and possibly article 9 remedies) regardless of whether the interest is a legal or factual one.

Comment [MSOffice257]: Confirm ed : Austria

An alternative reading of this definition in the context of the Convention, however, is that it requires Parties that narrowly define legal interest in the fields covered by article 6 of the Convention to expand those definitions. That is, Parties would be required to recognize subjective rights in a select class of cases on the basis of articulated concern, rather than on the basis of narrowly defined property or other legal interests. The Resolution of the Signatories explicitly commended the "active and constructive" participation of NGOs in the development of the Convention and recommended their continued participation in the Meeting of the Signatories. Recognizing the integral role that NGOs will play in the implementation of the Convention, Parties should strive to ensure that requirements on NGOs are not overly burdensome or politically motivated, and that each Party's legal framework encourages the formation of NGOs and their constructive participation in civic affairs.

Article 2, paragraph 5, explicitly includes NGOs whose statutory goals include promoting environmental protection within the category of the interested public, soas long as they meet "any requirements under national law". Whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, such as through its charter, by-laws or activities. "Environmental protection" can include purposes consistent with the implied definition of environment found in article 2, paragraph 3. In this respect the requirement for "promoting environmental protection" would thus be satisfied also in the case of NGOs focusing on promoting any aspect of the elements implied definition of the environment mentioned in article 2, paragraph 3. (a) For example, if an NGO works to promote the interests of those with health concerns due to water-borne diseases, this NGO would be considered to fulfil the definition of article 2, paragraph 5.

Comment [MSOffice258]: Edit (editorial team)

The reference to "meeting any requirements under national law" should not be read as leaving absolute discretion to Parties in defining these requirements. Their discretion should be seen in the context of the role the Convention assigns to NGOs regarding its

implementation and the clear requirement of article 3, paragraph 4, to provide “appropriate recognition” for NGOs. In its findings on communication ACCC/C/2005/05 (Turkmenistan), the Compliance Committee found that “Non-governmental organizations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public”.¹²²

Comment [E259]: Edit footnote : at request of Germany

Meeting any requirements under national law

In Case C-263/08 (Sweden), the European Court of Justice considered whether the requirement then found in Sweden’s Environmental Act that NGOs must have at least 2,000 members to appeal a development consent was too restrictive in relation to EU Directive 85/337 and the Aarhus Convention.

The ECJ held that Directive 85/337 leaves it to national law to determine the conditions for access to justice for NGOs. However, national law must ensure wide access to justice. It held that it was conceivable that a requirement that an environmental NGO have a minimum number of members may be relevant in order to ensure that the association does in fact exist and that it is active. However, the number of members required cannot be fixed at such a level that it runs counter to the objective of facilitating judicial review of projects which fall within the scope of the Directive. Furthermore, the Directive covers projects more limited in size which locally based associations are better placed to deal with.

In fact, the Swedish legislation effectively deprived local associations of any judicial remedy, as only two Swedish associations had at least 2,000 members. The ECJ held that while local associations might contact one of those two associations and ask them to bring an appeal, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, for example, the two large associations entitled to bring an appeal might not have the same interest in projects of limited size and moreover they would be likely to receive numerous requests of that kind.¹²³

After the ECJ judgement, the Swedish Supreme Court set aside the Swedish rule on NGO standing and referred the case back to the Environmental Court of Appeal. As from 1 August 2010, the Swedish Environmental Code allows any organization with 100 members or more to appeal decisions on permits and near related issues.

Comment [MSOffice260]: Insertion (Chair of Task Force on Access to Justice)

Thus, recognizing the integral role that NGOs play in the implementation of the Convention, Parties should strive to ensure that requirements on NGOs are not overly burdensome or politically motivated, and that each Party’s legal framework encourages the formation of NGOs and their constructive participation in civic affairs the public administration.

Comment [JRH261]: Edit (Chair of Task Force on Access to Justice)

Parties may set requirements for NGOs under national law, but these requirements should be consistent with the Convention’s principles, such as non-discrimination and avoidance of technical and financial barriers to registration. Within these limits, Parties may impose requirements based on objective criteria that are not unnecessarily exclusionary. For example, a possible requirement one UN/ECE country requires for environmental NGOs to have been active in that country for a certain number of three years and to have at least 2,000 members.⁸⁸ The requirement of activity in the country would not be consistent with the Aarhus Convention, because it would violate the non-discrimination clause of article 3, paragraph 9. Furthermore, the membership requirement might also be considered overly strict under the Convention. Similar requirements “to have been active” in itself might ~~would certainly~~ be overly exclusive in countries that have permitted the formation of NGOs for only a relatively short period of time, and where they are therefore relatively undeveloped. There are also sometimes

requirements for NGOs to have a certain number of active members. This was one of the issues considered by the European Court of Justice in Case C-263/08 (Sweden), discussed in the box above. Such a membership requirement might also be considered overly strict under the Convention, if the threshold is set at such a high level that only a handful of NGOs can meet it in a given country. In 2009, Slovenia amended its Environmental Protection Act to remove the requirement that NGOs promoting environmental protection undergo a financial audit of operations in order to qualify as the “public concerned” under article 2, paragraph 5.

Comment [MSOffice262]: Inserted (editorial team)

Comment [FM263]: New example provided by Slovenia

It is worth noting that the term “public concerned” is used to define the subject of the rights under the Convention only in the context of article 6, and, with some further qualifications, article 9, paragraph 2 (which addresses access to justice in relation to article 6). The subject of the public participation rights in article 7 and 8 are defined in a different way (see commentary to articles 7 and 8).

Comment [MSOffice264]: Edit (editorial team)

The concept of “public concerned” is further delimited for the purpose of article 9, paragraph 2. Access to justice under article 9, paragraph 2, is granted not to all members of “the public concerned” but only to those “having a sufficient interest” or “maintaining impairment of a right”. However, while the general concept of “public concerned” applicable for the purpose of a public participation procedure may be further restricted when it comes to access to justice, any further restrictions do not apply to environmental organizations that meet the definition of the public concerned for the purposes of the public participation procedure (see *opinion of the Advocate General Sharpston in case Case C-263/08*¹²⁴). Parties’ discretion in determining “any requirements under national law” relates only to which environmental organizations qualify as having an interest for the purpose of a given public participation procedure under article 6. If an organization meets the requirements under national law for the purpose of the public participation it is “automatically” among the public concerned for the purpose of access to justice in respect of that public participation procedure.

Comment [FM265]: Deletion (editorial team)

It is also worth noting that, once if an NGO meets the requirements set out in article 2, paragraph 5, it is deemed to be a member of the “public concerned” for all purposes under the Convention, and may even be deemed to have a sufficient interest under article 6 and article 9, paragraph 2. But for NGOs that do not meet such requirements ab initio, and for individuals, the Convention is not entirely clear whether the mere participation in a public participation procedure under article 6, paragraph 7, would qualify a person as a member of the “public concerned”. Because article 9, paragraph 2, is the mechanism for enforcing rights under article 6, however, it is arguable that any person who participates as a member of the public in a hearing or other public participation procedure under article 6, paragraph 7, should have an opportunity to make use of the access-to-justice provisions in article 9, paragraph 2. In this case, he or she would fall under the definition of “public concerned”. This issue is discussed further in the commentary on article 9, paragraph 2.

Comment [MSOffice266]: Deletion as will be discussed under article 9, paragraph 2, but adds confusion here (editorial team)

Comment [MSOffice267]: Edit (editorial team)

Comment [MSOffice268]: Edit (editorial team)

Article 3

General provisions

While the Aarhus Convention stands on three distinct pillars—access to information, public participation in decision-making and access to justice—there is are a need for number of provisions that apply to the Convention as a whole. Such provisions—ranging from overarching principles to be applied in the implementation of its obligations to practical commitments that apply to all three pillars—can be found in article 3.

Comment [MSOffice269]: Edit (editorial team)

Provision	Obligation	Implementation guidance
-----------	------------	-------------------------

Article 3, paragraph 1	Take necessary legislative, regulatory and other measures to establish framework for implementation of the Convention	<ul style="list-style-type: none"> • <u>Compatibility between provisions</u> • <u>Clear, transparent and consistent framework</u> • Proper enforcement
Article 3, paragraph 2	Endeavour to ensure that public authorities assist and guide the public	<ul style="list-style-type: none"> • Best efforts • All three pillars
Article 3, paragraph 3	Promote environmental education and awareness	<ul style="list-style-type: none"> • Generally • Especially with respect to three pillars
Article 3, paragraph 4	Recognize and support environmental NGOs within legal context	<ul style="list-style-type: none"> • Adjust legal system if necessary • "Promoting environmental protection" • "Appropriate"
Article 3, paragraph 5	Convention is a "floor" not a "ceiling"	<ul style="list-style-type: none"> • Right to maintain existing more positive measures • Right to introduce more positive measures
Article 3, paragraph 6	Discourage backsliding	<ul style="list-style-type: none"> • No derogation from existing rights required
Article 3, paragraph 7	Promote Convention's principles in international arena	<ul style="list-style-type: none"> • International environmental decision-making processes • International organizations
Article 3, paragraph 8	Anti-harassment	<ul style="list-style-type: none"> • "Penalized, persecuted or harassed" • Costs in judicial proceedings not affected
Article 3, paragraph 9	Non-discrimination	<ul style="list-style-type: none"> • All three pillars • Citizenship, nationality, domicile or seat

Comment [MSOffice270]: Edits (editorial team)

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

Building directly on article 1, this provision emphasizes that the Aarhus Convention is about taking concrete practical steps to achieve its rather elevated goals. Seemingly simple, this provision is arguably the most important provision in the Convention as its actually includes general obligations that go to the heart of administrative and judicial institutions and practice. Through its various elements discussed below, paragraph 1 provides a concise overview of what is required to effectively implement the Convention. Implicitly acknowledging that this is a difficult

and complex task, paragraph 1 sets out a number of elements that must be incorporated in any scheme to implement the Convention. ~~Measures other than legislative and regulatory ones may include strategies, codes of conduct, and good practice recommendations. Austria, for example, has promoted implementation of the Convention through “political guiding principles” for the promotion of sustainable development that establish inclusive good governance standards constituting a “code of conduct” for authorities to comply with while developing plans, programmes, policies and legal instruments.~~

Comment [MSOffice271]: Edits (editorial team)

National Implementation Plans

2008 Synthesis Report on the Status of Implementation of the Convention (ECE/MP/PP/2008/4/e, para. 27), noted that several Aarhus Convention Parties have addressed problems of transparency and coherency of the legislative framework for implementation by developing National Implementation Plans (NIPs). NIPs are a useful mechanism for individual parties to an MEA to promote compliance in a deliberate and proactive manner. Components of NIPs often include evaluations of obstacles to compliance (e.g., laws, institutions, capacities, social norms, public and private sector considerations), action points for overcoming these obstacles, identification of necessary financial and other resources, and methodologies for monitoring implementation and compliance. NIPs can also include plans for the establishment of new implementation agencies or other institutions, and can address both internal, domestic issues of compliance as well as measures for strengthening international cooperation and assistance.

Comment [MSOffice272]: Box moved down (editorial team)

Substantial practice in developing NIPs is found in connection with particular MEAs such as the Convention on Biological Diversity and its Cartagena Protocol on Biosafety, the Convention to Combat Desertification, the Stockholm Convention on Persistent Organic Pollutants (POPs), and the Rotterdam Convention on Prior Informed Consent (PIC). International organizations and funding mechanisms such as the Global Environment Facility (GEF) also promote the development of NIPs.

For further information, see UNEP Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (2006), pp. 103-110.

A clear, transparent and consistent framework to implement the Convention

The means for Parties to implement the Convention is a Article 3, paragraph 1, requires each Party to establish and maintain a "clear, transparent and consistent framework" to implement the Convention. The main beneficiaries of the Convention are the public. Conforming to the most basic principles of State-public administration, the public has to be aware of their opportunities for information, participation and access-to-justice and the applicable rules and procedures must be clear and consistent.

Comment [M274]: Edit (editorial team)

A review of past findings by the Compliance Committee reveals that a Party's failure to implement individual provisions of the Convention frequently also involves a violation of article 3, paragraph 1. For example, in its findings on communication ACCC/C/2005/12 (Albania), the Compliance Committee held that in addition to breaching article 6, the Party concerned's failure to establish through legislation clear procedures for early notification of the public (by public announcement or individual invitations, before a decision is made, the identification of the public concerned, quality of participation, and taking the outcome of public meetings into account, was a violation of article 3, paragraph 1.¹²⁵

Comment [M275]: Edit (editorial team)

Similarly, in its findings on submission ACCC/S/2004/01 and communication ACCC/C/2004/03 (Ukraine), the Compliance Committee held that the lack of clarity with regard to the public participation requirements in the Party concerned's EIA and environmental decision-making procedures for projects covered by article 6, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, gave rise to a breach of article 3, paragraph 1, as well as articles 6 and 4.¹²⁶

Comment [MSOffice276]: Paragraph moved up to here and edited (editorial team)

Comment [E277]: Edit footnote : at request of Germany

Comment [MSOffice278]: Paragraph moved up to here and edited (editorial team)

Any time new relevant legislation is adopted, care must be taken to ensure consistency with the framework for implementation of the Aarhus Convention. Adoption of a general law on public associations, for example, can create confusion and lack of

Comment [E279]: Edit footnote : at request of Germany

clarity if it fails to take clear account of Aarhus Convention requirements. Such a situation arose in Turkmenistan when its Act on Public Associations stated that it was subject to international agreements to which Turkmenistan was a Party (implicitly including the Aarhus Convention), but set up a regime that in practice had the effect of limiting the participation rights of environmental NGOs. (See the findings of the Compliance Committee on communication ACCC/C/2004/05 (Turkmenistan)).¹²⁷ Such a legal development at a minimum causes confusion and additional expense in order to understand and establish the legal hierarchy and the applicability of various rules, but it also carries with it a high risk of misapplication of the law, leading to uncertainty and the possible infringement of basic rights. It is highly likely that the public administration or a review body will be more comfortable applying in practice the language of the statute rather than that of an international agreement.

Comment [E280]: Edit footnote : at request of Germany

Comment [MSOffice281]: Paragraph moved up to here (editorial team)

Control over the inconsistent application of the law, or inconsistent judgements by judicial or administrative bodies, is a necessary matter for action in order to ensure a clear and consistent framework to implement the effective implementation of the Convention. The Compliance Committee, in its findings on communication ACCC/C/2005/11 (Belgium), the Compliance Committee noted that the inconsistent application of the law by various review bodies might, in an appropriate case, constitute a violation of the requirement to provide a “clear, transparent and consistent” framework for implementation of the Convention under article 3, paragraph 1.¹²⁸ Therefore, it may be necessary for the judicial system within a state Party to attempt to resolve differences/inconsistencies in the application of standards under the Convention. Thus, as stated by the Committee, the independence of the judiciary “cannot be taken as an excuse by a Party for not taking necessary measures” to meet its obligations under the Convention.

Comment [MSOffice282]: Edit (editorial team)

Comment [E283]: Edit footnote : at request of Germany

Comment [MSOffice284]: Edit (editorial team)

Comment [MSOffice285]: Paragraph moved up to here (editorial team)

In the same case, the Compliance Committee rejected Belgium’s submissions that its Federal structure acted as an impediment to meeting its obligations under the Convention. The Committee referred to the general international law of treaties, codified by article 27 of the 1969 Vienna Convention on the Law of Treaties, which holds that a State may not invoke its internal law as justification for failure to perform a treaty. As the Committee stated: “This includes internal divisions of powers between the federal government and the regions as well as between the legislative, executive and judicial branches of government. Accordingly, the internal division of powers is no excuse for not complying with international law.”

Comment [MSOffice286]: Paragraph moved up to here (editorial team)

Comment [MSOffice287]: Text box moved to here (editorial team)

National Implementation Plans

The 2008 Synthesis Report on the Status of Implementation of the Convention noted that several Aarhus Convention Parties have addressed problems of transparency and coherency of the legislative framework for implementation by developing National Implementation Plans (NIPs).¹²⁹ NIPs are a useful mechanism for individual parties to a multilateral environmental agreement (MEA) to promote compliance in a deliberate and proactive manner. Components of NIPs often include evaluations of obstacles to compliance (e.g., laws, institutions, capacities, social norms, public and private sector considerations), action points for overcoming these obstacles, identification of necessary financial and other resources, and methodologies for monitoring implementation and compliance. NIPs can also include plans for the establishment of new implementation agencies or other institutions, and can address both internal, domestic issues of compliance as well as measures for strengthening international cooperation and assistance.

Comment [MSOffice288]: Document reference put in endnote (editorial team)

Substantial practice in developing NIPs is found in connection with particular MEAs such as the Convention on Biological Diversity and its Cartagena Protocol on Biosafety, the Convention to Combat Desertification, the Stockholm Convention on Persistent Organic Pollutants (POPs), and the Rotterdam Convention on Prior Informed Consent (PIC). International organizations and funding mechanisms such as the Global Environment Facility (GEF) also promote the development of NIPs.

For further information, see UNEP Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (2006), pp. 103-110.

Necessary legislative, regulatory and other measures

The specific language of the Convention implies paragraph 1 makes it clear that the a mere declaration that the Convention is directly applicable would not be enough to meet this obligation. Likewise, the fact that a Party's constitution declares international agreements to have direct applicability and to be superior to national law, does not relieve that Party from taking the necessary legislative and other measures to ensure the effective implementation of the Convention (see the Compliance Committee's findings on communication ACCC/C/2005/11 (Belgium)).¹³⁰

Rather, it is incumbent upon Parties to develop implementing legislation, and executive regulations and "other measures" to establish and maintain this framework. Possible "other measures" Measures other than legislative and regulatory ones may might include strategies, codes of conduct, and good practice recommendations. Austria, for example, has promoted the implementation of the Convention through "political guiding principles" for the promotion of sustainable development. These principles establish inclusive good governance standards constituting a "code of conduct" for authorities to comply with while developing plans, programmes, policies and legal instruments.

In 2008, the European Commission launched its "Cooperation with Judges Programme" in Paris. The main objectives of the programme include to create and discuss EU law training materials for Member States' judges on the application of EU legislation - including rules regarding access to justice in environmental matters. The programme covers different areas of EU law, including waste, nature and EIA. With a view to disseminating information to Member States' judges, the material produced and delivered during the seminars is available free to national judicial training centres.

Put differently, as stated by the Compliance Committee in its findings on communication ACCC/C/2005/11 (Belgium), the fact that international agreements may have direct applicability and are superior to national law, does not relieve the Party from taking the necessary legislative and other measures to ensure the effective implementation of the Convention.¹³¹ Thus a Party's failure individual provisions of the Convention frequently also involves a violation of article 3, paragraph 1. For example, in its findings on communication ACCC/C/2005/12 (Albania), (The Compliance Committee held that in addition to breaching article 6, the Party concerned's failure of Albania to establish through legislation clear procedures for early notification of the public (by public announcement or individual invitations, before a decision is made), identification of the public concerned, quality of participation, and taking the outcome of public meetings into account, was considered to be a violation of article 3, paragraph 1. (See the Committee's findings on communication ACCC/C/2005/12 (Albania)).¹³² Similarly, in its findings on submission ACCC/S/2004/01 and communication ACCC/C/2004/03 (Ukraine), the Compliance Committee held that the lack of clarity with regard to public participation requirements in EIA and environmental decision making procedures for projects, such as time frames and modalities of a public consultation process, requirements to take its outcome into account, and obligations with regard to making available information in the context of article 6, were held to indicate the absence of a clear, transparent and consistent framework for the implementation of the Convention gave rise to a breach of article 3, paragraph 1, as well as articles 6 and 4, and to constitute non-compliance with article 3, paragraph 1, of the Convention. (See the Committee's findings on submission ACCC/S/2004/01 (Ukraine) and communication ACCC/C/2004/03 (Ukraine)).¹³³

Compatibility between provisions to implement the Convention

Comment [MSOffice289]: Edits (editorial team)

Comment [MSOffice290]: Edit (editorial team)

Comment [MSOffice291]: Text moved up to here from below and edited (editorial team)

Comment [E292]: Edit footnote : at request of Germany

Comment [MSOffice293]: Edits (editorial team)

Comment [MSOffice294]: Confirmed : Austria

Comment [MSOffice295]: Text moved down to here and edited (editorial team)

Comment [MSOffice296]: Edit : EU

Comment [MSOffice297]: Text moved two paragraphs earlier (editorial team)

Comment [MSOffice298]: Text moved up to discussion on "clear and transparent framework" (editorial team)

Comment [M299]: Insertion (editorial team)

Consistency of the framework should receive special attention, as it is directly related to another clause in this paragraph concerning "compatibility". ~~Those involved in negotiating the Convention~~~~The negotiating parties~~ were aware that ~~the Convention's~~~~its~~ commitments reached out in many directions, drawing new connections among aspects of ~~State~~~~public~~ administration, law and practice that might not have been apparent before. Because these new links are made by the Convention, and because the pillars of the Convention involve a ~~disparate~~~~wide~~ range of institutions and authorities, great attention must be paid to ensuring ~~consistency~~~~compatibility across the legislative and other measures intended to implement the Convention and in the conduct of the institutions and authorities involved in their implementation.~~ ~~throughout the implementing legislation and the civil administration.~~

Comment [MSOffice300]: Edits (editorial team)

Article 6, paragraph 3, for example, requires that public participation procedures have adequate time-frames for all the phases of public participation. Often in a particular public participation process, a member of the public may wish to request environmental information from a public authority under article 4. This information may be critical to the person's participation and may also therefore be necessary to ensure effective participation of the public. So the time periods for digesting the notification and the relevant information provided in the documentation relating to the proposed activity, and for preparing comments to be made at a public hearing or other opportunity, must take into account the possibility that further information may need to be requested from public authorities. The time periods for public participation should at a minimum be long enough for a response to a request for information to be made in the ordinary course. Yet, if the request for information requires an extension, or if some requested matter is refused under the exemptions of article 4, delays may result. The public participation procedures under article 6 might need to be flexible enough to respond to such eventualities, for example by providing that a member of the public who believes that his or her request for information relating to a particular public participation proceeding has been wrongfully refused or delayed may demand an extension of the public participation proceedings pending resolution of an appeal.

Inter-agency coordination mechanisms

~~Inter-agency coordination mechanisms may include the establishment of inter-agency commissions or working groups in order to increase understanding of the obligations of public authorities under the Convention. Such bodies have been established in Armenia, Austria, ... In best practice~~~~keeping with the philosophy of the Convention, they should include multi-stakeholder participation. For example, in October 2006, Armenia established an inter-agency commission comprised of representatives of a number of ministries and departments, and also of voluntary associations. The main objective of the Commission was to prepare the ground for compliance with the provisions of the Aarhus Convention.~~

Comment [MSOffice301]: Existing text made into text box and moved down (editorial team)

Comment [MSOffice302]: Deletion : Austria

Comment [M303]: NFPs and NGOs are invited to provide further examples of countries that have established inter-agency coordination mechanisms.

Comment [MSOffice304]: Deletion (editorial team)

Comment [MSOffice305]: Edit (editorial team)

Comment [MSOffice306]: Paragraph moved up to commentary on clear and transparent framework (editorial team)

~~Any time new relevant legislation is adopted, care must be taken to ensure consistency with the framework for implementation of the Aarhus Convention. Adoption of a general law on public associations, for example, can create confusion and lack of clarity if it fails to take clear account of Aarhus Convention requirements. Such a situation arose in Turkmenistan when its Act on Public Associations stated that it was subject to international agreements to which Turkmenistan was a Party (implicitly including the Aarhus Convention), but set up a regime that in practice had the effect of limiting the participation rights of environmental NGOs. (See the findings of the Compliance Committee on communication ACCC/C/2004/05 (Turkmenistan)).¹³⁴ Such a legal development at a minimum causes confusion and additional expense in order to understand and establish the legal hierarchy and the applicability of various rules, but it~~

also carries with it a high risk of misapplication of the law, leading to uncertainty and the possible infringement of basic rights. It is highly likely that the public administration or a review body will be more comfortable applying in practice the language of the statute rather than that of an international agreement.

Control over the inconsistent application of the law, or inconsistent judgments of judicial bodies, is a necessary matter for action in order to ensure the effective implementation of the Convention. The Compliance Committee, in its findings on communication ACCC/C/2005/11 (Belgium), noted that inconsistent application of the law by various review bodies might, in an appropriate case, constitute a violation of the requirement to provide a “clear, transparent and consistent” framework for implementation of the Convention under article 3, paragraph 1.⁴³⁵ — Therefore, it may be necessary for the judicial system within a state Party to attempt to resolve differences in the application of standards under the Convention. Thus, as stated by the Committee, the independence of the judiciary “cannot be taken as an excuse by a Party for not taking necessary measures” to meet its obligations under the Convention.

Comment [MSOffice307]: Paragraph moved up to commentary on clear and transparent framework (editorial team)

In the same case, the Compliance Committee rejected Belgium’s submissions that its Federal structure acted as an impediment to meeting its obligations under the Convention. The Committee referred to the general international law of treaties, codified by article 27 of the 1969 Vienna Convention on the Law of Treaties, which holds that a State may not invoke its internal law as justification for failure to perform a treaty. As the Committee stated: “This includes internal divisions of powers between the federal government and the regions as well as between the legislative, executive and judicial branches of government. Accordingly, the internal division of powers is no excuse for not complying with international law.”

Comment [MSOffice308]: Paragraph moved up to commentary on clear and transparent framework (editorial team)

Proper enforcement measures

Finally, this provision draws attention to enforcement. Enforcement is of course linked to access to justice, since the whole edifice of the Convention is backed up by it. But, while the access-to-justice pillar might be seen as a means for enforcement of the whole Convention other two pillars of the Convention, in fact even the access-to-justice provisions require mechanisms for their enforcement. Paragraph 1 clearly states the connection between having a clear, transparent and consistent framework for implementing the Convention, and properly enforcing it. It implies that even the most highly developed legislative or regulatory framework will deteriorate if it is not constantly renewed through enforcement mechanisms.

Comment [M309]: Edit (editorial team)

Comment [MSOffice310]: Edit (editorial team)

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

This provision follows the guidance laid out in the eighth preambular paragraph, which acknowledges that citizens may need assistance in order to exercise their rights under the Convention. This is a formula found in some human rights instruments and it may be useful to consult materials relating to human rights, such as the Council of Europe recommendations, when determining the scope of assistance and guidance to be provided to the public. In many UN/ECE countries the public is relatively inexperienced in the use of the tools for access to information, public participation and access to justice found in the Convention. In such countries it might be useful to develop the capacities of the public in various ways. Because officials are in the public service, it is reasonable to expect that they might help to activate the public's use of these instruments, by providing information, guidance and encouragement. Providing information is not enough, as can be seen by reading this provision together with the following paragraph. That paragraph concerns environmental education and awareness-raising, especially about the subject matters of the Convention. Paragraph 2 can only be read to go beyond the general

information-oriented obligation found in paragraph 3 to require a closer form of assistance by authorities faced with the specific needs of members of the public in a particular case.

While some authorities might say that it is not their job to help the public to criticize them, this opinion does not take into account the benefits of public participation, and presupposes an antagonism between authorities and the public that often does not exist. If one accepts the basic premise that freer information and a more active public can assist authorities in doing their jobs, then the reasoning behind this provision of the Convention becomes clear. It is in the authorities' own interest to assist the public in exercising their rights because positive results can be expected—both in the level of participation and in the spirit of cooperation. The Government of Austria, for example, has laid down in its 2007 government programme of late 2008 the objective of an innovative, cooperative, efficient and high-quality public administration with the guiding theme of enhanced citizen orientation (200810 Aarhus Convention National Implementation Report – Austria (ECE/MP.PP/IR/200810/AUS)). The Czech Republic includes training on public rights of access to environmental information in the introductory training of new civil servants (2008 Aarhus Convention National Implementation Report – Czech Republic (ECE/MP.PP/IR/2008/CZE)).

Comment [WX311]: Deletion (editorial team)

Comment [MSOffice312]: Edit : Austria

Rather than softening the obligation, the word "endeavour" is simply an acknowledgement that it is conceptually impossible for Parties to ensure that officials and authorities assist and provide guidance, because whether individual officers actually give assistance and guidance in a particular case is subjective. Under these circumstances, the word "endeavour to ensure" should be interpreted to require Parties to take firm steps towards ensuring that officials and authorities provide the assistance mentioned. Parties must provide means for assistance, opportunities for officials and authorities to provide such assistance, and must encourage officials and authorities to do so through official policies and capacity-building measures. Using electronic information as an example, easy-to-use Internet-based search engines can help the public gain access to information. However, where the public does not have widespread Internet access, authorities should consider establishing publicly accessible environmental information reference centres in convenient locations. Moreover, authorities must consider whether Internet access has to be supplemented with other forms of access in order to address the interests of the elderly, illiterate, poor, etc. Authorities may also need to help members of the public to refine their requests for information to be clearer or more specific.

Comment [M313]: Edit (editorial team)

Task Force on Electronic Information Tools

At its first session (21-23 October 2002, Lucca) the Meeting of the Parties established a Task Force on Electronic Information Tools to facilitate the implementation of the Convention by preparing draft recommendations on the more effective use of electronic information tools to provide public access to environmental information (see decision I/6 of the Meeting of the Parties to the Aarhus Convention).

Following the Task Force's preparation of draft recommendations in the intersessional period, at its second session (25-27 May 2005, Almaty), the Meeting of the Parties adopted decision II/3 on Electronic Information Tools and the Clearinghouse Mechanism, which included, as an annex, recommendations on the more effective use of electronic information tools to provide public access to environmental information. During the ensuing intersessional period, Parties, Signatories and other stakeholders were invited to complete a questionnaire on the implementation of the recommendations. The Meeting decided to extend the mandate of the Task Force.

At its third session (11-13 June 2008, Riga), the Meeting of the Parties extended in time the mandate of the Task Force and the Clearinghouse (see decision III/2 of the Meeting of the Parties to the Aarhus Convention). The Parties encouraged countries to use the full potential of information and communications technology (ICT) as a means to significantly improve the involvement of the public in environmental decision-making. In November 2010, the secretariat, in cooperation with the Ministry of Environment and Physical Planning of the Former Yugoslav Republic of Macedonia

and the Regional Environmental Center for Central and Eastern Europe organized a workshop to foster the implementation of the Aarhus Convention in the South-Eastern Europe subregion by promoting the use of electronic information tools. The workshop brought together public officials (policy makers and information technology specialists), representatives of non-governmental organisations and other experts, who shared their experiences on the most up-to-date applications and successful examples of use of electronic information tools.

Comment [MSOffice314]: Text box moved to here from commentary on article 3, para 3 and updated (editorial team)

Article 3, paragraph 2, does not directly require Parties to appoint special officials to help the public ~~find the requested information and in other phases of participation to seek information, to participate in decision-making or to seek access to justice~~, although this would be a good way to implement it. Practically, there are two ways of fulfilling this requirement: one is with special contact persons, the other is through obliging the officials who are in charge of the case in question to offer help to those who ~~want seek information, to participate or access to justice~~. In connection with information rights, article 5, paragraph 2 (b) (ii) and (iii), contains these two options for practical arrangements for making environmental information available to the public.

Comment [M315]: Edit (editorial team)

Comment [M316]: Edit (editorial team)

Both solutions have advantages and shortcomings, both for the authorities and for the public. The special contact person can develop special skills, knowledge and experience which makes him or her more effective in dealing with members of the public.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee found that the failure of a public authority to state lawful grounds for refusal of refusing access to the requested information, and the failure of the same public authority to give in its letters of refusal, information on access to the review procedure provided for in accordance with article 9, constituted a failure by the Party concerned to comply with both article 3, paragraph 2, and article 4, paragraph 7, of the Convention.¹³⁶

Comment [WX317]: Inserted (editorial team)

Comment [M318]: Edits (editorial team)

Comment [E319]: Edit footnote : at request of Germany

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

Paragraph 3 recognizes that environmental education and awareness are important foundations ~~for the implementation of the upon which the pillars of the Convention are based. It deals further with public capacity building, using a different approach from that employed in paragraph 2. This~~The paragraph starts with a general obligation to promote environmental education and environmental awareness among the public. This is consistent with several ~~soft~~ obligations and statements found in the provisions of various international instruments, including the Stockholm Declaration, principle 19, the United Nations Framework Convention on Climate Change (New York, 1992), article 6 (a)(i), the Convention on Biological Diversity (Rio de Janeiro, 1992), article 13, the Convention to Combat Desertification (Paris, 1994), article 19, and Agenda 21, *passim*. UNESCO has declared the decade 2005-2014 the United Nations Decade on Education for Sustainable Development. In March 2005, UNECE Ministers, vice ministers and other representatives of Environment and Education Ministries adopted the UNECE Strategy for Education for Sustainable Development (2005). The Strategy, was intended as a practical instrument to promote sustainable development through education. UNECE Ministers also adopted the Vilnius Framework for Implementation setting up a Steering Committee and an expert group on indicators in order to facilitate coordination and review of Strategy's implementation. UNESCO has declared the decade 2005-2014 the United Nations Decade on Education for Sustainable Development.

Comment [MSOffice320]: Edit (editorial team)

Comment [MSOffice321]: Edit (editorial team)

Comment [K322]: Text moved to here (editorial team)

Comment [K323]: Text moved up from here (editorial team)

The Aarhus Convention elevates ~~this the~~ objective of environmental education to

the status of a binding international legal obligation. Moreover, besides codifying the general obligation of the Parties to promote environmental education and awareness generally, article 3, paragraph 3, lays special emphasis on building the public's capacity in the matters that are the subject of the Convention. In this respect, the provision Article 3, paragraph 3, partly refers to general environmental education and awareness-raising and partly to the dissemination of meta-information (information about sources and use of information) on the subject matters of the Convention. Naturally basic environmental knowledge is an indispensable element of capacity-building for public participation in environmental decision-making.

Comment [MSOffice324]: Edit (editorial team)

Comment [MSOffice325]: Edit (editorial team)

Comment [MSOffice326]: Text moved up to here from below box (editorial team)

Comment [MSOffice327]: Edit (editorial team)

Green Packs

Since 2000 the Green Pack has been a multi-medium environmental education curriculum kit to teach children aged 11-15 about environmental protection and sustainable development. Green Packs have been developed or are under development in the following countries and regions: Albania - Azerbaijan - Bosnia and Herzegovina - Bulgaria - Central Asia - Czech Republic - Hungary - the Former Yugoslav Republic of Macedonia - Montenegro - Poland - Russian Federation - Serbia - Slovakia - Turkey -Ukraine. Green Packs are produced by the Regional Environmental Center for Central and Eastern Europe.

Comment [MSOffice328]: Confirmed : Bulgaria

Comment [WX329]: Inserted (editorial team)

Comment [MSOffice330]: Text moved up to here (editorial team)

Each of the main Green Pack components — the CD ROM, the teacher's handbook, the DVD video and the dilemma game — follows the same structure. Inspired by the political process Environment for Europe, the Green Pack educational materials have interpreted its sophisticated political messages on sustainable development by adapting them for teachers and students.

The Green Pack:

- includes a large spectrum of 22 topics divided into five chapters on development and environment presented in their environmental, economic and social contexts;
- presents specific challenges in their global, continental and national context as well as at the personal level (what is the role of every citizen in supporting sustainable development);
- presents the challenge of sustainability in a compelling and accessible way. Students follow lesson plans that come with videos, exercises, interactive dilemma games and augmenting information from a CD-ROM;
- emphasises the formation of new values and the establishment of a new model of behaviour;
- encourages students to take a proactive approach to environmental challenges
- includes a module on citizens' environmental rights.

Since 2001, more than 22.000 teachers within Europe the UNECE region have received training on how to use the Green Pack. About 2,5 million students have been educated through its interactive multimedia materials. A "Green Pack Junior" for younger students was launched at the 2007 Environment for Europe conference in Belgrade. Green Packs are produced by the Regional Environmental Center for Central and Eastern Europe.

Comment [M331]: Edits (editorial team)

The paragraph Article 3, paragraph 3, partly refers to general environmental education and awareness raising and partly to the dissemination of meta information (information about sources and use of information) on the subject matters of the Convention. Naturally basic environmental knowledge is an indispensable element of capacity building for public participation.

Comment [MSOffice332]: Text moved up above box (editorial team)

Task Force on Electronic Information Tools

At its first session (21-23 October 2002, Lucca) the Meeting of the Parties established a Task Force on Electronic Information Tools to facilitate the implementation of the Convention by preparing draft recommendations on the more effective use of electronic information tools to provide public

access to environmental information (see decision I/6 of the Meeting of the Parties to the Aarhus Convention).

Following the Task Force's preparation of draft recommendations in the intersessional period, at its second session (25-27 May 2005, Almaty), the Meeting of the Parties adopted decision II/3 on Electronic Information Tools and the Clearinghouse Mechanism, which included, as an annex, recommendations on the more effective use of electronic information tools to provide public access to environmental information. During the ensuing intersessional period, Parties, Signatories and other stakeholders were invited to complete a questionnaire on the implementation of the recommendations.

At its third session (11-13 June 2008, Riga), the Meeting of the Parties encouraged countries to use the full potential of information and communications technology (ICT) as a means to significantly improve the involvement of the public in environmental decision-making. In November 2010, the secretariat, in cooperation with the Ministry of Environment and Physical Planning of the Former Yugoslav Republic of Macedonia and the Regional Environmental Center for Central and Eastern Europe organized a workshop to foster the implementation of the Aarhus Convention in the South-Eastern Europe subregion by promoting the use of electronic information tools. The workshop brought together public officials (policy makers and information technology specialists), representatives of non-governmental organisations and other experts, who shared their experiences on the most up-to-date applications and successful examples of use of electronic information tools.

Comment [MSOffice333]: Text box moved up from here from commentary on article 3, para 2 (editorial team)

Environmental education in Poland

In accordance with the UNECE Strategy for Education for Sustainable Development (ESD), the Polish Ministry of the Environment organized a conference and workshops to exchange experiences regarding education for sustainable development and to share the recommendations to be included in National Action Plan.

One example of ESD activities in Poland is the "Schools for Sustainable Development" project, which has been in place since 2001. Since 2007, "Schools for Sustainable Development" has become part of the international Eco Schools Program, in which schools from many countries around the world take part. Participating schools can obtain certificates awarded for model management of the school environment. In Poland, the programme is administered by the Foundation for Environmental Education with the support of the Polish Ministry of the Environment and the Ministry of National Education.¹³⁷

Other recent campaigns carried out by the Polish government to promote more environmentally friendly habits by the public include "European Mobility Week" (regarding sustainable transport), "Keep Your Conscience Clear" (a campaign on waste management), "Eco Schick" (concerning sustainable shopping), "Partnership for Climate" (about climate change), "Unusual Biological Diversity Lessons" (a competition for NGOs and educational centres about biological diversity), and "Biodiversity Zone" (also about biological diversity). For more information, see: www.mos.gov.pl.

Comment [MSOffice334]: Insertion : Poland

Environmental education and awareness-raising may also be distinguished. While environmental education involves general education at all levels, environmental awareness-raising is more topic-oriented and can often be applied to the modification of behaviour in relation to the environment.

Aarhus Centres¹³⁸

Since 2002, the OSCE, in close cooperation with the Aarhus Convention secretariat, has supported the creation of Aarhus Centres and Public Environmental Information Centres in a number of countries throughout the UNECE region, in many cases also with the involvement of the Environment and Security (ENVSEC) Initiative. Working both in capital cities and in regional

areas, the Centres have been very active in promoting the implementation of the Aarhus Convention at the national and local levels, helping governments fulfil their respective obligations under the Convention, and involving citizens in environmental decision-making. Over time, the Centres have become important tools for promoting environmental education and successful models through which government officials and NGO representatives can meet to discuss and resolve issues regarding the environment and environmental security. Some examples of the variety of activities carried out by the Aarhus Centres include:

- The Aarhus Centre Georgia developed a user-friendly website which contains a variety of information from governmental and civil society sources, including national legislation (including draft legislation), international treaties, reports, analysis, pollution monitoring data, guidelines on how to obtain environmental information, and how to apply to court. Other information, such as databases of environmental NGOs, Environmental Impact Assessment (EIA) Reports, court cases on environmental matters, as well as information on environmental consulting companies, are also posted on the site. The Centre is also building an environmental “metabase” that includes contact details of organizations holding specific environmental information.
- In line with its mandate to improve cross-border co-operation in the Ferghana Valley and to raise awareness of linkages between environmental and security issues, the Aarhus Centre in Khujand, Tajikistan produced a video spot and a TV show to inform citizens of the Sughd Province on how the public can become involved in the decision-making process on environmental issues. In November 2009, the Centre organized an awareness-raising campaign on radioactive waste safety in several cities in northern Tajikistan, including a movie screening, public information meetings and the production of a film on radioactive safety. The campaign resulted in calls by citizens for radioactive waste safety issues to be included in the school curricula. In addition, teachers, medical staff and construction workers were trained on practical aspects of the radioactive safety.
- In 2008, the Aarhus Centre, Yerevan, Armenia, established an Environmental Law Resource Centre (ELRC) at the Yerevan State University. The ELRC has since been responsible for organising the participatory review of various draft pieces of legislation concerning the environment. The ELRC has also organized university courses on environmental law in the European Union and a conference on environmental security for professors and students throughout Armenia. It has also developed a manual on environmental rights, and together with the Ombudsman’s Office, undertaken an analysis on the practices of environmental law enforcement in Armenia.
- Kazakhstan’s first Aarhus Centre in Atyrau Province aims to address the environmental and security challenges in the Zhaik-Caspian Basin region. In October 2009, the Aarhus Centre, the OSCE and Kazakhstan’s Ministry of Emergency Situations organized a workshop to discuss possible responses to clean up oil spills, which is of particular concern given the importance of the oil industry for some Caspian littoral countries.
- The Aarhus Centres in Azerbaijan are primarily working on the first pillar of the Aarhus Convention by providing access to environmental information and undertaking public awareness-raising activities such as public meetings, discussions on topical environmental issues and a biennial environmental newsletter. In November 2009, the Aarhus Centre Baku organised a workshop for staff of the Ministry of Ecology and Natural Resources, who were trained on the Aarhus Centre Guidelines and effective techniques and best practices of public participation in environmental decision-making.
- The Aarhus Centre in Osh, Kyrgyzstan has organized several public hearings, meetings and training seminars. One public hearing concerned the environmental effects of mining activities around a village in Batken Province. Based on the results of the hearing, Kyrgyzstan’s Geology and Mineral Resources Agency subsequently decided to refuse the company an operating licence and ordered the company to restore the land affected by its activities.

Further information about the work of the Aarhus Centres can be found on the OSCE website.

Comment [MSOffice335]: Inserted (editorial team) based on material provided by OSCE.

Government sponsored environmental education and awareness raising in Tajikistan

In November 2009, the Khujand Aarhus Centre organized an information campaign in Taboshar city, Tajikistan, to provide more than 500 people with information on the local and regional environmental conditions involving uranium tailings. Five workshops were conducted between 9 and 13 November 2009. Participants received guidance in the form of a pocket book containing information on current radiation levels, their hazardous affects on human health and means of protection. The participants were also shown a locally produced short film called "Survival through Action". On 14 November 2009, the Khujand Aarhus Centre in collaboration with the local authorities and supported by experts endorsed by the International Atomic and Energy Agency (IAEA) organized a roundtable for representatives of local government, local communities, mass media and civil society regarding the uranium tailings, their adverse affects on human health, and the potential threat to environmental security in the region.

Comment [P336]: Replaced by larger overview of Aarhus Centres (editorial team)

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

Recognition of and support to associations, organizations, or groups are issues running throughout the Convention. For example, articles 2, paragraph 5, 6 and article 9, paragraph 2, together establish recognise a special status for environmental NGOs in under the Convention. This special status recognises acknowledges that such NGOs have a particularly important role to play in the implementation of the Convention. For example, in its findings on communication (ACCC/C/2004/05 (Turkmenistan), the Compliance Committee stated that NGOs, "by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public."¹³⁹ The effective use of the status, however, depends not only on the provisions of the Convention, but on matters of a more general nature, such as legalities of registration, tax status, limitations on activities, etc. Another related provision is article 9, paragraph 5, which discusses the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. The Convention follows on numerous environmental and human and civil rights instruments that recognize the importance of contributions from governments to support civil society so as to ensure that different interests in society are represented in a balanced manner.

Comment [K337]: Edit (editorial team)

Comment [E338]: Edit footnote : at request of Germany

Comment [MSOffice339]: Deletion as duplicated below (editorial team)

Comment [MSOffice340]: Deletion (editorial team)

As a preliminary matter, Parties must ensure that their national legal system provides for the possibility of forming and registering associations and NGOs. Such associations may take several forms, including not-for-profit corporations, charitable foundations and mutual societies. NGOs formed for the express purpose of environmental protection are one category of associations. This type of NGO is sometimes called an "environmental citizens' organization". In addition, NGOs ostensibly formed for other purposes (for example, issues of health and safety) might from time to time promote environmental protection in connection with their activities. Even NGOs formed to advance the interests of a particular profession, such as environmental scientists, might incidentally promote environmental protection. While the Convention refers specifically to "associations, organizations or groups promoting environmental protection", as a rule laws relating to the formation and registration of organizations do not distinguish on this basis. While some UN/ECE countries have encountered problems when persons abused the law by creating sham foundations that covered private business activity, Parties must ensure that measures taken to combat illegal activities do not inhibit the formation of legitimate NGOs.

Comment [MSOffice341]: Deletion (editorial team)

The inclusion of the word "groups" is intended to ensure that technical requirements such as registration will not be a bar to the recognition and support of groups of people in association who promote environmental protection. In many instances, groups organize over specific topics at the grass-roots level. In these cases registration as a formal, "permanent" organization may be unnecessary. The level of recognition by, and support from, the public administration may, however, vary between registered organizations and ad hoc groups. Estonia is one country that specifically provides recognition in its administrative law for non-registered groups. In Estonia, an association of persons, including an association which is not a legal person, has the right of recourse to an administrative court in to protect the interests of its members or other persons if its founding document, articles of association or relevant law grants it this right.¹⁴⁰

Comment [H342]: Deletion : Croplife

Comment [MSOffice343]: Edit (editorial team)

Comment [MSOffice344]: Edit (editorial team)

Comment [MSOffice345]: Confirm ed : Estonia

~~Appropriate recognition of such associations, organizations and groups, besides the possibility of meeting legal requirements for existence, may also involve recognition of certain powers and rights. For example, under article 18 of the Lugano Convention: "any association or foundation which according to its statutes aims at the protection of the environment and which complies with any further conditions of internal law of the Party where the request is submitted may, at any time, request: the prohibition of a dangerous activity which is unlawful and poses a grave threat of damage to the environment; that the operator be ordered to take measures to prevent an incident or damage; that the operator be ordered to take measures, after an incident, to prevent damage; or that the operator be ordered to take measures of reinstatement."~~

In its findings on communication ACCC/C/2004/05 (Turkmenistan), the Compliance Committee examined a situation in which a blanket prohibition on activities being conducted by non-registered NGOs was combined with draconian requirements for NGO registration significant bureaucratic obstacles to NGO registration. While the requirement that NGOs register would not by itself be an impairment to public participation by associations, the Turkmenistan Act on Public Associations was found to present genuine obstacles to the exercise of participation rights due to its difficult registration procedures and requirements. This, in turn, was found to be a violation of the obligation to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system was consistent with this obligation.¹⁴¹

Comment [MSOffice346]: Edit (editorial team)

Comment [MSOffice347]: Edit (editorial team)

Beyond the mere recognition of the rights of association, public authorities often also provide specific forms of recognition of the important role that associations, organizations or groups promoting environmental protection civil society organizations play in decision-making and policy-making. It has become common practice in UNECE countries for authorities to establish consultative councils or other mechanisms to promote cooperation with NGOs, and to include NGOs in environmental decision-making bodies, working groups or advisory bodies.¹⁴² (Synthesis Report on the Status of Implementation of the Convention, (ECE/MP/PP/2008/4), paragraph 39).

Comment [E348]: Edit footnote : at request of Germany

Comment [MSOffice349]: Paragraph moved up to here (editorial team)

Comment [MSOffice350]: Edit (editorial team)

Comment [FM351]: Edit : Croplife

Comment [MSOffice352]: Reference removed to footnote (editorial team)

Appropriate government support to such associations, organizations and groups can take various forms. Support could be direct or indirect. Direct support might be offered to a particular group or organization for its activities, and could be project-based or general core support. In some UNECE countries it is not unusual for substantial financial grants or awards to be given to environmental citizens' organizations, associations, organizations and groups to support their activities. Other countries suffer from a lack of financial resources or are reluctant to provide support because such support might be misinterpreted as a political endorsement of some kind. While particular mechanisms for support are not prescribed, it would appear that a Party must at least have a legal system that would allow the government to provide support to associations, organizations or groups where appropriate. Parties must ensure that measures taken to combat illegal activities do not inhibit the formation of legitimate NGOs.

Comment [FM353]: Edit : at request of Croplife

Comment [MSOffice354]: Text moved down from previous page (editorial team)

Indirect support might involve general rules for tax relief (for example, exempting charitable organizations from payment of certain taxes), financial incentives for donations (such as tax deductibility) or fee waiver provisions. These are usually found in a law on non-profit organizations. In this case, provisions should be non-discriminatory. Governments must be careful to avoid giving an appearance of preference to particular organizations. While it may be practical to enter into memoranda of understanding with groups of NGOs, the agreements reached should take into account the goal of providing recognition of and support to environmental NGOs associations, organizations and groups generally, in recognition of the important role of independent civil society actors such entities play in solving environmental problems, without creating the impression that particular NGOs have greater access or importance. In addition, procedural rules, which give environmental citizens' organizations associations, organizations or groups, for example, advantages when they participate in individual cases might also be counted as support

Comment [FM355]: Edit (editorial team)

Comment [MSOffice356]: Edit (Editorial team)

Comment [MSOffice357]: Deletion as now elaborated in more detail several paragraphs above (editorial team)

Another important form of support under the Convention is in the context of access to justice. Such support might include regulations entitling environmental associations, organizations and groups to apply for legal aid, or measures exempting them from court fees or litigation costs. Such issues will be discussed further in the commentary on article 9, paragraph 5, regarding the removal and reduction of. Moreover, the rules for access to justice should remove or reduce financial and other barriers, in conformity with article 9, paragraph 5 to access to justice.

Comment [MSOffice358]: Edits (editorial team)

In its findings on communication ACCC/C/2004/05 (Turkmenistan), the Compliance Committee examined a situation in which a blanket prohibition on activities by non-registered NGOs was combined with draconian requirements for NGO registration. While the requirement that NGOs register would not by itself be an impairment to public participation by associations, the Turkmenistan Act on Public Associations was found to present genuine obstacles to the exercise of participation rights due to its difficult registration procedures and requirements. This, in turn, was found to be a violation of the obligation to provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and to ensure that its national legal system was consistent with this obligation.¹⁴³

Comment [MSOffice359]: Text moved several paragraphs earlier (editorial team)

5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

Taken together, article 3, paragraphs 5 and 6, are among the most important provisions of the Convention, establishing establish that the Convention is a "floor, not a ceiling". Parties have at any time the right to provide for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention, and Parties are not required to derogate from any existing rights. That is, the Convention sets forth requirements that Parties must meet *at a minimum* in order to provide the basis for effective access to information, public participation in decision-making and access to justice in environmental matters. One example where Parties have legislative frameworks that go beyond the Convention's standards is in the deadlines for responding to environmental information requests. Several countries have deadlines shorter than one month for responding to simple requests.

Comment [MSOffice360]: Edit (editorial team)

Comment [MSOffice361]: Edit (editorial team)

The wording of these paragraphs is specifically crafted to take note of the fact that countries will be meeting the obligations of the Convention through legal frameworks. Since these frameworks will be subject to interpretation, article 3, paragraphs 5 and 6,

guide this interpretation, essentially restricting differences between the Convention and the implementing laws to a "one way" interpretation—in the direction of greater rights and guarantees to the benefit of the public. The Convention establishes the grounds for future developments whereby the Parties might raise the accepted international standards in the future, based upon experience with higher standards on the domestic level. Nevertheless, in addition, the Convention should not have the legal effect of automatically supplanting pre-existing law or policy on the subject, where that pre-existing law or policy is more favourable to the public. In this regard, it is important to keep in mind the interests expressed by certain States during the negotiations that led to the particular language of article 3, paragraphs 5 and 6.

Comment [MSOffice362]: Deletion (editorial team)

Comment [MSOffice363]: Sentence moved from end of previous paragraph to start of next paragraph (editorial team)

Comment [MSOffice364]: Sentence moved up (editorial team)

Comment [MSOffice365]: Essence of sentence moved into lower paragraph (editorial team)

It is a well-known tendency, when drafting international agreements that must take into account national differences, for the negotiations to lead towards a lowest common denominator outcome. Because of the special nature of the Aarhus Convention in comparison with traditional, command and control oriented international agreements, a different approach had to be taken to ensure that the Convention would carry Parties forward in its subject areas. Consequently, the negotiating parties had difficulty in finding the right formulation. They were faced with a constitutional oddity that threatened to undermine the Convention. It is a well known tendency, when drafting international agreements that must take into account national differences, for the negotiations to lead towards the lowest common denominator. In the negotiation of the Aarhus Convention, this common tendency presented a problem thus encountered special challenge was to avoid the possibility that as it may have meant that rights and protections in some some of the young democracies at that time in Central and Eastern Europe eastern European countries might would actually be diminished. This was the predicament faced by those countries whose constitutions give primacy to international obligations in such a way that This could happen if ratification of the Convention were to would supplant the prior national legislation on the same subject matter, a real possibility in countries whose constitutions give primacy to international obligations under some constitutional orders. This would cause obvious difficulties when maximum limits are set on the basis of the lowest common denominator rule.

Comment [MSOffice366]: Edits (editorial team)

Earlier UNECE conventions used the following wording to establish that Parties could provide more protection than that provided in a given convention:

"The provisions of this Convention shall not affect the right of Parties individually or jointly to adopt and implement more stringent measures than those set down in this Convention."¹⁴⁴

The use of the word "stringent" is may be appropriate for traditional, command-and-control oriented international agreements where when the subject matter of a convention is the obligation of the Parties to take protective measures and to restrict or regulate behaviour, but it is obviously problematic when applied to a convention which pertains to the establishment of institutions, procedures and structures to facilitate public activities the subjects covered by the Aarhus Convention.¹⁴⁵ The language finally settled upon was intended to make clear that pre-existing rights or provisions favourable to access to information, public participation in decision-making and access to justice in environmental matters cannot be automatically impinged by the Convention, and, furthermore, that Parties are free to go beyond the protection and provision of rights contained in the Convention in their own national legislation and practice.

Comment [MSOffice367]: Edit (editorial team)

Comment [MSOffice368]: Edit (editorial team)

An important interesting question is whether these two provisions taken together constitute an "anti-backsliding" or "anti-deterioration" clause. Some of those closest to involved in the negotiations of the Convention and even the first edition of this Guide took the position that the Convention should be understood as having this requirement. However, in its findings on communication ACCC/C/2004/04 (Hungary), the Compliance Committee considered that the wording of article 3, paragraph 6, which merely states that the Convention does not require any derogation from existing rights of information, public participation or access to justice in environmental matters, in a way that does not completely exclude the possibility of a Party reducing existing rights, so long as they do not fall below the minimum level granted by the Convention. In its findings This finding notwithstanding on communication ACCC/C/2004/04 (Hungary), the Committee

Comment [MSOffice369]: Deletion (editorial team)

Comment [MSOffice370]: Edits (editorial team)

Comment [MSOffice371]: Edits (editorial team)

Comment [MSOffice372]: Edits (editorial team)

regarded the reduction from existing rights as being at variance with the spirit objectives of the Convention, and recommended the Meeting of the Parties, at its forthcoming second session, to urge Hungary not to take such action. However, at that session (Almaty, 25-27 May 2005), the Meeting of the Parties in Almaty in 2005 made no such declaration.¹⁴⁶

Comment [MSOffice373]: Edits (editorial team)

Comment [E374]: Edit footnote : at request of Germany

Certainly, at a minimum, article 3, paragraph 6, would prevent a Party from justifying a using the standards set by the Convention to justify a reduction in reduction in existing rights based on the fact that the Aarhus Convention sets a standard. The Convention clearly cannot be used as a justification for any reduction in existing rights. Moreover, those seeking to urge governments to avoid backsliding can point to jurisdictionjurisprudence in human rights cases stating that the establishment of a standard for protection of rights, once established, cannot be derogated from without a compelling countervailing right. Ironically, an excellent statement of this rule is found in a case from Hungary's Constitutional Court, the "Protected Forests" case, where the Court held that if the state guarantees a certain level of protection, it cannot be withdrawn arbitrarily. The Court held that such protections could only be diminished in proportion to upholding other constitutional rights or values. The "Protected Forests" case is described in more detail in the the Handbook on Access to Justice under the Aarhus Convention (2003), at pp. 235-236.

Comment [K375]: Edits (editorial team)

Comment [MSOffice376]: Edits (editorial team)

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

The Convention requires Parties to promote its principles concerning environmental matters in international decision-making processes and within the framework of international organizations. In light of this, at its second session (Almaty, Kazakhstan, 25-27 May 2005), the Meeting of the Parties adopted decision II/4 on promoting the application of the principles of the Aarhus Convention in international forums. The Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums are annexed to the decision.

The primary purpose of the Almaty Guidelines is to provide general guidance to Parties on promoting the application of the principles of the Convention in international forums in matters relating to the environment.¹⁴⁷ The Guidelines are intended to apply to all international stages of any relevant decision-making process in matters relating to the environment and are intended to positively influence the way in which the public may have access to international forums in which Parties to the Convention participate.¹⁴⁸ The definition of international forums in the Guidelines is not exhaustive, but expressly includes:

Comment [MSOffice377]: Footnote inserted (editorial team)

Comment [MSOffice378]: Insertion (editorial team)

Comment [MSOffice379]: Footnote inserted (editorial team)

- (a) The negotiation and implementation at the international level of MEAs, including decisions and actions taken under their auspices;
- (b) The negotiation and implementation at the international level of other relevant agreements, if decisions or actions undertaken at that level pursuant to such agreements relate to the environment or may have a significant effect on the environment;
- (c) Intergovernmental conferences focusing on the environment or having a strong environmental component, and their respective preparatory and follow-up processes at the international level;
- (d) International environmental and development policy forums; and
- (e) Decision-making processes within the framework of other international organizations in matters relating to the environment.¹⁴⁹

Comment [MSOffice380]: Footnote inserted (editorial team)

Regional economic integration organizations (e.g. the European Union) or forums exclusively comprising all member States of a regional economic integration organization are expressly excluded from the scope of the Guidelines.¹⁵⁰

Comment [MSOffice381]: Footnote inserted (editorial team)

These categories of international forums listed above may overlap in certain instances. ~~For example~~ To illustrate, international legal instruments are frequently negotiated at intergovernmental conferences, such as conferences of States on environmental issues, for example the 1992 Rio Conference Earth Summit or the periodic ministerial meetings "Environment for Europe" or "Environment and Health". Working groups charged with the negotiation of international legal instruments might also fall under this category be considered as intergovernmental conferences. International environmental decision-making processes may include bilateral or multilateral decision-making relating to shared natural resources (such as river basin management regimes), as well as the decisions of bodies established under international ~~conventions~~ agreements. ~~It may also include international forums, such as the United Nations General Assembly, dealing with specific issues with significant potential environmental impacts. include conferences of States on environmental issues, such as the 1992 Rio Conference or the periodic ministerial meetings "Environment for Europe" or "Environment and Health". Working groups charged with the negotiation of international legal instruments could also fall under this category.~~ The drafting of the 1999 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992) is one process in which many of the principles of the Aarhus Convention have already been applied. The Protocol's negotiating parties expressly took the Aarhus Convention into account.¹⁵¹

Comment [MSOffice382]: Edit (editorial team)

Comment [o383]: Edit (editorial team)

Comment [MSOffice384]: Edit (editorial team)

Comment [MSOffice385]: Edit (editorial team)

Comment [MSOffice386]: Edit (editorial team)

Comment [MSOffice387]: Edit (editorial team)

As noted at (e) in the above list, Parties are also obliged to promote the Aarhus Convention's principles in respect of decision-making processes within the framework of other international organizations in matters relating to the environment. This includes international forums, such as the United Nations General Assembly, when dealing with specific issues relating to the environment with significant potential environmental impacts. Such organizations It also includes multilateral lending institutions such as the European Bank for Reconstruction and Development, specialized agencies and other organizations in the United Nations system such as the World Bank and the World Trade Organization, and special international organizations formed for specific tasks, such as the reconstruction of post-war infrastructure in the Balkans.

Comment [MSOffice388]: Edit (editorial team)

~~The phrase may include bodies of organizations such as the European Community, although the Convention uses a special term regional economic integration organizations to apply to the latter.~~

The Guidelines are intended to provide guidance to Parties with respect to both (i) the development, modification and application of relevant rules and practices applied within international forums (e.g. rules of procedure covering issues such as transparency, accreditation); and (ii) the treatment of relevant substantive issues within those forums. Like the Convention, the Guidelines are based around three pillars: access to environmental information, public participation in decision-making regarding environmental matters and access to review procedures in environmental matters. A summary of the Guidelines is provided below:

Comment [MSOffice389]: Insertion (editorial team)

An overview of the Almaty Guidelines on Promoting the Principles of the Aarhus Convention in International Forums

General considerations

- Like the Convention itself, the Almaty Guidelines are based on the belief that access to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels, essential for sustainability and generally improve the quality of decision-making and the implementation of decisions.
- The Guidelines state that in any structuring of international access, care should be taken to make or keep the processes open, in principle, to the public at large. Where members of the public have differentiated capacity, resources, socio-cultural circumstances or economic or political influence, special measures should be taken to ensure a balanced and equitable process.

Access to environmental information

- In order to make access by the public more consistent and reliable, each Party should encourage international forums to develop and make public a clear and transparent set of policies and procedures on access to the environmental information that they hold.
- Environmental information, including that in official documents, should be provided proactively, in a timely manner, in a meaningful, accessible form, and where appropriate, in the international forum's official languages, so that access to information translates into greater knowledge and understanding. The use of appropriate technical means to make information accessible to the public free of charge, e.g. using electronic information tools, such as clearing houses, and live webcasting of events should be promoted.
- Any member of the public should have access to environmental information developed and held in any international forum upon request, without having to state an interest, as soon as possible, and subject to an appropriate time limit, e.g. one month. The availability of information free of charge or, at most, at a reasonable charge should be promoted.
- Requests for environmental information should be refused only on the basis of specific grounds for refusal, taking into account the Convention's requirement that the grounds for refusal should be interpreted in a restrictive way, taking into account the public interest in disclosure. A refusal of a request should give reasons for the refusal and provide information on access to any review procedure.

Public participation in decision-making on environmental matters

- Efforts should be made to proactively seek the participation of relevant actors, in a transparent, consultative manner, appropriate to the nature of the forum. Participation of the public concerned in the meetings of international forums, including their subsidiary bodies should be allowed at all relevant stages of the decision-making process, unless there is a reasonable basis to exclude such participation according to transparent and clearly stated standards. Where they are applied, accreditation or selection procedures should be based on clear and objective criteria, and the public should be informed accordingly.
- International processes should benefit from public participation from an early stage when options are still open and effective public influence can be exerted. This includes ~~including, at the international level, the negotiation and application of conventions; the preparation, formulation and implementation of decisions; and substantive preparation of events. Effective participation of the public concerned may be ensured through a variety of forms, for example including, at meetings in international forums, observer status, advisory committees open to relevant stakeholders, forums and dialogues open to members of the public and webcasting of events, as well as general calls for comments.~~
- Participation of the public concerned should include, at meetings in international forums, the entitlement to have access to all documents relevant to the decision-making process produced for the meetings, to circulate written statements and to speak at meetings, without prejudice to

Comment [MSOffice390]: Edits (editorial team)

Comment [MSOffice391]: Deletion (editorial team)

the ability of international forums to prioritize their business and apply their rules of procedure.

- Public participation procedures in international forums should include reasonable time frames for the different stages, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively during the decision-making process. The opportunity to participate in a given international decision making process should be provided at a stage when options are still open and effective public influence can be exerted. The public should be informed in due time of the opportunities, procedures and criteria for public participation in the decision-making.
- In decisions, due account should be taken of the outcome of public participation and transparency with respect to the impact of public participation on final decisions should be promoted.
- Given that traditional arrangements for financial support can be quite costly, efforts should be made to apply innovative, cost-efficient and practical approaches to maximizing participation.

Access to review procedures

- Each Party should encourage international forums to consider measures to facilitate public access to review procedures relating to the application of the forums' rules and standards regarding access to information and public participation within the scope of the Guidelines.

Comment [MSOffice392]: Deletion as duplicative (editorial team)

Comment [MSOffice393]: Paragraph inserted (editorial team)

~~Through decision II/4, the Meeting of the Parties recommended the application of the Guidelines by all Parties on the understanding that the Guidelines would be reviewed and, if appropriate, amended by the Parties at their third ordinary meeting. The Meeting invited Signatories and other interested States to consider the concepts reflected in the Guidelines and to apply them as appropriate. It also invited international forums within the scope of the Guidelines, including their secretariats, to consider how their own processes might take into account the principles of the Convention and further the application of the Guidelines.~~

Task Force on Public Participation in International Forums

~~Through decision II/4 adopting the Almaty Guidelines, the Meeting of the Parties also established a task force to enter into consultations regarding the Guidelines with the relevant international forums within the scope of the Almaty Guidelines. It also invited Parties, Signatories, other interested States, NGOs, interested international forums and other relevant actors to submit to the secretariat comments relating to their experience regarding the application of the Guidelines. of the Parties, based on its consideration of the outcome of the consultations and experiences regarding the application of the Guidelines, to review the Guidelines and make recommendations, as appropriate, for consideration by the Parties at their third ordinary meeting. In accordance with this, The Task Force conducted a consultation process with relevant international forums over a thirteen-month period from June 2006 to July 2007. Forty-nine international forums took part in the written phase of the consultation process. The consultation process culminated in an international workshop for representatives of international forums and their stakeholders in July 2007. At its third session (Riga, 11-13 June 2008), the Meeting of the Parties adopted decision III/4 in which it welcomed the work of the Task Force and expressed its belief that there was no need to revise the Almaty Guidelines at the present time. The Meeting and recognized that significant work remains to be done to implement article 3, paragraph 7, of the Convention. Renewing the mandate of the Task Force for a further three years, it and agreed that the principal focus of common work on this issue in the next intersessional period should be to assist Parties to do so.~~

Comment [MSOffice394]: Heading deleted and textbox changed to normal text (Editorial team)

Comment [MSOffice395]: Deletion (editorial team)

Comment [MSOffice396]: Edit (editorial team)

~~It should be noted that European Community institutions are affected directly as well as indirectly through the obligation found herein. That is because the European Community is also a Signatory to the Convention. It stated at the signing of the Aarhus~~

~~Convention that its institutions would be covered, alongside national authorities. It is irrelevant whether these international organizations were formed before or after the coming into force of the Convention. The Resolution of the Signatories included a recommendation that NGOs should be allowed to participate effectively in the preparation of instruments on environmental protection by intergovernmental organizations other than UN/ECE, and encouraged international organizations, including the regional commissions of the United Nations and bodies other than UN/ECE, to draw upon the Convention to develop appropriate arrangements relating to the subjects covered by it.~~

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

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

Paragraph 8 requires Parties to protect persons exercising rights under the Convention. To some extent it reflects the so-called whistle-blower protection principle (~~referring to based on~~ the notion that someone is "blowing the whistle" to call the attention of the authorities to particular unlawful activities). ~~In many countries the principle is aimed at protecting employment. To be applied in a wide variety of legal contexts, however, it goes beyond traditional whistle-blower rules. It has been given maximum flexibility and is aimed at preventing retribution of any kind. As in so many other situations that involve openness and transparency and where economic interests are at stake, persons who take the risk of demanding that the rules should be complied with and proper procedures followed need to be protected from various forms of retribution. Early forms of this type of provision can be were found in United States labour law in the form of provisions to protect the jobs of workers who reported violations of worker health and safety regulations to the authorities. A good example of employment protection is found in a United States statute known as the Occupational Safety and Health Act of 1970.⁹⁴ It protects workers if they complain to government officials about unsafe or unhealthy working conditions. The statute makes it illegal for the employer to discharge or otherwise discipline the worker who makes such a complaint. If a worker is wrongfully discharged or disciplined, the worker has the right to reinstatement with back pay.⁹⁵ The United States Congress assumed that the employees in a given work site would best know the hazards there.⁹⁶~~

Comment [K397]: Edit (editorial team)

Comment [K398]: Deletion as duplicates text later in paragraph (editorial team)

Comment [W399]: Edit (editorial team)

Similar provisions can be found in Europe as well. In Hungary, **the Law on Public Complaints** provides for remedies if an employer takes retaliatory action against a worker who has made a complaint in the public interest. The employer is obliged to restore the employee's lawful status immediately and to properly compensate material and moral damages. If necessary such restoration can be ordered by a superior body, which simultaneously should start disciplinary or criminal action. A complainant can ask to keep his or her name confidential, which must be granted unless the effectiveness of the examination of the data requires otherwise. In this case the complainant must be informed of an intent to disclose his or her identity in advance.¹⁵² ~~Moreover~~ **With respect to whistle-blowing more generally and not just in the workplace, Hungarian law provides that those who retaliate against persons who have made complaints in the public interest commit a misdemeanour under the Criminal Code and are subject to punishment by an imprisonment of up to one year, mandatory public service or a fine.¹⁵³**

Comment [K400]: Edit (editorial team)

~~In its findings on communication ACCC/C/2009/36 (Spain), the Compliance Committee found that by insulting the communicant publicly in the local press and mass media for its interest in activities with potentially negative effects on the environment and health of the local population, the public authorities, and thus the Party concerned, had~~

failed to comply with article 3, paragraph 8, of the Convention (paragraph 64)¹⁵⁴

In its findings on communication ACCC/C/2008/27 (United Kingdom), the Compliance Committee noted that, while article 3, paragraph 8, does not affect the powers of national courts to award reasonable costs in judicial proceedings, the Committee did not exclude that pursuing costs in certain contexts may be unreasonable and amount to penalization or harassment within the meaning of article 3, paragraph 8. The Committee took the view that, based on the evidence before it, the Party concerned's pursuit of costs did not amount to a penalization under article 3, paragraph 8 in that case (paragraph 47). The Committee made similar observations in its findings on communication ACCC/C/2008/23 (United Kingdom), paragraph 53.

With respect to its own procedures, the Aarhus Convention Compliance Committee has considered steps measures to protect members of the public making communications to the Committee from the possibility of harassment. The Guidance Document on the Aarhus Convention Compliance Mechanism provides that, if a communicant is concerned that the disclosure of information submitted to the Committee could result in his or her being penalized, persecuted or harassed, he or she is entitled to request that such information, including any information relating to his or her identity, be kept confidential. The same applies if the communicant is concerned that the disclosure of information submitted to the Committee could result in penalization, persecution or harassment to any other person. The Committee respects any request for confidentiality. Further details on the Committee's procedure with respect to requests for confidentiality, are available in the Guidance Document on the Aarhus Convention Compliance Mechanism.¹⁵⁵

Comment [K401]: Insertion :
Plataforma Contra la Contaminación de
Almendralejo

Comment [E402]: Edit footnote : at
request of Germany

Comment [K403]: Insertion (editorial
team)

Comment [K404]: Edit (editorial
team)

Comment [K405]: Edit (editorial
team)

Comment [MSOffice406]: Insertion
(editorial team)

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

This non-discrimination clause is another of the key provisions of the Convention. It establishes that all persons, regardless of origin, have the exact same rights under the Convention as the citizens of the subject Party. Although the public is defined without respect to citizenship and other international instruments have also talked in terms of the "any person" principle in the context of environmental protection, it was considered necessary to expressly address non-discrimination in a forceful way in the Convention. This was in part due to the legacy of authoritarianism in some countries, where discrimination on the basis of citizenship, nationality or domicile was the norm with respect in particular to access to information. During the negotiations the reluctance of some countries to accept a principle of non-discrimination in fact led to a more forceful posture by the majority of countries, which considered this to be non-negotiable. In the end, a quite clear and simple provision emerged. It should be noted, additionally, that this provision is potentially useful to domestic persons in cases of positive discrimination in favour of foreign entities.

A similar provision may be found in the Espoo Convention. Its article 2, paragraph 6, makes sure that its Parties under whose jurisdiction a proposed activity is envisaged to take place ("Party of origin") will provide "an opportunity to the public . . . to participate in relevant environmental impact assessment procedures". Furthermore, the Party of origin has to "ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin". Another similar provision can be found in the United Nations' 1994 draft principles on human rights and the environment, which states, "All persons shall be free from any form of discrimination in

Comment [MSOffice407]: Edit
(editorial team)

regard to actions and decisions that affect the environment" (E/CN.4/Sub.2/1994/9, annex I, ~~paragraph 3~~).

~~Because NGOs have a special status under the Aarhus Convention regime (see above), Parties must be sensitive to the need to ensure that the law regarding the formation, establishment and membership of NGOs takes into account the non-discrimination obligations under this paragraph. In its findings on communication ACCC/C/2004/05 (Turkmenistan), the Compliance Committee, when considering Turkmenistan's Act on Public Associations, held that "the exclusion of foreign citizens and persons without citizenship from the possibility to found and participate in an NGO might constitute a disadvantageous discrimination against them."~~¹⁵⁶

Comment [H408]: Deletion: Croplife

Comment [E409]: Edit footnote : at request of Germany

The non-discrimination provision may be especially significant for defining the "public concerned" under article 2, paragraph 5, article 6 and article 9, paragraph 2, and identifying the public under article 7. Public authorities might tend to discriminate against non-citizens or non-residents in determining whether they have a recognizable interest or articulatable concern, and might also tend to omit non-citizens and non-residents when including the public in the development of plans and programmes relating to the environment. ~~Particularly in transboundary situations, language issues may be a ground of discrimination. In 2009, a case in which a Dutch NGO complained that EIA documentation relating to a proposed construction of a thermal electric power plant 500 metres from the Dutch-Belgian border was available only in French, and public hearings were conducted only in three French-speaking municipalities, was the subject of a compliance matter review under the Espoo Convention (EIA/IC/INFO/4).~~¹⁵⁷ Article 3, paragraph 9, makes it clear that distinctions based upon citizenship, nationality, residence or domicile, place of registration or seat of activities are ~~improper not permitted~~ under the Convention.

Comment [MSOffice410]: Edits to text and endnote added (editorial team)

Comment [M411]: Edit (editorial team)

*Pillar I***ACCESS TO INFORMATION**

Access to information is the first "pillar" of the Convention. The environmental rights outlined in its preamble depend on the public having access to environmental information, just as they also depend on public participation and on access to justice. This section discusses both article 4 on access to environmental information and article 5 on the collection and dissemination of environmental information as the two components of the access-to-information pillar.

Purpose of access-to-information pillar

Under the Convention, access to environmental information ensures that members of the public can understand what is happening in the environment around them. It also ensures that the public is able to participate in an informed manner.

What is access to information under the Convention?

The Convention governs access to "environmental information". Environmental information is defined in article 2, paragraph 3, to include ~~the such things as~~ state of the elements of the environment, factors that affect the environment, decision-making processes, and the state of human health and safety. (See commentary to article 2, paragraph 3.)

The access-to-information provisions of the Convention are found in article 4 on access to environmental information and article 5 on the collection and dissemination of environmental information. Article 4 sets out the general right of persons to gain access to existing information upon request, also known as "passive" access to information. Article 5 sets out the duties of the government to collect and disseminate information on its own initiative, also known as "active" access to information.

The preamble, article 1 on the objective and article 3 on general provisions support the provisions of articles 4 and 5, by establishing the right to information, guaranteeing that right and requiring Parties to take all necessary measures and to provide guidance to the public. Article 3, in particular, reminds Parties that the Convention's provisions, including those in articles 4 and 5, are minimum requirements and that Parties have the right to provide broader access to information for the public.

Access to information in international law

Laws on access to information held by public bodies The Convention develops at the international level rules that have long been found at the national level. The Convention elaborates international standards in the specific area of environmental information. Some of these national rules have found their way into international law, especially in recent years. Many environmental treaties developed before the 1990s provided for access to information among Parties. More Recent-recent treaties have taken the concept of access to information one step further and have included obligations for Parties to make government-held information accessible to members of the public. Many of these treaties have their basis in principle 10 of the Rio Declaration, which declares

Comment [o412]: Edit : Greenpeace

that each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities In the last few years, access to information has also gained increasing recognition as a human right, implicit in the right to freedom of expression which is guaranteed by a number of global and regional treaties.

Comment [M413]: Insertion: Greenpeace

Treaties including elements of the Pillar I access to information principles include both UN/ECE and worldwide agreements, such as the Convention on Civil Liabilities for Damage Resulting from Activities Dangerous to the Environment (Lugano, 1993) and the United Nations Framework Convention on Climate Change (1992). Like the Aarhus Convention, the Lugano Convention specifies that any person has the right to access information held by public authorities upon request without having to prove an interest (art. 14, para. 1). It also lists the conditions under which that right may be restricted (art. 14, para. 2) – these conditions closely mirror those in the Aarhus Convention. Finally, it specifies time frames in which information must be supplied (art. 14, para. 4), stipulates that fees for information should be "reasonable" (art. 14, para. 6), and guarantees a right to appeal against wrongful denial or inadequate fulfilment of a request for information (art. 14, para. 5). The United Nations Framework Convention on Climate Change, by contrast, simply instructs Parties to promote and facilitate public access to information on climate change and its effects (art. 6 (a) (ii)). the Stockholm Convention on Persistent Organic Pollutants (POPs) and the Rotterdam Convention on Prior Informed Consent (PIC). Another example of access to environmental information provisions in international law is article 16 of the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. This article requires certain information, including water-quality objectives, permits and results of sampling and compliance checks, to be available to the public at all reasonable times for inspection, free of charge, and requires the Parties to provide members of the public with reasonable facilities for obtaining copies of such information from the Parties, on payment of reasonable charges. The Water and Health Protocol contains a similar provision in its article 10, which requires that additional information be available in response to a request from a member of the public. Article 23 of the Cartagena Protocol on Biosafety requires parties to provide access to information on certain living modified organisms identified in accordance with the Protocol that may be imported.

Comment [M414]: Paragraph already deleted in first draft but at that stage shown out of order (see two paragraphs below) (editorial team)

the Convention on Civil Liabilities for Damage Resulting from Activities Dangerous to the Environment (Lugano, 1993) and the United Nations Framework Convention on Climate Change (1992). Like the Aarhus Convention, the Lugano Convention specifies that any person has the right to access information held by public authorities upon request without having to prove an interest (art. 14, para. 1). It also lists the conditions under which that right may be restricted (art. 14, para. 2) – these conditions closely mirror those in the Aarhus Convention. Finally, it specifies time frames in which information must be supplied (art. 14, para. 4), stipulates that fees for information should be "reasonable" (art. 14, para. 6), and guarantees a right to appeal against wrongful denial or inadequate fulfilment of a request for information (art. 14, para. 5). The United Nations Framework Convention on Climate Change, by contrast, simply instructs Parties to promote and facilitate public access to information on climate change and its effects (art. 6 (a) (ii)).

Comment [WX415]: Insertion (editorial team) in light of Croplife comments

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

Comment [M416]: These paragraphs are now correctly shown as deleted text in the order that they appeared in the original published Implementation Guide (see paragraphs above) (editorial team)

Many of the environmental treaties of the past 15 years adopted since 1990 also provide that Parties should collect and disseminate specific environmental information,

relevant to that treaty, to members of the public. For example, the 1992 Convention on the Transboundary Effects of Industrial Accidents requires Parties to ensure that adequate information is given to the public in areas capable of being affected by an industrial accident arising out of a hazardous activity (article- 9, paragraph 1).

In the human rights arena, there has been a substantial move towards recognition of access to information as a human right.

The Inter-American Court of Human Rights issued a landmark judgement in 2006 holding that Article 13 of the American Convention on Human Rights (freedom of thought and expression) guarantees the right of all individuals to request and be granted access to government-held information, unless there is a specific justification for refusal. The case was brought by members of a Chilean environmental NGO who had been denied access to documents related to the environmental impact of a proposed logging project¹⁵⁸.

Further recognition of access to information as a right came with the adoption, on 27 November 2008, of the Council of Europe Convention on Access to Official Documents (No. 205). The Convention counts as the first international treaty on access to information in general, and recalls the Aarhus Convention in its preamble. As of June 2011, it had attracted three ratifications, seven short of the number needed for entry into force.¹⁵⁹

Comment [o417]: Number of ratifications will be updated before publication (editorial team)

In 2009, the European Court of Human Rights issued two rulings (*Társaság a Szabadságjogokért v. Hungary* and *Kenedi v. Hungary*) recognising that a right of access to information held by public bodies is inherent in Article 10 (freedom of expression) of the European Convention on Human Rights¹⁶⁰. In *Társaság a Szabadságjogokért v. Hungary*, the Court found a refusal by Hungary's Constitutional Court to disclose a complaint lodged by an MP and others to be an unjustified interference in the freedom of expression of the requester, a civil liberties NGO. The Court had previously repeatedly resisted such an interpretation of Article 10 of the European Convention on Human Rights, which is worded in terms very similar to those of Article 13 of the American Convention. It had, however, recognised a limited right of access to information where necessary to protect the right to private and family life (Article 8). For example, in *Guerra et al. v. Italy*,¹⁶¹ the applicants, who lived within 1km of a factory classified as "high risk", complained about the authorities' failure to inform the public about the hazards posed by the installation and emergency response procedures. The Court found a breach of Article 8, recognising that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life" (§60), but ruled that Article 10 was not applicable as this provision did not impose on a government "positive obligations to collect and disseminate information of its own motion" (§53). The Court's judgements in *Társaság a Szabadságjogokért v. Hungary* and *Kenedi v. Hungary* indicate that access to information is rapidly gaining recognition as a human right at the international level.

Comment [A418]: Edit : Greenpeace

Comment [A419]: Edit : Greenpeace

At its 100th session in October 2010, the UN Human Rights Committee completed its first reading of draft General Comment No. 34, on Article 19 of the International Covenant on Civil and Political Rights (freedom of expression). The draft states that "Article 19, paragraph 2 embraces a general right of access to information held by public bodies" (§18).

Comment [H420]: Insertions: (Greenpeace)

Access to information and the EU

At the time the Aarhus Convention was adopted, EU Directive 90/313/EEC on the freedom of access to information on the environment provided the legal basis for access to environmental information in the EU member states. The Directive established basic obligations for EU member states to ensure that public authorities were required to make available information relating to the environment to any natural or legal person at his or

her request. However, there were differences between the Directive and the Aarhus Convention, so the EU institutions had to adjust the legislation in order to meet the Aarhus requirements. Directive 2003/4/EC repealed Directive 90/313/EEC in order to meet these new requirements and expanded the access granted under Directive 90/313/EEC. In addition, other EU legislation adopted since the Aarhus Convention came into force have included provisions to meet the requirements of the Convention. Some of these are discussed in other parts of this Guide.

Comment [MSOffice421]: Edit : EU

The influence of the Aarhus Convention on EU law on access to environmental information

A number of important changes that were made to EU legislation through Directive 2003/4/EC (references are to relevant provisions of the Aarhus Convention) including:

Comment [MSOffice422]: Edit (editorial team)

Definitions: the definitions of environmental information and public authority are expanded (art. 2);

Use of term "adversely": in the old definition of "environmental information", the Directive limited measures to those that *adversely* affect the environment, whereas the new definition covers measures affecting the environment in any way;

Response time limits: the ambiguous time limits of the old Directive are replaced with time limits identical to those in the Convention (art. 4, para. 2);

No stated interest: under the new Directive, the applicant need not state an interest (art. 4, para. 1 (a)), while under the old Directive, the applicant did not need to *prove* an interest;

Form requested: the new Directive requires information to be given in the form requested with certain exceptions (art. 4, para. 1 (b));

Information on emissions: in certain circumstances, information on emissions may not be withheld from disclosure ~~on any grounds~~ (art. 4, para. 24 (d));

Comment [o423]: Correction by UK and EU

Course of completion: under the Aarhus Convention, Parties may except "material in the course of completion" from disclosure, while under the old Directive, member States could except "unfinished" materials from disclosure — the new Directive preserves the "unfinished documents or data" exception while also including the Convention formulation (see below under art. 4, para. 3 (c) as to whether this is in compliance with the Convention);

Comment [MSOffice424]: Deletion (Sweden)

Course of justice: the new Directive provides an exception for information that may adversely affect the "course of justice" (art. 4, para. 4 (c)), rather than the "sub-judice" exception in the old Directive;

Public interest test: the new Directive introduces the requirement to construe exceptions narrowly, taking into account the public interest in disclosure (art. 4, paras. 3 and 4);

Transfer of the request: when the public authority does not hold the information it must either transfer the request or let the public know where the information is held (art. 4, para. 5);

Information appeals: in accordance with the Aarhus Convention, a full or partial refusal must now include information on appeals procedures (art. 4, para. 7).

Implementing access to information

The following table contains the main elements of articles 4 and 5. It serves as an overview of the obligations that will be discussed in the following sections. The Convention imposes varying degrees of obligations on Parties and public authorities. In

most cases, the Convention structures its obligations through a clear general principle combined with more flexible requirements, as well as implementation guidance with an even higher level of flexibility for the Party or public authority. These varying degrees of obligation will be explained in more detail below. The table covers the general obligations and provides some insight, beyond the requirements in the Convention, of how Parties may wish to implement these obligations.

	General requirements	Implementation guidance
Article 4	A system to allow the public to request and receive environmental information from public authorities	<ul style="list-style-type: none"> • Create an access-to-environmental-information law or regulation • Let the public know which public authority holds which type of information • Have a system to help the public formulate properly directed requests • Set clear standards for time limits • Create a schedule for charges • Clearly define any exemptions
Article 5	A system under which public authorities collect environmental information and actively disseminate it to the public without request	<ul style="list-style-type: none"> • Require record-keeping and reporting by public authorities and from operators to public authorities • Make lists, registers and files publicly accessible free of charge • Develop environmental information offices and identify individual points of contact • Use electronic databases and the Internet • Create incentives for operators to give information directly to the public

Article 4

Access to environmental information

Article 4 sets out a framework through which members of the public can gain access to environmental information from public authorities and, in some cases, from private parties. Once a member of the public has requested information, article 4 establishes criteria and procedures for providing or refusing to provide it. Under the Convention, all persons have the right of access to information.

The Convention starts out with a general rule of freedom of access to information. Parties are required to establish a system whereby a member of the public can request

environmental information from a public authority and receive that information within a reasonable amount of time. This general rule is protected by safeguards concerning the timing of responses, the conditions for refusals, the documentation of the process in writing, and provision for review under article 9, paragraph 1.

Most of the provisions in article 4 are requirements that Parties and public authorities must meet. However, paragraphs 3 and 4 outline the circumstances when a Party *may* allow public authorities to refuse a request for information. Indeed, paragraphs 3 and 4 outline the *only* circumstances under which exceptions to the general rule apply. The Convention does not require Parties to adopt these optional provisions. In addition, even if the exceptions are adopted, under all of the following exceptions, Parties may allow the public authority under some circumstances to exercise discretion to provide the information requested. The conditions contained in article 4, paragraphs 3 and 4, simply outline circumstances under which public authorities may withhold the information if necessary to protect the relevant interests, limited in some cases by the public interest in disclosure.

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

Provision	Obligation	Implementation elements
Article 4, paragraph 1	Requires public authorities to make information available upon request	<ul style="list-style-type: none"> • No interest stated • In form requested (with exceptions)
Article 4, paragraph 2	Sets time limits for public authorities to respond and supply information	<ul style="list-style-type: none"> • As soon as possible • At the latest: one month • Possible extension with justification to two months
Article 4, paragraph 3	Optional exceptions	<ul style="list-style-type: none"> • Not held • "Manifestly unreasonable" or "too general" • Material in the course of completion or internal communications
Article 4, paragraph 4	Optional exceptions and if they adversely affect certain interests	<ul style="list-style-type: none"> • Proceedings of public authorities • International relations, national defence or public security • Course of justice • Commercial and industrial confidentiality • Intellectual property rights • Personal data • Voluntary information • Protecting the environment
Article 4, paragraph 5	Ensures that the information request will reach the appropriate public authority	<ul style="list-style-type: none"> • Inform applicant • Transfer information request
Article 4, paragraph 6	Ensures that even if some of the information requested falls under the exceptions, the	<ul style="list-style-type: none"> • Separate out information

	remaining information will be made available	
Article 4, paragraph 7	Procedures for refusals	<ul style="list-style-type: none"> • In writing • Stated reasons • Information on the review procedure • Time limits • Notice to applicant
Article 4, paragraph 8	Optional charges for information	<ul style="list-style-type: none"> • Reasonable costs • Schedule of charges

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

Article 4, paragraph 1, contains the general obligation for public authorities to provide environmental information in response to a request. Parties must ensure that this obligation is met "within the framework of national legislation". This means both that (i) national legislation should set out a framework for the process of answering information requests in accordance with the Convention and that (ii) national legislation may limit access to information in accordance with the optional exceptions outlined in article 4, paragraphs 3 and 4. (See also commentary to article 2.)

Environmental information, the public and public authorities are defined in article 2. A "request" can be any communication by a member of the public to a public authority asking for environmental information. The Convention does not specify the form of the request, thus implying that any request meeting the requirements of article 4, whether oral or written, will be considered to be such under the Convention.

However, while the Convention does not require a person making an information request to explicitly refer to (a) the Convention itself, (b) the implementing national legislation or (c) even the fact that the request is for environmental information, such references are considered good practice. Any or all such indications in the request facilitate the work of the responsible public authorities and help in avoiding delays. This is particularly so where only part of the requested information constitutes environmental information as defined in article 2, paragraph 3, of the Convention, or where the relevance of the requested information to the environment might not be obvious at first glance. Such a situation arose in communication ACCC/C/2007/21 (European Community, paras 34-35) involving a request for information about the financing of a project by the European Investment Bank. The Compliance Committee noted that, where a public authority does not recognize a request as an environmental information request, it may not be aware of the potential legal obligations, thus causing problems with compliance.¹⁶²

Comment [E425]: Edit footnote : at request of Germany

Further, under the Convention, public authorities must upon request provide copies of the actual documents containing the information, rather than summaries or excerpts prepared by the public authorities. This requirement goes together with subparagraph (b), requiring that information should be given in the form requested, subject to certain exceptions. The requirement that copies of actual documents should be provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context. ~~The "actual documentation" requirement already exists in many countries. For example, in Portugal, the right of access includes the right to be informed of the existence of the document, as well as the right to obtain a full copy.~~⁹⁹

(a) Without an interest having to be stated;

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

Georgia's General Administrative code contains a provision expressly stipulating that an applicant is not obliged to state the reason he/she wants the information. Another example ~~An example of a good practice in this field~~ is the Memo on Processing Public Requests for Environmental Information, prepared by the Ministry of the Environment of Kazakhstan and the Organization for Security and Co-operation in Europe (OSCE), issued in 2004. The Memo clearly states that a request for information does not need to be justified. However, for such a memo to be effective, it should be legally binding and properly disseminated among public authorities, and training and capacity-building are needed. Kazakhstan's efforts appear to have been partially in response to a finding of non-compliance on this exact issue by the Compliance Committee in its findings on communication ACCC/C/2004/1 (Kazakhstan), para. 20.¹⁶³

Comment [o426]: Insertion : Aarhus Centre Georgia

Comment [M427]: Edit (editorial team)

Comment [E428]: Edit footnote : at request of Germany

(b) In the form requested unless:

Under article 4, members of the public may request information in a specific form, such as paper, electronic media, videotape, recording, etc. In general, the public authority must honour the request for a specific form except under the conditions outlined below.

Why is the form important?

Allowing the applicant to choose the form can have benefits for the public authority and the applicant, for instance:

- Faster provision of information;
- Less costly provision of information;
- Accommodation of members of the public with special needs, such as disabilities, different languages, or lack of certain equipment;
- Efficient use of complex information systems, such as geographical information systems (GIS), that can produce information in a variety of forms.

The issue of form also means that public authorities must provide copies of documents when requested, rather than simply providing the opportunity to examine documents. In addition, some applicants may prefer to examine the original documentation rather than receive copies. If they so request, public authorities must allow them to do so, subject to subparagraphs (i) and (ii) below. This may be compared to article 6, paragraph 6, which requires public authorities to give the public access for examination of documents in decisions on specific activities.

In its findings on communication ACCC/C/20078/224 (Spain), the Compliance Committee found ~~Spain~~ the Party concerned to be not in compliance with the Convention when authorities responding to an information request failed to provide the information in electronic form on a CD as requested, and instead provided paper copies of the information. The provision of information in paper form proved to be 100 times more expensive than provision of the information in the form requested would have been. The requester determined that it could not afford to pay 1200 euros for the complete 600 page document. The requester decided to take only 34 pages, and also gave up its request for copies of certain relevant plans for which an additional charge would have been levied.

Comment [MSOffice429]: Correction : Plataforma Contra la Contaminación de Almendralejo

Comment [MSOffice430]: Edit (editorial team)

Thus, the failure to provide information in the manner requested severely significantly limited the public's access to environmental information in that case.¹⁶⁴

Comment [MSOffice431]: Edit (editorial team)

Comment [E432]: Edit footnote : at request of Germany

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

The Convention provides certain exceptions to the requirement that information should be provided in the form requested. Under article 4, paragraph 1 (b) (i), the public authority may decide on another form than the one requested if it is "reasonable". In any case, the public authority must state its reasons.

A second exception is that the public authority is not required to give the information in the form requested if it is already publicly available in another form, such as in a government-published book that may be found in a public library. Instead, the public authority may refer to or give the already publicly available form. Clearly, accessibility of the publicly available version of the information should be taken into account. Informing an applicant about the existence of a single copy of a book in a library 200 km from his or her residence would probably not be a satisfactory response. In addition, "publicly" available assumes that the same reasonable cost standards are in place for that information as required under the Convention.

However, article 3 ~~stipulates implicitly calls that for~~ access to information ~~should to~~ be effective in practice. To be effective, "publicly available" means that the information is easily accessible to the member of the public requesting the information. In addition, "another form" means that the available information is the functional equivalent of the form requested, not a summary; and that the information should be available in its entirety.

Comment [WX433]: Edit (editorial team)

Estonia's Public Information Act

The general obligation of public authorities as the holders of information to assist persons making requests for information has been established in paragraph 9 of Estonia's Public Information Act. A more detailed description of the obligations is provided in paragraph 15 of the same Act, according to which the holders of information are required to clearly explain to requesters the procedure for, and the conditions and manners of, access to information; to assist them in every way during the application process, to identify the relevant information and most suitable manner of access thereto; and if necessary, to promptly refer requesters to the competent official or employee, or promptly forward the request in writing to the competent official or employee. If a request for information does not indicate the manner in which the requested information is to be provided, the holder of information shall promptly contact the requester in order to clarify the request.

Comment [MSOffice434]: Confirmed : Estonia

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

The Convention requires public authorities to make information available within a specific time limit. As a general rule, it requires public authorities to provide the information "as soon as possible". It then sets a maximum time limit of one month, with certain circumstances allowing an extension of up to two months. The limits set in the Convention are maximum limits and the Convention requires Parties to respond to

requests in a shorter time-frame, whenever possible. The Convention also does not define when the period for the time limit begins, but says only after the request has been "submitted". The time when a request will be deemed submitted will generally be regulated by the administrative law of a Party.

Timing for providing information

- "As soon as possible" the base standard;
- "At the latest within one month" the maximum time allowed;
- "Extension of up to ~~two~~ one additional months" only when justified by the volume and complexity of the request.

In cases where viewing files in a public office is requested, "as soon as possible" can mean a few days or longer depending on how quickly the office can organize the release of the information. Countries have defined the time limit differently depending on whether the request is to view the document or to copy it. The Brussels region of Belgium, for example, encourages that access should take place immediately if viewing of a document is requested.¹⁶⁵ In the case of a request for copies of a document, "as soon as possible" can mean within a few days. For example, in Norway, public authorities must provide information "without undue delay", which typically means within two to three days of receiving a request.¹⁶⁶ The "as soon as possible" standard is echoed in article 4, paragraph 5, requiring the public authority to inform the applicant or transfer the request "as promptly as possible" if it does not hold the information.

Comment [MSOffice435]: Confirmed : Belgium

Comment [MSOffice436]: Confirmed and footnote amended : Norway

In normal cases, the Aarhus Convention gives authorities up to one month after the request was submitted to answer, including a refusal under article 4, paragraph 7. This time limit was chosen because the vast majority of countries in the UNECE region already have such limits, many of them even shorter. For example, Denmark and Portugal requires the request to be answered in 10 days, Hungary and Latvia in 15 days and Slovenia 20 days for providing the requested information weeks, and 8 days for refusal. Latvia also generally requires answers within 15 days, though other time limits may apply. For example, the time limit is 7 days in the case of a refusal or 30 days if additional processing of the requested information is necessary. In Georgia the administrative body is obliged to provide the applicant with the requested information promptly or within 10 days. If the information data processing needs more time the authority must notify the applicant. Attention should be paid to whether a general information law exists, since deadlines may differ. In Poland, for example, the deadline for responding to an environmental information request is actually longer than the deadline for general information.

Comment [o437]: Deletion : Denmark

Comment [o438]: Insertion (editorial team).

Comment [o439]: Confirmed and amended : Slovenia

Comment [MSOffice440]: Confirmed and amended : Latvia

Comment [o441]: Insertion : Aarhus Centre Georgia

In some cases, the Convention allows public authorities to find that the "volume and complexity" of the information justify an extension of the one-month time limit to two months. Countries can establish clear criteria to judge whether the volume and complexity of information justify an extension. If the volume and complexity of the request justify the longer two-month period, public authorities must inform the applicant of this extension as soon as possible and at the latest by the end of the first month. The Convention also requires public authorities to give the reasons for the extension. This requirement is reiterated in article 4, paragraph 7, which also requires a reason for an extension beyond the one-month period to be given to the applicant.

The possibility of an extension or of an eventual refusal shows how important early notification of the status of the request is for achieving effective access to information. Some countries, therefore, require special early notification of the status of the request. For example, Ukraine requires one time limit for notification of the status of the information request and a second time limit for the actual response to the request. The authorities must reply to a request within 10 days and inform the applicant whether his

request will be granted (and if not, why), while the term for providing a response to the request is 30 days. This type of requirement for an interim reply speeds up the process significantly, especially if the request is refused.

Proper administration of the time limits in the Convention are critical to the proper functioning of the regime. Timeframes are often linked with the timeframes of other processes. For example, a problem getting information in response to an information request in a timely manner may affect the ability of members of the public concerned to participate in decision-making processes under Article 6. Such a situation arose in the Compliance Committee's findings in ACCC/C/20078/224 (Spain), in which information was provided four months after a request for information related to pending land use decisions. In the intervening time, authorities decided to approve a modification of the land use plan. Thus, the delay in providing information impinged on the ability of the public to participate in the planning decision. The Compliance Committee did not find a violation of the Convention with respect to this information request because the Convention was not in force with respect to Spain, the Party concerned at the time of the request, but a later information request in the same case was found to have been improperly handled when it was not fulfilled until seven months after the request was made. The Compliance Committee clarified that at the end of the two month maximum period for complying with information requests, the only option for the public authority is to provide the information or refuse the request in whole or in part on the basis of article 4, paragraphs 3 and 4.¹⁶⁷

Comment [MSOffice442]: Correction : Plataforma Contra la Contaminación de Almendralejo

Comment [MSOffice443]: Edit (editorial team)

Comment [E444]: Edit footnote : at request of Germany

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

A public authority is required to give access only to the information that it "holds". This means that if a Party chooses to apply this exception, it will need to have defined what is meant by "holding" information. However, information that is held is certainly not limited to information that was generated by or falls within the competency of the public authority. The Convention provides some guidance in article 5, paragraph 1 (a), which requires Parties to ensure that public authorities possess and maintain environmental information relevant to their functions. In practice, for their own convenience, public authorities do not always keep physical possession of information that they are entitled to have under their national law. For example, records that the authority has the right to hold may be left on the premises of a regulated facility. This information can be said to be "effectively" held by the public authority. Domestic law may already define conditions for physical and/or effective possession of information by public authorities. Nothing in the Convention precludes public authorities from considering that they hold such information, as well as the information actually within their physical possession.

If the public authority does not hold the information requested, it is under no obligation to secure it under this provision, although that would be a good practice in conformity with the preamble and articles 1 and 3. However, failure to possess environmental information relevant to a public authority's responsibilities might be a violation of article 5, paragraph 1 (a). Where another public authority may hold the information, however, the public authority does have a duty under article 4, paragraph 5, to inform the applicant which public authority may have the information. Alternatively, it can transfer the request directly to the correct public authority and notify the applicant that it has done so. In either case, the public authority must take these measures as promptly as possible.

(b) The request is manifestly unreasonable or formulated in too general a manner; or

Public authorities may refuse a request for information that is "manifestly

unreasonable". Parties to the Convention are not required to apply this exception. If Parties do choose to do so they will need to define "manifestly unreasonable" so as to assist public authorities in determining when a request is so unreasonable that it may be refused under this exception, and to protect the public's interest that the test will not be applied arbitrarily. Although the Convention does not give direct guidance on how to define "manifestly unreasonable", it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2. Under that paragraph, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request "manifestly unreasonable" as envisioned in paragraph 3 (b).

The above interpretation was confirmed by the Compliance Committee in its findings on communications ACCC/S/2004/01 (Ukraine) and ACCC/C/2004/03 (Ukraine), where the Committee, in a combined set of findings, noted that the volume of information requested does not justify a refusal to provide the requested information. The Committee stated:

"In cases where the volume is large, the public authority has several practical options: it can provide such information in an electronic form or inform the applicant of the place where such information can be examined and facilitate such examination, or indicate the charge for supplying such information, in accordance with article 4, paragraph 8, of the Convention."¹⁶⁸

Comment [E445]: Edit footnote : at request of Germany

Under the Convention, public authorities may also refuse an information request on the grounds that it is "formulated in too general a manner". The Convention does not define "too general" and if a Party chooses to implement this exception, it may wish to provide further guidance for its public authorities. The concept of "too general" is already defined in some national legislation or practice.

Defining "too general"

Parties have flexibility in how they define "too general", but they can look for guidance to existing cases.

For example, the **French Commission for Access to Administrative Documents (CADA)** has ruled in the past that a request for "any document" relating to a specific wild bear species and a request for "all opinions" issued for environmental impact assessments by the Government were too general. However, it must be kept in mind that in France many EIAs are conducted each year, so that the request would cover hundreds and perhaps thousands of EIAs. CADA did not consider too general a request for the data from water analyses of all the local authorities in a department for five specified months and a request for all the documents relating to the development of the local road system.

Article 3, paragraph 2, requires Parties to try to ensure that guidance is provided to the public in seeking information. Any assistance or guidance provided by public authorities to members of the public seeking information will help to avoid situations where the request is manifestly unreasonable or formulated in too general a manner.

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

The public authority may refuse to disclose materials "in the course of completion" or materials "concerning internal communications," but only when national law or

customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties "customary practice" may apply only to those materials covered by evidence of established norms of administrative practice.

Even when the requirement exists in national law or customary practice, authorities are required to take into account the public interest that would be served by disclosure of the information before making a final decision to refuse the request. The requirement in paragraph 7 to put the reasons for refusal in writing means that authorities must document precisely how they considered the public interest as a part of their determination.

The Convention does not clearly define "materials in the course of completion". However, the mere status of something as a draft alone does not automatically bring it under the exception. The ~~move from rewording of the language of old Directive 90/313/EEC on the freedom of access to information on the environment of "unfinished documents" to "materials in the course of completion"~~ suggests that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. "In the course of completion" suggests that the document will have more work done on it within some reasonable time-frame. Other articles of the Convention also give some guidance as to how Parties might interpret "in the course of completion". Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, environmental impact assessments, policies, programmes, plans, and executive regulations that are open for comment under the Convention would not be "materials in the course of completion" under this exception. ~~New Directive 2003/4/EC includes the exception allowed under this subparagraph for "material in the course of completion" but also preserves the exception found in the old Directive for "unfinished documents or data." For the reasons given above, a refusal to provide certain information on the grounds that the Directive allows unfinished documents or data to be excluded, without those documents or data also falling under the "material in the course of completion" exclusion, could be incompatible with the Convention.~~

Comment [WX446]: Edit (editorial team)

~~The same~~A similar conclusion was reached by the Conseil d'Etat of France, in case N° 266668 (7 August 2007) with respect to Directive 90/313/EEC's use of the term "unfinished documents." ~~The Conseil d'Etat held that a provision excluding from the right of access to environmental information preliminary documents produced in the course of drawing up an administrative decision is not compatible with article 3, paragraph 3 of directive 90/313/EEC which limits the possibility for a request for environmental information to be refused to when the request concerns "unfinished documents."~~

Comment [MSOffice447]: Deletion (editorial team in light of Denmark's comment)

Comment [MSOffice448]: Edit (editorial team)

The second part of this exception concerns "internal communications". Again, Parties may wish to clearly define "internal communications" for implementing the Convention. In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form. Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication."

Internal communications of the Irish Taoiseach

~~In October 2008 the Irish Information Commissioner ordered the Department of the Taoiseach to release documents concerning Cabinet discussions on Ireland's greenhouse gas emissions for the years 2002 to 2007. The decision set aside the constitutionally enshrined doctrine of Cabinet confidentiality. The case was brought by a member of the public in October 2007 after his information request under EU Directive 2003/4/EC was refused. While Article 28.4.3 of the~~

~~Constitution protects the confidentiality of discussion at meetings of Government, the EU directive allows members of the public to access information on environmental matters and specifically states that any request for information on emissions into the environment cannot be refused. Following his victory, the requester commented: "This represents a sea change in the old legal regime of absolute Cabinet confidentiality. The effect of the decision will be far reaching and will benefit those looking for political accountability and proper environmental protection. Information on waste management, climate change, and issues such as emissions from the transportation sector must now all be released."~~

Comment [MSOffice449]: Deletion as decision has subsequently been repealed (editorial team in light of UK's comments)

Again, even if one of these two exceptions applies, paragraph 3 (c) further requires Parties or public authorities to take into account the public interest in disclosure of the information. The public interest test is discussed again in paragraph 4.

Taking the public interest into account

The Convention does not provide specific guidance on how to balance the "public interest". ~~It would seem that~~ One issue is whether Parties may choose to consider the public interest categorically across an entire issue or case by case in each decision on whether to release information, or may provide some latitude for case-by-case determinations within the framework of policies or guidelines. In C-266/09 (Commission v. the Netherlands) the European Court of Justice held that Article 4 of Directive 2003/4/EC must be interpreted as meaning that the balancing exercise it prescribes between the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, even if the national legislature were by a general provision to determine criteria to facilitate that comparative assessment of the interests involved. (Judgement December 2010).

Comment [M450]: Insertion (editorial team)

4. A request for environmental information may be refused if the disclosure would adversely affect:

The interests set out in article 4, paragraph 4, are exceptions to the general rule that information must be provided upon request to members of the public. Parties are not required to incorporate these exceptions into their implementation of the Convention. In practice there is substantial variation among Parties to the Convention as to whether the grounds for refusal contained in this paragraph are included in their national law. For example, in its 2008 National Implementation Report, Armenia reported that its national law does not allow for the exceptions found under subparagraphs (a), (b), (g) or (h). This is a good example of the spirit of the Convention found in article 3, paragraphs 5 and 6, which encourage expressly permits Parties to establish regimes that provide for broader access to information. For the exceptions Parties do accept, the Parties may provide criteria for the public authorities to apply within their discretion, or may categorically exclude certain information from disclosure.

Comment [O451]: NFPs are invited to share other national examples.

Comment [MSOffice452]: Edit ; (editorial team in light of Denmark's comments)

In any case, public authorities must make a determination that disclosure will adversely affect any one of these interests. Adversely affect means that the disclosure would have a negative impact on the relevant interest. The use of the word "would" instead of "may" requires a greater degree of certainty that the request will have an adverse affect than applies in other provisions of the Convention (e.g.art.6,para. 1(6)).

In addition, as will be discussed later, either the Party or the public authority must take the public interest in disclosing the information into account, must consider whether the information relates to emissions, and must generally interpret the grounds for refusal laid out in article 4, paragraph 4, in a restrictive way. These last provisions come after the exceptions are listed and apply to all of them. They are discussed in more detail below.

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee referred to article 4, paragraph 4, in its finding that the adoption of a government regulation “On the rent of Forestry Fund for Hunting and Recreational Activities” which set out a broad rule with regard to the confidentiality of the information received from the rent holders and the refusal for access to information on the grounds of its large volume constituted a failure by the Party concerned to comply with article 3, paragraph 1, and article 4, paragraph 4, of the Convention.¹⁶⁹

Comment [WX453]: Inserted (editorial team)

Comment [E454]: Edit footnote : at request of Germany

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

Article 4, paragraph 4 (a), provides an exception to the release of information relating to the proceedings of public authorities, if such release would adversely affect the confidentiality of such proceedings. The Convention does not define "proceedings of public authorities" but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence. The confidentiality must be provided for under national law. This means that public authorities may not unilaterally declare a particular proceeding confidential and stamp documents “confidential” in order to withhold them from the public. National law must provide the basis for the confidentiality.

(b) International relations, national defence or public security;

If release of the requested information would adversely affect international relations, national defence or public security, the public authority may consider whether to deny the request.

The Convention does not define the terms “international relations”, “national defence” or “public security”, but suggests that the definition of such terms will be determined by the Parties consistent with international law. Many national governments already have similar exceptions in place and have interpreted them narrowly. Some countries have chosen to require information concerning the environment to be made publicly accessible, regardless of how it affects international relations, national defence or public security. For example, the **Ukrainian Constitution, article 50**, provides that no one may restrict information on the environmental situation, the quality of food and housing. The **Russian Federation Law on State Secrets** declares that information, *inter alia*, on the state of the environment, health and sanitary data is excluded from being designated a State secret.¹⁷⁰ Public authorities tend to analyse whether public access to the information would actively harm national security.

How to determine when information is a "State secret"?

Some countries such as **Hungary** have established several steps for determining whether information should be kept secret under this or other exceptions. Hungary, like most other countries, exempts information defined as State secrets from public disclosure. It takes two steps to declare a piece of information a State secret.¹⁷¹

- The class of information must be defined as a State secret in the annex to the Act on State Secrets and Official Secrets;
- The specific piece of information must be declared a State secret by a qualified senior executive (as defined in Hungarian law).

Information that must actively be provided to the public cannot, under Hungarian law, be declared a State or official secret. The list of classified documents must also be published in the official State gazette and the Ombudsman must give a final opinion on the secrecy of the

information.

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

If the release of information would adversely affect the "course of justice," public authorities may have a legal basis to refuse to release it. The course of justice refers to active proceedings within the courts. The term "in the course of" implies that an active judicial procedure capable of being prejudiced must be under way. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused.

Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases. The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

Under the Convention, public authorities are allowed to withhold certain, limited types of commercial and industrial information from the public. For public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that information must pass several tests.

First, national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets. Second, the confidentiality must protect a "legitimate economic interest."

Options for implementing "legitimate economic interest"

The Convention does not define "legitimate economic interest". There are several steps that countries have taken to help define legitimate economic interest case by case:¹⁷²

- Establish a process. Parties may wish to establish some type of process or test to identify information that has a legitimate economic interest in being kept confidential;
- Determine confidentiality. Legitimate economic interest carries the implication that the information is only known to the company and the public authority, or at least is certainly not already in the public domain; and that the body whose interests are at stake took reasonable measures to protect the information. This can be objectively determined in each case;
- Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist competitors.

With respect to “legitimate economic interest”, it would be difficult for an enterprise operating in a monopolistic manner, such as certain state-run enterprises, to assert a claim of commercial confidentiality, since there are no competitors that could gain an advantage by access to the information. The Compliance Committee took this view in its findings on communication ACCC/C/2004/01 (Kazakhstan) with respect to a state-owned atomic energy enterprise.¹⁷³

Comment [E455]: Edit footnote : at request of Germany

Thirdly, as an exception to the exception, the Convention holds that information concerning pollutant emissions which is relevant for the protection of the environment may not be claimed as confidential commercial information. This provision is broadly consistent with the principle that information about emissions would lose its proprietary character once the emissions enter the public domain. In principle, the exception seems to allow that information on emissions that is not relevant for the protection of the environment could still be exempted from disclosure. In practice, it is not completely clear in what circumstances information on emissions might be deemed not relevant to the protection of the environment. Any information on emissions that may affect the quality of the environment, in view of the Convention's principles and objectives, should be considered relevant for environmental protection, irrespective of their quantities. Indeed, a case can be made that all information on emissions is relevant to the protection of the environment. This notion is reflected in the legal systems of a number of UN/ECE member States.

Defining “emissions”

The term "emission" has been defined in EU Directive 2008/1/EC ~~Council Directive 96/61/EC of 24 September 1996~~ concerning integrated pollution prevention and control (IPPC Directive)^{174/97} as a "direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land".

(e) Intellectual property rights;

Under the Convention, public authorities may choose not to disclose information that would adversely affect an intellectual property right. Intellectual property and intellectual property rights are protected under national and international law.

The primary forms of intellectual property rights are copyright, patent, trademark (including geographical indications), and trade secret. Sui generis forms include, *inter alia*, Plant Breeders Rights, database protection, industrial designs, plus rights for databases where applicable and with trade marks having some relevance as well. Generally, patents protect novel ideas or inventions, copyrights protect original expressions (art, literature, music, etc.), trade marks and geographical indications protect symbols and names used in commerce, and trade secrets protect proprietary business information of all kinds from improper acquisition and use.

Comment [WX456]: Edited (editorial team)

Intellectual property laws do not, as a general matter, protect "generic" ideas and concepts, principles of nature or scientific fact, or (except for geographical indications) ideas, names or expressions which are already in widespread public use. For patents, copyright and trade marks, protection is afforded to a specific individual person or corporate entity, is limited in duration, and has the primary goal of creating economic rewards for creators and inventors, through market transactions involving the intellectual property right or its subject matter.

Misusing copyright to deny access to information

In its findings on communication ACCC/C/2005/15 (Romania), the Compliance Committee considered the question of the legality of designating the contents of an Environmental Impact Assessment study to be the property of the author of the study, which the relevant public authority could only disclose with the author's permission. The Committee stated: "EIA studies are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law."¹⁷⁵ Furthermore, where copyright laws may be applied to such studies, it does not justify a general exclusion of such studies from public disclosure.

Comment [E457]: Edit footnote : at request of Germany

(f) The confidentiality of personal data and/ or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

Under the Convention, public authorities may withhold information that will adversely affect the privacy of individuals. However, the confidentiality must be protected in national law. The individual whose personal data is in question can waive his or her right to confidentiality.

The exception does not apply to legal persons, such as companies or organizations. It is meant to protect documents such as employee records, salary history and health records.

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

Under the Convention, public authorities may withhold information that would adversely affect the interests of a "third party" who voluntarily gives the information to

the government. A "third party" is a person not a party to a particular agreement or transaction, but a person who may have rights or interests therein (see commentary to article 2, paragraph 1).

This exception is meant to encourage the voluntary flow of information from private persons to the government. Information provided to public authorities that the public authority has not specifically requested is not necessarily "voluntary". It would not be voluntary, for example, if the person providing the information could be legally obliged to provide it.

For example, in some countries the national government may delegate competence to a public authority to require an enterprise to report certain information. The public authority may decide not to require formally that this information should be reported if it is already being reported in practice. Most countries have found this type of information not to be "voluntary". In this way, in Ireland, "voluntary" means that the public authority lacked the competence to oblige the information in question to be reported.¹⁷⁶ This definition protects the public interest by ensuring that any information that the public authority may require under national rules is accessible to the public.

Not only must the information in question qualify as voluntarily supplied information, the person that provided it must have denied consent to have it released to the public. Some countries require such a refusal to release to be made by the party providing the information in writing and at the time the information is provided. In those countries, the public authority is usually not under an obligation to go back to the third party at the time of the request to gain its consent for the disclosure.

Where a particular Party uses voluntary agreements in practice, it would be a good idea to specify the use of any information disclosed by the private party to the public authorities among the terms of the agreement itself.

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

Public authorities may refuse to release information to the public that would adversely affect the environment. This exception allows the government to protect certain sites, such as the breeding sites of rare species, from exploitation—even to the extent of keeping their location a secret. It exists primarily as a safeguard, allowing public authorities to take harm to the environment into consideration when making a decision whether or not to release information.

Grounds for refusal that are not permitted under the Convention

Among the possible grounds that might be put forward for refusal to comply with an information request under the Convention, those that are not permissible are:

- the information is in the public domain (see the Compliance Committee's findings with respect to communication ACCC/C/2007/21 (European Community/Union))
- disclosure of the information requires consent of a third party (see the Compliance Committee's findings with respect to communication ACCC/C/2005/15 (Romania))

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

The final clause of article 4, paragraph 4, instructs Parties and public authorities on

how to interpret all of the exceptions to access to information under that paragraph. The fact that requested information falls, in a literal sense, under one or other of the exempt categories is not in and of itself sufficient justification for invoking the exception.

Parties and public authorities must interpret the exceptions in a "restrictive way". For example, if an official refuses to release information by claiming one of the exceptions, he or she could be required to go through a process to ensure that the decision to use the exception is not arbitrary and that in each case the release of information would lead to actual harm to the relevant interest. The Convention contains two safeguards that help Parties understand what is meant by restrictive.

Under article 4, paragraph 4, Parties must take the public interest served by disclosure into account. As discussed in article 4, paragraph 3 (c), "the public interest served by disclosure" is not clearly defined in the Convention. It is left for Parties to decide how and when the public interest will be taken into account, in conformity with the principles and objective of the Convention. The [Sofia Guidelines](#) on Public Participation in Environmental Decision-making (see Introduction) provide Parties with some guidance as to what could be meant by the reference to the public interest served by disclosure. Paragraph 6 of the [Sofia Guidelines](#) stipulates that the "aforementioned grounds for refusal are to be interpreted in a restrictive way with the public interest served by disclosure weighed against the interests of non-disclosure in each case". Most of the [Signatories-Parties](#) to the Aarhus Convention have endorsed the Sofia Guidelines, and the Guidelines are specifically mentioned in the preamble and the Resolution of the Signatories [to the Convention](#). In addition, national law provides some guidance for defining "public interest". Taking interests into account thus requires an active balancing of interests. Nevertheless, Parties can and should give substantial guidance on balancing so as to limit arbitrary distinctions and promote uniformity.

The balancing test that authorities must go through to weigh the public interest served by disclosure against the interests protected by the exceptions was noted by the Compliance Committee in its findings on communication ACCC/C/2007/21 (European Community). In that case the Committee rejected the position of the Party concerned that the identification of any harm to one of the protected interests would be sufficient to keep the information from being disclosed. As the Committee stated, "in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure."¹⁷⁷

Comment [E458]: Edit footnote : at request of Germany

Defining public interest

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

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

Public interest under the EU Transparency Regulation 1049/2001 and the EU Aarhus Regulation 1367/2006

The EU Transparency Regulation includes provisions related to the disclosure of information upon request by European Union institutions. This Regulation has been qualified in light of the Aarhus Convention and the EU Regulation adopted to apply the Convention to EU institutions (the Aarhus Regulation). The different handling of "public interest" is shown in part by Case T-264/04, *WWF-EPO v. Council of the European Union* (Court of First Instance, 25 April 2007). The case involved a complaint by an NGO against the Council for failure to fulfill a request under the Transparency

Regulation to provide information related to a committee meeting at which the EU's position in relation to a WTO meeting was discussed. In determining that the refusal was justified, the Court confirmed the rule:

“that the public is to have access to the documents of the institutions and refusal of access is the exception to that rule. Consequently, the provisions sanctioning a refusal must be construed and applied strictly so as not to defeat the application of the rule. Moreover, an institution is obliged to consider in respect of each document to which access is sought whether, in the light of the information available to that institution, disclosure of the document is in fact likely to undermine one of the public interests protected by the exceptions which permit refusal of access. In order for those exceptions to be applicable, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical.”¹⁷⁸

The Court went on to find that the documents related to sensitive ongoing international negotiations and thus the contention that it was in the public interest to refuse to disclose the documents was justified.

In contrast with the Transparency Regulation, the Aarhus Regulation establishes clearly that there is an overriding public interest in disclosure when information requested relates to emissions into the environment. The Aarhus Regulation also specifically refers to the Transparency Regulation's grounds for refusal, stating that these “shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.”¹⁷⁹

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

Article 4, paragraph 5, reflects the principle that public authorities have a collective responsibility for dealing with information requests from the public, irrespective of the particular agency or department to which a request is submitted. Article 4, paragraph 3 (a), allows a public authority to refuse a request for information if it does not hold that information. However, under paragraph 5, the public authority's responsibility does not end with the written refusal notice. The public authority has two choices. It can tell the applicant where he or she may find the information or it can transfer the request to the proper authority and inform the applicant of the transfer. In general, the most timely and effective method, as encouraged in the Convention's preamble and article 3 on general provisions, is to require public authorities to transfer the request directly, whenever possible.

The Convention also emphasizes the importance of timeliness. Article 4, paragraph 5, requires public authorities to notify the applicant or transfer the request "as promptly as possible". Indeed, some countries give a specific, much shorter time limit for referrals than for the provision of information.

Timing of referrals

Parties may choose to make the time limits for referrals shorter than those for refusals. In Armenia, if an agency does not possess the requested information, it is obliged to forward the request to an agency that does possess the information within five days.¹⁸⁰ Hungarian law adopts another way to ensure that referral does not become an excuse for delay. In Hungary, the transfer of a request within the administrative system does not affect the starting point of the administrative time limit.¹⁸¹

In many countries public authorities do not necessarily know what type of information other public authorities have. This can make referrals difficult or incorrect, adding to delay for the public in securing access to information. Article 5, paragraph 2 (a), stipulates that Parties should provide sufficient information to the public about the type and scope of environmental information held by relevant public authorities—a practice that has improved access to information in some countries already.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

Once a public authority determines that certain information is confidential in accordance with one of the exceptions, this does not mean that the entire requested document may be refused. Under the Convention, public authorities must make the non-confidential portion of the information available.

In practice, this usually means that a public authority marks out or deletes the information to be withheld. Some countries require the public authority to indicate the general nature of the deleted information. For example, in the Netherlands, if confidential commercial information has been removed from a document before its release, a so-called second text must be supplied. It indicates where information has been removed and, in a general way, the substance of the information withheld.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

The Convention sets out very clear procedures for refusals of access to information. It stipulates that if the request for information is in writing, the refusal must also be in writing. If the request was made verbally and the applicant asked for an answer in writing, the refusal must be in writing. Many countries have found it easier and cheaper to uniformly require refusals to be in writing. For example, in Belgium, the reason for every partial or complete refusal must be given and the applicant notified in writing. As an alternative, some countries have tried to ensure that everyone is aware of the right to have a refusal in writing. In the Netherlands, a person receiving an oral refusal of a request for information must be informed as to how they can obtain a refusal in writing.

Comment [MSOffice459]: Confirmed : Belgium

Under the Convention, the refusal must include reasons and information on the review procedure (see discussion under article 9, paragraph 1). This applies to both written and oral refusals. Written documentation of the reasons for refusal provides the applicant with the opportunity to rephrase and resubmit the request. These reasons can include a determination that the information requested meets the criteria of one of the exceptions, that the request was too general, or that the public authority in question does not hold the information and is not aware of any other public authority which might hold the information.

If the applicant disagrees with the rationale for refusal, a written reasoning also provides the basis for an appeal of the decision under article 9. In fact, in Belgium, not only must the reason for every partial or complete refusal be given in writing, but the authority must also specify the options open for appeal. In France, the authority must specify the provisions of law on which the refusal is based.¹⁸²

Comment [MSOffice460]: Confirmed : Belgium

The Convention also regulates the timing of a refusal along similar lines as the time limits set out in article 4, paragraph 2, for responding to requests for information. The Convention sets out a general rule of "as soon as possible", "a maximum of one month", and an extension under certain circumstances of one additional month. Some countries require even shorter deadlines for refusals. For example, in Norway, when a request for information is received by an agency, the agency has 5 working days to respond. If no response is given within this time period, the request is to be considered rejected and a right to appeal arises, independent of whether the request has actually been rejected.¹⁸³ Any rejection must be given in writing and accompanied by the relevant legal provision justifying the refusal.¹⁸⁴ Within 3 weeks of receiving a rejection, the requester may request a further written justification for the refusal. The agency is required to provide the further justification in writing at the earliest opportunity and not later than ten working days after receiving the request.¹⁸⁵ refusals must be sent out within two weeks along with an explanation.¹⁸⁶ In practice, this is often accomplished within one week. However, as the authorities in In all cases of refusals, Norwegian authorities should must consider whether the information can be released despite the fact that it has been classified as exempt from public access,¹⁸⁷ such decisions may take up to the two week maximum.

Comment [MSOffice461]: Confirmed and amended : Norway

A public authority may find itself in a situation where a third party with a possible protectable legal interest in the information under consideration has mounted a legal challenge against the release of the information. There is no provision in the Aarhus Convention, however, that would extend a relevant authority's deadline for providing the information due to the fact that there is a legal challenge pending.

Comment [WX462]: Inserted (editorial team)

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee found that the failure of a public authority to state lawful grounds for refusal of access to information, and the failure of the same public authority to give in its letters of refusal information on access to the review procedure provided for in accordance with article 9, constituted a failure by the Party concerned to comply with article 3, paragraph 2, and article 4, paragraph 7, of the Convention. Furthermore, the failure of the authority to respond in writing and in a timely manner to one of the information requests was found to be a violation of article 4, paragraph 7 of the Convention.¹⁸⁸

Comment [E463]: Edit footnote : at request of Germany

Time limits for refusals

General rule: *as soon as possible*. In this way, the member of the public requesting information has the ability to rephrase the request or appeal against the refusal and still receive relevant information in a timely fashion;

Maximum time limit: *one month*. Under the Convention, public authorities may not take longer than one month to issue a refusal notice;

Extensions: *up to one additional month*. If the complexity of the information justifies an extension, the public authority may take one more month. To receive the extension, the public authority must inform the applicant of the extension and the reasons justifying it, by the end of the first month at the latest. Note that some countries require a shorter timeframe for refusals of information requests.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public

authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

The Convention embraces the concept that if information is to be truly accessible it must also be affordable. Article 4, paragraph 8, stipulates that any charges for information must be reasonable. Many countries with access-to-information regulations try to keep information affordable—and free whenever possible. Georgia’s legislation requires that access to information is free of charge, though an applicant may be required to pay a minimal fee -for the cost of making copies of the requested information

Comment [o464]: Insertion : Aarhus Centre Georgua

The Convention safeguards this requirement by obliging public authorities to provide guidance for information charges. These guidelines must include (i) a schedule of charges; (ii) criteria for when charges may be levied; (iii) criteria for when charges may be waived; and (iv) criteria for when the supply of information is conditional on the advance payment of a charge.

A schedule of charges can help protect against abuse and inconsistency of charges. In addition, it strengthens the ability of members of the public to access information if they know in advance what it will cost. **For example, in the Netherlands, a published schedule of charges exists for the ministries of the national Government, while local authorities are free to establish their own charging provisions.**¹⁸⁹ Some countries provide clear criteria of when charges can be levied. For example, a country may decide not to levy charges for copies of a limited number of pages, for electronic transmissions, for non-commercial use or for limited postage. To ensure that financial barriers are not an impediment to access to information, and every person can afford information, public authorities often waive fee requirements for individuals and non-governmental organizations.

“A reasonable amount”

The Compliance Committee considered the issue of reasonable costs in its findings on communication ACCC/C/20078/224 (Spain). Municipal authorities had set a charge of 2.15 Euro per page for copying documents held by the municipality in accordance with the Local Finances Regime Law as a “special utilization of the public domain” supported by economic analysis. The Committee analyzed the practice of states and jurisprudence of European and national courts, as well as the local commercial rate for copies, which was 0.03 Euros per page, and determined that the municipality’s charge scheme was unreasonable.¹⁹⁰

Comment [MSOffice465]: Correction : Plataforma Contra la Contaminación de Almendralejo

Comment [WX466]: Edit (editorial team)

Comment [WX467]: Edit (editorial team)

Comment [E468]: Edit footnote : at request of Germany

Comment [WX469]: Moved to endnote (editorial team)

The Court of Justice of the European Communities (CJEC) ruled in Case C-217/97, *Commission v. Germany* (paragraph 47) that: “[A]ny interpretation of what constitutes ‘a reasonable cost’ for the purposes of Article 5 of the [EC] directive [on information, 1990] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected. [...] [C]onsequently, the term ‘reasonable’ for the purposes of Article 5 of the directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.”¹⁹¹

National practice supports that idea that costs should be limited to the material costs of producing information. By way of illustration, the Information Tribunal of the United Kingdom in a recent 2006 case ruled that “the Council should adopt as a guide price the sum of 10p per A4 sheet [about 0.11 Euro], as identified in the Good practice guidance on access to and charging for planning information published by the Office of the Deputy Prime Minister and as recommended by the DCA [Department of Constitutional Affairs]. [...] The Council should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so.”¹⁹² See, Information Tribunal, Appeal Number: EA/2005/0014, *David Markinson v. Information Commissioner* (14 March 2006), published on the Internet at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/1161/Markinson.pdf> (last seen on 15 September 2009).

Comment [H470]: Edit (UK)

Comment [H471]: Deletion: UK

Comment [WX472]: Reference moved to footnote (editorial team)

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

As indicated above, Council Directive 90/313/EEC on freedom of access to information on the environment was one of the main starting points for the Convention's negotiations on access to information.

All EU member States and the European Community signed the Aarhus Convention. There are several places where its requirements differ from those of the current EC Directive including:

- *Definitions*: under the Aarhus Convention, the definitions of environmental information and public authority are expanded (art. 2);
- *Use of term "adversely"*: in the definition of "environment information", the Directive limits measures to those that *adversely* affect the environment, whereas the Aarhus Convention covers measures affecting the environment in any way;
- *Response time limits*: under the Aarhus Convention, the deadline for supplying the requested information is one month, with a possible extension of up to two months (art. 4, para. 2); the Directive was ambiguous on this point;
- *No stated interest*: under the Aarhus Convention, the applicant need not state an interest (art. 4, para. 1 (a)), while under the Directive, the applicant did not need to prove an interest;
- *Form requested*: the Aarhus Convention requires information to be given in the form requested with certain exceptions (art. 4, para. 1 (b));
- *Actual documents*: the Aarhus Convention explicitly gives the public the right to receive a copy of the actual document (art. 4, para. 1);
- *Information on emissions*: when relevant to environmental protection, information on emissions may not be withheld from disclosure as confidential commercial or industrial information under the Aarhus Convention (art. 4, para. 4 (d));
- *Course of completion*: under the Aarhus Convention, Parties may except "material in the course of completion" from disclosure (art. 4, para. 3 (e)), while under the Directive, member States may except "unfinished" materials from disclosure;
- *Course of justice*: the Aarhus Convention's exceptions refer to information that may adversely affect the "course of justice" (art. 4, para. 4 (e)), rather than the "sub-judice" exception in the Directive;
- *Public interest test*: the Aarhus Convention requires exceptions to be construed narrowly, taking into account the public interest in disclosure (art. 4, paras. 3 and 4);
- *Transfer of the request*: when the public authority does not hold the information it must either transfer the request or let the public know where the information is held (art. 4, para. 5);
- *Information appeals*: under the Aarhus Convention, a refusal must include information on appeals procedures (art. 4, para. 7).

Article 5

Collection and dissemination of environmental information

Article 5 sets out the obligations of the Parties and public authorities to collect and disseminate environmental information. It covers a wide range of different types of information that Parties should actively provide to members of the public. Therefore, article 5 defines the types of information that fall under this more active obligation for collection and dissemination. In general, it covers information such as emergency information, product information, pollutant release and transfer information, information about laws, policies and strategies, and information about how to get information. Some of its provisions require the Parties or public authorities to take certain specific steps for collection and dissemination. Other provisions give the Parties and public authorities some guidance as to the desired end result, but they leave the choice of process and implementation methods open.

The implementation of article 5, paragraph 9 has been greatly enhanced by the adoption and entry into force of the 2003 Protocol on Pollutant Release and Transfer Registers. The Protocol entered into force on 8 October 2009.

To a large extent, article 5 focuses on concrete implementation guidance for the collection and dissemination of environmental information. In doing so, it often suggests a range of implementation steps, leaving the choice of precisely how to fulfil the general obligation to each Party. The following table outlines the main obligation for each provision and indicates implementation elements that are found in the Convention itself. These elements are meant to guide the Parties and public authorities as they integrate the Convention's obligations into their national legal framework and determine how best to make the Convention work in practice.

Provision	Obligation	Implementation elements
Article 5, paragraph 1	General obligations for Parties to ensure that public authorities collect, possess and disseminate environmental information	<ul style="list-style-type: none"> • Relevant to their functions • Adequate flow to public authorities • Immediate dissemination if imminent threat to human health or environment
Article 5, paragraph 2	Practical arrangements for making information accessible	<ul style="list-style-type: none"> • Publicly accessible lists, registers or files at no charge • Support to public in seeking information • Points of contact
Article 5, paragraph 3	Aims to ensure that information will eventually progressively become available electronically	<ul style="list-style-type: none"> • Accessible through public telecommunications networks
Article 5, paragraph 4	Requires national state-of-the-environment reports	<ul style="list-style-type: none"> • Regular Published and disseminated at regular intervals, not exceeding three or four years
Article 5, paragraph 5	Requires the government to disseminate national legislation, and policy documents, and international agreements on environmental issues	<ul style="list-style-type: none"> • Measures in national legislation for this purpose
Article 5, paragraph 6	Requires the government to encourage private operators to regularly inform the public of environmental impact of their activities Applies to the public dissemination of privately held information	<ul style="list-style-type: none"> • Operators whose activities have significant impact on the environment • Where appropriate, within the framework of voluntary eco-labelling or eco-auditing schemes or by other means
Article 5, paragraph 7	Requires the government to publish information concerning environmental decision-making, and policy-making, the performance of public functions and provision of public services relating to the environment	
Article 5, paragraph 8	Requires the government to develop mechanisms for disseminating environment-	<ul style="list-style-type: none"> • Sufficient information to enable consumers to make informed choices

Comment [M473]: Edit (editorial team)

Comment [M474]: Edit (editorial team)

Comment [M475]: Edit (editorial team)

Comment [M476]: Edit (editorial team)

Comment [M477]: Edit (editorial team)

Comment [M478]: Edit (editorial team)

	related product information to consumers	
Article 5, paragraph 9	Requires the government to take steps to progressively establish national systems for maintaining information on pollution releases and transfers	<ul style="list-style-type: none"> • Coherent, nationwide system • Structured, computerized, publicly accessible database • Compiled through standardized reporting • Taking into account international processes where appropriate
Article 5, paragraph 10	Incorporates the optional exceptions from disclosure listed in article 4	

Comment [M479]: Edits (editorial team)

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

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

Article 5, paragraph 6	• Encourage certain operators to inform the public directly	• Impact of their activities and products
Article 5, paragraph 7	• Publish	• Facts and analyses of facts for policy proposals • Explanatory material on dealings with the public under the Convention • Information on the performance of public functions relating to the environment
Article 5, paragraph 8	• Develop mechanisms	• Product information
Article 5, paragraph 9	• Steps to establish pollution inventories or registers	• Inputs, releases and transfers of a specified range of substances and products
Article 5, paragraph 10	• Exceptions	

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

Article 5, paragraph 1 (a), requires public authorities to possess and update environmental information relevant to their functions. As already discussed, "environmental information" is defined earlier in the Convention (article 2, paragraph 3). The current provision further defines the type of environmental information that a public authority must possess and update as relevant to its functions. For example, a water authority would be expected to possess and update information concerning water resources and not necessarily air emissions data.

The Convention does not give much guidance on how to implement this requirement. However, Parties can consider establishing systems that ensure a regular flow of information from operators, monitoring systems, researchers and others to the responsible public authorities. Such an information flow will help Parties to meet the requirement that the public authority should possess and update the relevant information. So this requirement implies a reliable system for collecting information, such as envisioned in article 5, paragraph 1 (b). It also implies reliable systems for storing information, such as the practical arrangements required in article 5, paragraph 2 (b). (i). Once a flow of information is established and the information is held in well-organized files or registers, public authorities will find that the information can be updated immediately upon receiving new reports from operators and others. Air emissions and ambient air quality, which are usually monitored daily, provide good examples.

Comment [M480]: Edit (editorial team)

Under Convention practice, it has also been established that this provision requires public authorities to possess and update information that is relevant to the decisions and actions that they take. Therefore, it should be assumed that the information upon which an authority has based its decision is held by that authority. The ownership of the information is not relevant to the question of whether the public authority holds the information, as it is the obligation of any applicant for a decision by a public authority to provide the necessary information supporting the application. The possible disclosure of this information is then covered by article 4, paragraphs 3 and 4 of the Convention.

Implementation guidance on "possess and update"
<ul style="list-style-type: none"> • Establish a record-keeping and reporting system for operators;

- Establish monitoring systems with regular reporting;
- Establish research systems with regular reporting.

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

Article 5, paragraph 1 (b), requires mandatory systems to ensure an adequate flow of information to public authorities. The information is about proposed or existing activities that have the potential to "significantly affect" the environment. Article 6 also covers activities that may significantly affect the environment, which can mean either a positive or negative effect. (See discussion of "~~significancesignificant effect~~" in commentary to article 6, paragraph 1.)

Comment [M481]: Edit (editorial team)

To implement this provision, Parties can impose various requirements on public or private actors. One way to implement the provision is through mandatory monitoring and research programmes. Another is through systems of self-monitoring and record-keeping by facilities on data such as air and water emissions and waste disposal.

Governments often delegate monitoring responsibilities to specialized agencies, laboratories, universities or quasi-governmental institutions. These would be public authorities under article 2, paragraph 2(b) or (c), insofar as they meet the requirements of that article.

____ Many States also require enterprises to monitor their own emissions and other activities that have an impact on the environment. Placing the burden on the polluter is consistent with the polluter pays principle as set forth for example in Principle 16 of the Rio Declaration adopted by 172 States, including 108 Heads of State at the 1992 Earth Summit (Rio de Janeiro, 3-14 June 1999).¹⁹³ Principle 16 of the Rio Declaration states:

“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

~~which speaks inter alia of the “internalization of environmental costs.”~~ The enterprises can be required to keep records of the monitoring and periodically report this information to the appropriate public authority. For example, in **Belarus**, the Ministry of Statistics collects information on emissions, discharges, waste disposal and environmental protection measures from enterprises. The law requires all enterprises and institutions, regardless of ownership, to provide such information. ~~The Russian Federation provides examples of several ways in which a country can establish a mandatory flow of information from private entities to public authorities. For instance, since 1993, the Russian Federation has had a system of ecological monitoring that provides a flow of information from private entities to public authorities. Public authorities receive regular information from polluters.~~ An additional source is the information that private entities must submit to public authorities under the system of licensing and renewal of licences.

Comment [M482]: Edit (editorial team)

Comment [M483]: Deletion (editorial team)

In its findings on communication ACCC/C/2005/15 (Romania), the Compliance Committee found that article 5, paragraph 1, subparagraphs (a) and (b), taken together, require, at a minimum, that the relevant public authorities possess and update EIA studies in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation.¹⁹⁴

Comment [E484]: Edit footnote : at request of Germany

Comment [M485]: Text moved up to here from below text box (editorial team)

Elements of possible information flow systems to public authorities

- Public authorities monitor emissions and environmental quality;
- Public authorities conduct environmental research;
- Operators monitor emissions regularly;
- Operators keep records of their emissions monitoring;
- Operators report the emission monitoring data to the public authorities;
- Public authorities keep and update records of information submitted in permitting and other licensing procedures, including EIA studies in their entirety.

Comment [M486]: Edit (editorial team)

In its findings on communication ACCC/C/2005/15 (Romania), the Compliance Committee found that article 5, paragraph 1, subparagraphs (a) and (b), taken together, require, at a minimum, that the relevant public authorities possess and update EIA studies in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation.¹⁹⁵

Comment [M487]: Text moved up above text box (editorial team)

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

Article 5, paragraph 1 (c), requires public authorities to inform the public in the event of environmental emergencies. Its requirement to disseminate information is triggered by any "imminent threat" to human health or the environment. This means that actual harm does not have to occur for the information-immediate dissemination of information to be required. The Convention does not draw a distinction between threats caused by human activities or by natural causes: both are treated with equal weight. The Convention also gives equal weight to whether the object of the threat is human health or the environment.

Comment [M488]: Edit (editorial team)

Under the Convention, the information that public authorities must release includes anything-all information that could enable the public to take measures to prevent or lessen harm arising from the threat. Information to enable the public to take preventive or mitigation measures can include safety recommendations, predictions about how the threat could develop, results of investigations, and reporting on remedial and preventive actions taken.

Comment [M489]: Edit (editorial team)

International and EU law concerning environmental industrial accidents

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

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

The UNECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992) includes an article (article 9) on information to, and participation of the public. Following the Seveso accident in 1976, the European Union adopted a series of Directives on the major accident hazards of certain industrial activities and those involving dangerous substances, starting with the so-called Seveso Directive 82/501/EEC, which was replaced by Council Directive 96/82/EC, the so-called Seveso II Directive. This directive was extended by Directive 2003/105/EC.¹⁹⁶

Article 13 (1) of the Directive requires information to be provided to all persons and establishments serving the public likely to be affected by a major accident originating in so-called upper-tier establishments. Annex V to the Directive specifies the information to be provided. This includes "adequate information on how the population concerned will be warned and kept informed in the event of a major accident" and "adequate information on the actions the population concerned should take, and on the behaviour they should adopt, in the event of a major accident." In addition,

Comment [MSOffice490]: Edit : EU

Article 13(5) requires that the public is able to give its opinion on the planning of new upper-tier establishments, and on modifications to, and developments around, existing establishments. Furthermore, Article 11(3) requires that the public is consulted on external emergency plans. The Directive is currently under revision, inter alia, to align it with the Aarhus Convention.

Comment [WX491]: Insertion (editorial team)

The Convention sets a high priority on the rapid dissemination of information that could save human lives or prevent environmental damage. The public authority must disseminate the information immediately. Dissemination without delay can help save lives and prevent damage in situations involving an imminent threat to human health or the environment. In 1998, a case before the European Court of Human Rights dealt with this issue. The Government had neglected to release essential information that would have enabled citizens to assess the risks they and their families might run if they continued to live in a town particularly exposed to danger from accidents at a local fertilizer production factory.¹⁹⁷ The Court held that the State did not fulfil its obligation to secure the applicant's right to respect for their private and family life by failing to provide timely information.¹⁹⁸

Comment [WX492]: Footnote inserted (editorial team)

Emergency preparedness

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

Public authorities may distribute the information as widely as they wish. The Convention sets a minimum obligation to disseminate the information to members of the public who may be affected. In some cases, this will be the entire country, in others it may include members of the public in neighboring countries, in yet others it may be more localized to a specific region. The use of the word "may" indicates that there need only be a reasonable possibility that members of the public could be affected for the public authority to be obliged to inform them.

To facilitate implementation of this provision, Parties can designate which public authority is responsible for which type of information and in what circumstances. Countries can establish a system for emergency communications that can be used in these conditions. For example, in Belarus, the Ministry of Emergencies is responsible for spreading environmental information in the event of emergencies. The Centre for Radiation Control and Monitoring has a system of early emergency warning and control and is responsible for providing this information to the government and the public. Local authorities are the best placed to distribute some types of information.

Implementing the obligation to collect and disseminate

- *Public authorities need to have a reliable system for collecting and updating environmental information.* Information can be collected and updated through clear requirements and procedures for monitoring, record-keeping and reporting, by both private enterprises and government agencies;
- *Public authorities must hold environmental information.* They can do so through structured systems of registers, files and lists;
- *Public authorities need a system for immediate dissemination of information in emergencies.* This step can be taken through established processes to give information out over the radio, newspapers, and television, as well as directly to emergency health personnel and local government

officials.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, *inter alia*, by:

The common law duty to disclose

Some Aarhus Convention Parties have legal systems that impose a duty on public authorities to affirmatively disclose information to the public that may be relevant to a particular decisionmaking procedure. This duty is independent of any procedural obligations that may fall under a law related to a particular proceeding, such as an EIA procedure.

In a UK case, *David Edwards and Lilian Pallikaropoulos (Appellants) - and - 1) The Environment Agency 2) The First Secretary of State 3) Secretary of State for the Environment Food and Rural Affairs (Respondents) - and - Cemex UK Cement Limited (formerly Rugby Limited) (Interested Party)*, 31 July 2006, 2006 EWCA Civ 877, the Court of Appeal (Civil Division) held that the non-disclosure of reports held by a public authority containing information about the projected emissions from a cement factory that intended to change its processes to include the burning of waste tyres, left the public in ignorance, until the agency's grant of the permit, of the full information as to the extent of the low level emissions of dust and the information on their possible impact on the environment. The Court was of the view that such information was potentially material to the agency's decision and to the members of the public who were seeking to influence it. The failure by the agency to disclose it at the time was a breach of its *common law duty of fairness* to disclose it.

Experience has shown that simply having a law or regulation giving the public access to information does not guarantee access in practice. Article 5, paragraph 2, requires Parties to make sure that when public authorities make environmental information available, they do so openly and ensure that the information is really accessible. Parties are required to do so "within the framework of national legislation". First, this means that Parties must have placed the obligations and mechanisms of article 5, paragraph 2, in their national legal framework. It also means that Parties can be flexible in implementing this provision within their own national legal frameworks. Article 5, paragraph 2, does require a minimum of several concrete mechanisms for ensuring transparency and effectively accessible information—all of which can be structured slightly differently depending on the system of national law.

Transparency means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained. Article 5, paragraph 2, thus, builds on article 3, paragraph 1, requiring Parties to establish and maintain a clear and transparent framework to implement the Convention, and article 3, paragraph 2, requiring officials to assist the public in seeking access to information.

"Effectively accessible" means that the established information systems should go beyond simply making the information available to the public. Records, databases and documents can be considered effectively accessible when, for example, the public can search for specific pieces of information, or when the public has easy access through convenient office hours, locations, equipment such as copy machines, etc. For instance, the environmental authority in Cork (Ireland) lends copies of large documents to make them more effectively accessible to members of the public. However, as well as being physically accessible, information should be available in a format, language and level of

technical detail that the public can effectively access.

Comment [MSOffice493]: Insertion : EBRD

Comment [WX494]: Existing paragraph moved above text box (editorial team)

Effectively accessible information

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

Comment [MSOffice495]: Edit (editorial team)

The Convention gives special attention to new forms of information, including electronic information. This is referred to in the preamble and in article 3 on the general provisions and in articles 4 and 5 on access to information. The Convention takes into account the changing changes in information technology, which is moving towards electronic forms of information, and the ability to transfer information over the Internet and other systems. At its first session (Lucca, 21-23 October 2002), the Meeting of the Parties established a task force to prepare draft recommendations on the more effective use of electronic information tools in providing public access to environmental information. At its second session (Almaty, 25-27 May 2005), the Parties adopted decision II/3 on Electronic Information Tools and the Clearinghouse Mechanism. Annexed to the decision are Recommendations on the more effective use of electronic information tools to provide public access to environmental information.

Comment [MSOffice496]: Text moved to separate box below (editorial team)

Effectively accessible – the issue of language

Following concerns that environmental and social impact assessments were sometimes made available in English only, with only the non-technical summary being translated, the European Bank for Reconstruction and Development has since the mid-1990s required the full environmental and social impact assessment to be made available in the local language. This enables more meaningful public participation because local people who are those potentially affected by the project are able to read the full document and not just the technical summary.

Comment [MSOffice497]: Insertion : EBRD

Electronic information tools and the Aarhus Convention

The Convention gives special attention to new forms of information, including electronic information. This is referred to in the preamble and in article 3 on the general provisions and in articles 4 and 5 on access to information. The Convention takes into account the changes in information technology, which is moving towards electronic forms of information and the ability to transfer information over the Internet and other systems. At its first session (Lucca, 21-23 October 2002), the Meeting of the Parties established a task force to prepare draft recommendations on the more effective use of electronic information tools in providing public access to environmental information. At its second session (Almaty, 25-27 May 2005), the Parties adopted decision II/3 on Electronic Information Tools and the Clearinghouse Mechanism. Annexed to the decision are Recommendations on the more effective use of electronic information tools to provide public access to environmental information.

Comment [MSOffice498]: Second paragraph of “Effectively accessible information text box moved to here (editorial team)

The following provisions of article 5, paragraph 2, set out specific requirements for

how Parties should achieve transparency and effective accessibility. The Convention provides these as minimum requirements; the phrase "*inter alia*" means that Parties may add whatever mechanisms they find necessary or desirable to achieve transparency and effective accessibility.

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

Article 5, paragraph 2 (a), provides one example of the type of information covered under the article. Article 5, paragraph 2, covers not only environmental information, but also information about how best to access environmental information. The public will have much better access to environmental information if it knows what type of information is held, where it is held, the terms for obtaining it if any, and the procedures for obtaining it. Under the Convention, the information must be "sufficient", or complete enough to ensure that it helps the public to effectively gain access to information.

Information about information ("meta-information")
<p>In Austria, section 10 of the Federal Law on Environmental Information obliges the federal Ministry of the Environment to establish an environmental data catalogue for public information. The national Environmental Data Catalogue (UDK) has been drawn up to assist in locating environmental information. UDK is a computer-supported database that has been available to the public since 1995. It provides information as to who has what available environmental data, as well as other useful information relevant to environmental matters, and is accessible via the Internet. The European Environment Agency (EEA), through its Catalogue of Data Sources topic centre in Hanover (Germany), encourages the development of national meta-information systems in each of its member countries and is building capacity in the EU accession countries to develop similar systems. The European Commission has developed European standards of collective redress in the field of consumer law, the most recent being the Green Paper on consumer collective redress¹⁹⁹.</p>

Comment [MSOffice499]: Confirmed : Austria

Comment [MSOffice500]: Edit : EU

Furthermore, public authorities must provide sufficient information about the basic terms and conditions under which the environmental information is available and the process by which it can be obtained. This can be done through information publications, announcements in government publications, announcements on government Web sites, television or radio public service announcements, or as part of environmental information catalogues, as described in the box above.

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

Paragraph 2(b) further defines transparency and effectiveness in terms of practical arrangements for access to information. The Convention requires Parties to establish and maintain practical arrangements. These can include a variety of options, such as publicly accessible lists, registers or files; support to the public; and identification of contact points. They are meant to facilitate access to both the information itself and the information about how to get information referred to in paragraph 2 (a) above. The Convention includes examples of practical arrangements that Parties are likely to find useful in implementing it.

(i) Publicly accessible lists, registers or files;

The Convention includes publicly accessible lists, registers or files as examples of how a Party can meet the requirement to establish and maintain practical arrangements

for accessing environmental information and information about where to find that information.

One way in which countries can establish practical arrangements for access to information is through lists, registers or file systems. The words "lists", "registers" and "files" are often used interchangeably among different countries' systems. The form of the list, register or file can vary. In some cases it may be in traditional, hard copy, kept, for example, in a library; in others it may be a computer database in electronic form.

Lists, registers and files can be used to compile information submitted from private sources or gathered from the government. They can also provide advantages to both the public and the authorities. When a member of the public has the ability to inspect a list, register or file, he or she is able to target the information request more precisely. This can save time, make information requests easier to process and reduce costs. Countries have many different types of registers, lists and files with environmental information. Public registers, lists and files need not be centralized nationally, but may be held locally in libraries or local government offices around the country.

Registers, lists and files can contain the actual environmental information itself or references to which documents exist and where they are to be found. For example, By way of example regarding the first, the United Kingdom has a fairly extensive system of "public registers" covering a wide range of information, such as planning applications, lists of stray dogs and pesticide evaluation documents. The registers are files of information maintained under particular pieces of legislation that specify the exact nature of the information which is to be available to the public and usually where it is to be located. The information is often kept in hard copy and typically the register is kept in an office that can be visited by the public during normal business hours. Copies can usually be obtained for a fee. Certain registers consist of computerized files, in which case an operator is needed to access the files and prior arrangement may need to be made, but an increasing amount of public register information is available via the Internet, giving worldwide public access. By way of example regarding the second, Poland keeps a register of which documents exist and where they can be found.

Selected public registers in the United Kingdom

- Register of applications to release or market genetically modified organisms
- Pesticide Evaluation Documents
- Register of Pesticide Enforcement Notices
- The Planning Register
- Integrated Pollution Control Register
- Local Authority Air Pollution Register
- Register of Hazardous Substances Consents
- Register of Sites Holding 25 tonnes of Dangerous Substances
- Register of Radioactive Substances
- Register of Notifications of Intended Works on Trees in Conservation Areas
- Register of Drinking-water Quality
- Register of Licences for Deposits at Sea
- Maps of Nitrate-sensitive Areas
- Trade Effluent Register
- Water-quality Register
- Maps showing freshwater limits of rivers
- Register of Waste Management Licences

Lists, registers and files can also contain all of the documents pertaining to a specific case. They can contain collections of documents relating to a decision-making process, including drafts, background analyses, public comments, alternative proposals, interim decisions, and proceedings of any meetings. For example, the environment ministry might maintain a publicly accessible register or file with all the documentation from an environmental impact assessment or licensing case. This would help to meet the requirement in article 6, paragraph 6, that public authorities should allow the public to examine all information relevant to the decision-making process. It also would establish a record of decision in review cases under article 9 on access to justice.

In the city of Shkodra, Albania, a system of special information billboards operated by municipalities and the Regional Environment Agencies allows for the public display of environment permits, permit applications, EIA documentation and SEA documentation on a regular basis.

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

A second type of practical arrangement to ensure effective access to information is having government officials support the public in requesting information. This provision is an example of a way to fulfil the obligation under article 3, paragraphs 2 and 3, to provide guidance to the public in seeking access to information. Parties can require public authorities to assist members of the public in formulating or refining their requests, if need be.

Comment [WX501]: Inserted (editorial team)

More and more information is available on the internet and through information points where environmental information can be found in structured databases. However, public authorities need to be sensitive to the needs of members of the public who may need additional assistance, such as the elderly, illiterate, poor and others.

In many cases, Parties may need to go beyond simply requiring public authorities to assist the public. Parties also can provide training for government officials in access-to-information laws and regulations, including guidelines to understanding the exceptions and how to ensure that the public has timely, transparent and effective access to information.

(iii) The identification of points of contact; and

The final practical arrangement required by the Convention is that public authorities should identify points of contact for each authority to facilitate public access. Points of contact are especially useful when many people will be interested in accessing information. A publicly identified office or individual point of contact will facilitate and hasten the process of accessing the information for members of the public. For example, Georgia's General Administrative Code obliges governmental bodies to designate particular public officials as contact points for applicants making information requests)

Comment [o502]: Insertion : Aarhus Centre Georgia

In thinking about how to implement this provision, Parties can consider identifying individual points of contact in specific cases, such as environmental impact assessment, permitting, or rule-making. Some countries require that every time a public authority gives notice of a process, such as licensing or environmental impact assessment, that provides an opportunity for public participation, it must include a point of contact in the notice so as to facilitate access to information. Article 6, paragraph 2, on public participation requires the notice to include an indication of the public authority from which information can be obtained.

In general, an effective way to establish such points of contact is through a specific environmental information service or office. For example, in Ireland, the Government's Environmental Information Service (ENFO) (has an extensive database and library on the environment, and offers a range of information materials in readily accessible form. It operates out of a walk-in information centre in Dublin, backed by a

~~network for distributing information around the country. An increasing amount of information is being made available in electronic form (CD-ROM) and via the ENFO Web site () has been transformed from a single walk-in information centre to a national environmental information service with dedicated public library spaces called 'ENFOpoints' where people can access a wide range of information and a new website www.askaboutireland.ie.~~

Comment [MSOffice503]: Edit (Ireland)

~~Estonia's Environmental Information Centre was established within the Ministry of Environment in 2004. Other Parties have worked in cooperation with international organizations to establish "Aarhus Centres" throughout the countries (see box in commentary to article 3, paragraph 3).~~

Comment [MSOffice504]: Confirmed (Estonia)

Comment [M505]: Insertion (editorial team)

OSCE Aarhus Centres

~~Since 2002, the OSCE has supported the creation of Aarhus Centres and Public Environmental Information Centres, both through its field offices and its Office of the Co-ordinator of OSCE Economic and Environmental Activities. It has done so in close co-operation with the Aarhus Convention Secretariat and, in most cases, with the support of the Environment and Security (ENVSEC) Initiative. Over time, the Centres have become successful models through which government officials and non-governmental organization members can meet to discuss and resolve issues that relate to the environment and environmental security. Aarhus Centres have been opened in various locations in the capital cities and countryside in Albania, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, the former Yugoslav Republic of Macedonia, Serbia and Tajikistan. Working both in capital cities and remote regional areas, these Centres have been very active in promoting the implementation of the Aarhus Convention on regional, national and local levels, to help governments fulfil their respective obligations under the Convention, and to involve the citizens of the region in environmental decision-making. In 2009, the OSCE supported the development of a set of guidelines for the Aarhus Centres with the purpose of enhancing and streamlining their work, and to give them guidance for their strategic orientation, set-up and activities, thereby ensuring a common understanding of all stakeholders on the roles of the Centres. Many of those involved in driving the Aarhus Centre initiative, meet at regular intervals to exchange experiences and lessons learned.~~

Comment [M506]: Deletion as duplicates text box in article 3, paragraph 3 (editorial team)

Implementation guidance for national environmental information services

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

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

- Staffed by professionals with information services, computing and telecommunications support;
- Service should encourage the exchange of environmental information and experience among countries with similar information demands.

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b)(i) above free of charge.

Article 5, paragraph 2 (c), adds to Parties' understanding of transparency and effective access to information by addressing the issue of cost. The Convention requires public authorities to provide access to the environmental information contained in lists, registers or files free of charge. Under article 4, paragraph 8, public authorities are allowed to make a reasonable charge for supplying information. Article 5, paragraph 2 (c), makes it clear that public authorities are not allowed to charge for examination of information held in publicly accessible lists, registers or files.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

Article 5, paragraph, 3 requires Parties to expand their information-gathering and disseminating efforts by making use of electronic information systems. Changes in information technology are revolutionizing the way public authorities and the public create, store and transfer information. The Convention reflects these changes by requiring Parties to work towards making environmental information available electronically. In implementing this provision, Parties have a clear obligation to ensure that environmental information progressively becomes available in electronic databases, and can be flexible in determining who will manage this process, the time-frame for meeting the obligation, and the shape of the electronic databases. The Convention requires that once Parties have established electronic databases, these must be easily accessible to the public.

Poland

~~Poland requires computer in publicly available place where members of the public can check all relevant info. However this should not be used to "fob off" members of the public when asking for personal assistance from the authorities, particularly if the member of the public may have difficulty using the computer to find the information.~~

Comment [FM507]: Text moved down and out of box (editorial team)

Implementation options for electronic databases

The Convention stipulates only that the electronic databases should be easily accessible to the public. Parties can consider various ways of meeting this requirement, including the following:

- Setting up databases that can be searched for specific information electronically;
- Setting up databases that can provide information in a variety of categories, such as type of pollutant, type of species, region of the country, via structured, customized queries;
- Using telecommunications networks, as discussed in article 5, paragraph 3, to facilitate access to the databases and avoid the need for a public authority operator;
- Setting up interconnected databases: currently, although environmental information is very

interrelated, it is often collected through separate means. Databases could establish links between themselves to allow a larger pool of information to be searched at once.

A number of Aarhus Convention Parties, including Albania²⁰⁰, Armenia²⁰¹, Georgia²⁰² and the Republics of Kazakhstan²⁰³ and Tajikistan²⁰⁴, have contributed to their implementation of article 5, paragraph 3, through their involvement in the establishment of either Public Environmental Information Centers (PEICs) or Aarhus Centers. These centres use electronic tools such as websites, databases and electronic list serves to make environmental information easily accessible to the public. Environmental information made available online by some of the centres includes national and regional state-of-the-environment reports, various international, national and local legislative and policy documents and other publications related to the environment. For more information about Aarhus Centers, see the commentary on article 3, paragraph 3 above.

Comment [FM508]: Example provided by Asian American Partnership, Kazakhstan

Polish law requires that a computer be made available in a public place, e.g. a public library, so that members of the public can access environmental information. However, the availability of such a resource should not be used to “fob off” members of the public who ask for personal assistance from the authorities, particularly if the member of the public may have difficulty using a computer to access the information.

Comment [FM509]: Text moved down to here and out of box (editorial team)

The German Environmental Information Portal PortalU

Comment [MSOffice510]: Confirmed : Germany

In federal systems like Germany, public environmental information is provided by various agencies at local, regional and national levels. This results in environmental information which varies widely in both content and format. The German Environmental Information Portal PortalU[®] (www.portalu.de) is an instrument aimed at coordinating this very diverse public environmental information within Germany. The main objective of the portal is to improve access to environmental information held by or for public authorities. PortalU[®] thus draws together the rapidly increasing quantity of decentralised public environmental information available on the internet. Both environmental experts and the general public can access the portal free of charge.

PortalU[®] is a long-term project which is based on an administrative agreement between the Federation and the 16 German federal states (Länder). The aim of this Federation-Länder cooperation is to involve all public data providers in PortalU[®], the one-stop-portal for public environmental information as defined in Article 2 of the EU Directive 2003/4/EC. The second important task of PortalU[®] is to provide information about environmental spatial data and spatial data services in line with the metadata requirements of the INSPIRE Directive (2007/2/EC).

Comment [MSOffice511]: Insertion : Germany

The PortalU[®] initiative was launched in June 2006 when the German environmental information network GEIN[®] was merged with the environmental catalogue UDK. Since then, a great deal of public environmental information has been available at the click of a mouse. PortalU[®] gives answers on environmental questions such as government measures to combat climate change or water quality in specific areas. Over 2.53 million web pages and over 500,000 database entries from public authorities are available from about 35040 public institutions and organisations at the national, Länder and municipal level.

Comment [MSOffice512]: Insertion : Germany

Comment [MSOffice513]: Insertion : Germany

In PortalU[®] the user can run simple or advanced searches on all environmental information, web pages, databases and data catalogues. The results are listed in a ranking independent of the data source. In addition, PortalU[®] offers separate access to service pages, environmental measurement pages, Web Mapping Services, an environmental chronicle and selected web pages. These serve as easy access points to various environmental topics and can be seen as a tool for the active dissemination of environmental information. The 21 topics range from A for “air and climate” to W for “water”.

It is important that the electronic versions do not replace other forms of the same information, as computers and public telecommunications networks are not readily accessible to all members of the public in every country. The wholesale replacement of traditional forms of information storage might not satisfy the requirement that information should be truly accessible to the public, at least in the short term. However, for those members of the public who do have access to the Internet, through their personal computers, or through publicly accessible computers in libraries or information centres, electronic databases provide a fast, and effective way of searching and finding relevant environmental information—anytime and from anywhere. And although electronic databases can be expensive initially for a public authority, they can later pay for themselves in time and resources saved, not only in answering information requests, but also in providing information for the public authority's own implementation and enforcement initiatives.

The Convention lists specific types of information that should eventually become accessible electronically. The use of the word "should" instead of "shall" in this provision means that the Convention recommends Parties to take this course of action, rather than requiring them to do so. The fact that accessible information should "include" [the following], means that Parties can add other relevant environmental information to this list if they deem it useful.

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

Under paragraph 3(a), Parties should ensure that the state-of-the-environment reports required under paragraph 4 also progressively become available in electronic databases. As state-of-the-environment reports already exist electronically in most countries, this will primarily mean putting these reports in the types of databases that are publicly accessible. The electronic database form will help both the public and the public authorities to search the state-of-the-environment reports for specific information which they can use to compile comparative information about the state of the environment over time.

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

Under paragraph 3 (b), Parties should ensure that texts of legislation on or relating to the environment progressively become available in electronic databases. Legislation is often one of the first items to be made publicly accessible through the Web sites of ministries. For example, the Danish Ministry for Environment and Energy has a publicly accessible Web site with a wide range of documents, including legislation. In the Czech Republic, Finland, Hungary and Poland, ministries and parliaments make texts of legislative drafts, international treaties and laws electronically accessible.²⁰⁵ Parties may wish to take advantage of ECOLEX, an Internet-based information service (www.ecolex.org) on environmental law that UNEP ~~is developing~~ operates in cooperation with the World Conservation Union (IUCN). It links national custodians of environmental law texts and related literature.

Comment [MSOffice514]: Deletion: Finland

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

Under paragraph 3 (c), Parties should ensure that, as appropriate, policies, plans and programmes on or relating to the environment progressively become available in electronic databases. In this case "as appropriate" means that Parties have additional flexibility in determining which policies, plans, and programmes would be most usefully accessible through electronic databases because of a public interest in accessing them. For example, this can be a useful tool for implementing article 7 on public participation in decisions concerning plans, programmes and policies. It is very important for the public and for public authorities to have easy access to existing plans, programmes and policies when commenting on proposals.

Policies, plans and programmes can be at the international, regional, national or local level. Like legislation, these documents are typically among the first to be published electronically by government ministries with Web sites.

Paragraph 3 (c) also requires, as appropriate, that "environmental agreements" should become progressively available in electronic databases. Environmental agreements include covenants or contracts between the government and private enterprises or industry groups, and may also include bilateral or multilateral agreements and other types of agreement. (See the commentary to article 2, paragraph 3 (b).) For example, the Netherlands uses public-private environmental agreements. This type of environmental agreement often represents voluntary agreements to cooperate in meeting certain emission limits on the part of industry in exchange for fewer reporting or other requirements imposed by government.

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

Under paragraph 3 (d), Parties should identify other information that can readily be made accessible in electronic form if it would facilitate the application of national law implementing the Convention. For example, a Party can determine that providing the proposals and other drafts open to public participation under articles 6, 7 and 8 would facilitate the application of national law implementing the Convention. It could require that proposals for specific activities, for plans, programmes and policies, and for executive regulations and legally binding instruments should become progressively available in electronic databases. This provision also serves as a reminder that the Convention's information provisions are not limited to written text only, but also apply to graphics, photographic materials, sound recordings, etc.

provided that such information is already available in electronic form.

Article 5, paragraph 3, does not require Parties to put the information in electronic form. It only stipulates that, if the information is already in electronic form, it should be placed in publicly accessible databases on public telecommunication networks. In practice, the aforementioned categories of information will tend to exist in electronic form. The purpose of this final provision would appear to be to avoid imposing on public authorities an obligation to scan or type in handwritten or oral submissions from the public, as well as older documents that might not exist in electronic form.

Using electronic information technology in Kazakhstan

The 2007 Environmental Code of the Republic of Kazakhstan provides a detailed list of environmental information that must be made available to the public through telecommunication networks as required by article 5, paragraph 3, of the Convention. Article 160 of the Republic of Kazakhstan's Environmental Code requires competent public authorities to make publicly available through the internet and other public telecommunications networks the following types of environmental information:

- reports on the state of the environment;
- drafts and text of national legislation and international treaties on environmental issues
- drafts and texts of governmental policy documents, programmes and action plans relating to the environment
- reports on environmental enforcement
- information on electronic government services related to the environment.

The Code also requires that the competent public authorities establish and maintain publicly accessible electronic registers of environmental information.

Comment [M515]: Insertion (editorial team)

Comment [FM516]: New example provided by Asian American Partnership, Kazakhstan

4. Each Party shall, at regular intervals not exceeding three or four years, publish

and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

Article 5, paragraph 4, requires that a national state-of-the-environment report should be published at regular intervals. The regular intervals may not exceed three to four years. Throughout the UNECE region, countries have found it useful for reasons of comparison and to monitor progress to publish their state-of-the-environment reports on a yearly basis.

The state-of-the-environment reports must be publicly disseminated. Dissemination can take many forms. For example, in the Russian Federation annual federal reports on the state of the environment are distributed, in written form, through publishing and computer networks, as well as through announcements on television and radio. Georgian legislation requires that a report on the state of the environment be submitted to the President of Georgia every 3 years for approval and then published. The report is also made available in electronic format through the Aarhus Centre Georgia's website.

Comment [o517]: Insertion : Aarhus Centre Georgia

The Convention requires the reports to include information on both the quality of the environment and the pressures on the environment. "Pressures on the environment" can mean many things in the context of the report. For example, the Czech state-of-the-environment report includes information on the causes of change in the environment, the state and development of environmental elements, the consequences of environmental changes for the human population and developments in environmental law and policy.

As discussed above in article 5, paragraph 3 (a), state-of-the-environment reports must progressively become available in electronic databases that are easily accessible through public telecommunications networks, provided that the information is already available in electronic form.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, *inter alia*:

In requiring Parties to take measures to disseminate certain information specified below, article 5, paragraph 5, goes beyond the passive access-to-information requirements of article 4. Dissemination means giving the information to the public through means such as publications, mailings or electronic posting. It can also mean letting the public know that certain kinds of information are available, telling it where and how to access the full text of the environmental information, and making that information accessible to the public at little or no cost. Article 5, paragraph 5, is to be implemented "within the framework of [a Party's] legislation", giving Parties some flexibility in implementing measures that both meet the Convention's obligations and can be placed within the national legal framework.

Paragraph 5 is similar to the earlier requirement that information relating to imminent threats to human health or the environment should be disseminated immediately to members of the public who may be affected (article- 5, paragraph- 1 (c)). Paragraph 5 is a more general requirement for the dissemination of documents that the public has the right to know on a regular basis. It concerns dissemination to all members of the public and through the use of the phrase "*inter alia*" contains only a preliminary list of what kinds of information should be disseminated. Parties may add to this list any other relevant types of information that will help implement the Convention.

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

Paragraph 5 (a) requires Parties to develop a legal system to disseminate legislation

and policy documents that concern the environment. This provision should be considered also in the context of articles 7 and 8, which concern public participation in plans, programmes, policies, law-making and rule-making. Parties are required to actively disseminate the texts of strategies, policies, programmes and action plans relating to the environment. In addition to the texts of these law and policy documents, the Convention requires Parties to disseminate progress reports on their implementation. The term "relating to the environment" is used here instead of "environmental information". "Relating to the environment" arguably includes a broader range of information such as policies on transport, energy, agriculture or mining as these relate to the environment through their impacts or otherwise.

Most countries already publish legislation and policy documents in official government journals that are publicly accessible. For example, in the Republic of Moldova, legislation, presidential decrees, international acts, resolutions and instructions of the Government, and acts of ministries, departments, and the national bank must be published in *Monitorul Oficial al Republicii Moldova*—the official register — in order to become effective. The journal is printed in Romanian and Russian. Once an act has been published in the journal, it may be further publicized on radio and television. In addition, the decisions of mayoral offices and executive regional councils that involve a public interest must be disseminated to the public by means of the mass media. In Georgia, the texts of legal acts must be published electronically on the web page of Georgia's official journal – *Legislative Bulletin* - which also maintains an electronic data base of legal acts.

Comment [FM518]: Insertion (Aarhus Centre Georgia)

(b) International treaties, conventions and agreements on environmental issues; and

Paragraph 5 (b) requires Parties to disseminate international treaties, conventions and agreements on environmental issues. International treaties, conventions and agreements are legally binding ~~contracts-instruments that establish obligations~~ between two or more countries. In ~~general some countries~~, once a ~~country has ratified~~ an international treaty, convention or agreement ~~to which it is a party and it has come into force~~, that instrument ~~has immediate and direct effect and international law becomes a part of the applicable~~ domestic law in that country. For example, the Convention on Biological Diversity has become part of national law in many countries, along with the nature conservation laws, and under article 5, paragraph 5 (a), should be disseminated to all members of the public through, for example, journals, publications, and radio and television announcements.

It is standard to disseminate international treaties, conventions and agreements through publication in legal gazettes. One way to disseminate international treaties, conventions and agreements is to require publication. For example, article 88 of the Polish Constitution requires publication as a precondition for any law or international treaty to enter into force.

Another way to disseminate these documents is through electronic databases on the Internet, as is required when the information is already available in electronic form under article 5, paragraph 3 (b). Finland, for instance, is already doing does this.

Comment [MSOffice519]: Confirmed (Finland)

(c) Other significant international documents on environmental issues, as appropriate.

Paragraph 5(c) requires Parties to take measures within the framework of their national legislation to disseminate other significant international documents on environmental issues, as appropriate. Agenda 21 provides an excellent example of a significant international document on environmental issues that the public should have the opportunity to receive.

In this case, "as appropriate" means that the Parties can exercise their judgement as to which international documents on environmental issues are most likely to serve the obligations of this Convention by being relevant and of interest to the public. For example, a Party might determine that regional agreements from other regions might not

be appropriate for active dissemination to members of the public. Multilateral environmental agreements signed by the Party in question would fall in the category of "appropriate" for dissemination.

International documents on environmental issues do not only come from international environmental institutions. Countries can sign or develop many other types of international documents on environmental issues. For example, countries that participate in the deliberations of the World Trade Organization (WTO) ~~can~~ should disseminate information on WTO policies and rules on environmental issues, such as decisions in cases that will directly impact the environment. Countries that are part of or in negotiations with the World Bank, the European Bank for Reconstruction and Development or one of the other multilateral lending institutions, should ~~can~~ disseminate information on bank policies and loans relating to environmental issues. Wide publication of such documents can help mobilize public support for states to influence international decision-making as discussed under article 3, paragraph 7.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

Comment [csd520]: NFPS and NGOs are invited to share further examples of good practices

Paragraph 6 concerns the flow of information from an "operator" directly to the public. An "operator" can be a private enterprise or a governmental body that conducts activities with a significant impact on the environment. Paragraph 6 requires Parties to encourage these operators voluntarily to disseminate information about the environmental impact of their activities and products. This provision differs from paragraph 1, which requires the establishment of mandatory systems for operators to provide information to public authorities. Here, in the case of information flowing from an operator directly to the public, the Party need only provide incentives and other encouragement.

The Convention recognizes that some countries already have voluntary systems that give this type of information directly to the public, such as "eco-labelling" or "eco-auditing". The Convention foresees that Parties may wish to encourage operators to disseminate information on the environmental impacts of their activities and products through these voluntary systems. Eco-labelling is a system that includes information about the environmental impacts of the process for manufacturing a product and the contents of the product directly on the label. For example, some cosmetic companies state on their labels that they do not test their product on animals. Some food product labels state that they were produced through farming methods that did not use chemical pesticides or fertilizers. Some detergent labels state they do not contain phosphates.

Eco-auditing is a system that reports on environmentally relevant information about the inputs, processes and outputs of a manufacturing activity. For example, a computer chip manufacturing facility could carry out an eco-audit to show the amount and type of chemicals taken in and the amount and type that remain as waste or as products. Eco-auditing systems often help enterprises realize how they can prevent pollution and use their resources more effectively.

At the national level, many countries only have requirements concerning the direct flow of information from an enterprise to the public in the event of potential emergencies, as required by the EU. Austria provides a common example of how a Party can approach implementation: Austria requires enterprises posing a risk of serious industrial accident to inform all affected members of the public of the risk. This obligation applies to certain facilities, on the basis of characteristics such as size, location or the use of hazardous methods. The owner must inform the members of the affected public in advance about: the possible risks of the occurrence of an abnormal incident; the existence of safety measures; and the correct behaviour in the event of an abnormal occurrence. This information must be issued in a suitable manner, in a form understandable to the general public.

Comment [MSOffice521]: Confirmed (Austria)

The Aarhus Convention goes beyond merely encouraging a direct flow of information in emergencies. Its article 5, paragraph 6, requires Parties to encourage operators whose activities have a significant impact on the environment to give information directly to the public. This is a much lower threshold than environmental "emergencies". There are many ways in which Parties can encourage operators to use the existing voluntary systems or to develop new ones. They can develop reliable regulatory frameworks that encourage public dissemination of information. They can offer operators special incentives if they provide information directly to the public, such as relaxation of certain regulatory requirements or tax incentives. Parties can give special publicity to operators that participate in programmes to inform the public, creating an opportunity for the enterprise to advertise itself as a responsible environmental citizen. They can also explicitly include provision of information to the public as a criterion for selection in other government assistance programmes. One established means for operators to give information about the environmental consequences of their activities is through environmental reporting in their annual financial reports.

7. Each Party shall:

Paragraph 7 requires Parties to publish information that will help members of the public, public authorities and other Parties to the Convention understand what goes into government decisions, to monitor how those decisions are implemented and to make more effective contributions to decision-making.

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

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

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

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

Paragraph 7(b) requires Parties to make accessible any explanatory materials on the Convention's implementation. The Parties must either publish this information or use another means that will make it accessible, such as electronic publication, teletext publication, or radio announcements. The scope of the information includes any explanatory material on the government's dealings with the public in access to information, public participation and access to justice as covered by the Aarhus Convention. This can include, for example, data on access to information requests, such as how many were received, how many satisfied, how many refused, which exemptions were used, etc.

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

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

Paragraph 7(c) requires Parties to provide information on how their public authorities carry out public functions and provide services relating to the environment. This provision is not just limited to central public authorities, but applies to regional and local public authorities as well.

Many countries have some form of self-assessment or reporting that allows them to monitor the progress of public authorities. For example, in **Denmark** two reports—one that describes the state of the environment and the impacts on it and another that describes follow-up policy initiatives—are very useful tools for the public authorities themselves, as well as for the public, in monitoring performance and identifying areas for improvement in the future. ~~Furthermore, the Ministry of the Environment prepares a yearly publication of statistics on environmental indicators that assists the public in assessing the performance of public functions.~~ In **Poland**, the *Statistical Yearbook* gives implementation and enforcement information, such as the number of environmental permits issued, the number of inspections carried out, and the number of enforcement actions undertaken.

Comment [o522]: Deletion :
Denmark

The report required under paragraph 4 includes information on the state of the environment and the pressures on the environment. Paragraph 7 (c) obliges public authorities to also provide information on how they implement environmental and other laws and how they perform specific environmental services, such as waste management.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

Paragraph 8 requires Parties to develop mechanisms to ensure that sufficient product information is available to the public. The information must be made available—whether by Parties, producers, or sellers—in a manner that enables consumers to make informed environmental choices. This is a potentially far-reaching provision that could be developed greatly by governments in implementation.

The **EU** has long been developing a body of consumer law, including access-to-information, public-participation and access-to-justice principles. ~~Since the entry into force of the Maastricht Treaty, consumer protection has been a full Community policy.~~²⁰⁶ Consumer protection has been a core EU policy since 1993.

One common tool for providing consumer information is eco-labelling (see article 5, paragraph 6). Eco-labels can contain information concerning the origins of the product and its contents, the effects of the product's contents, the impact of the product on health or the environment during and after use, and consumer guidelines for using the product in as environmentally-friendly a manner as possible.

In general, mechanisms for product information can be effectively established through codes of conduct that ensure consistency and reliability. In addition, public authorities that embrace the ~~new~~ ISO 14021 standard on environmental claims can also translate this standard into practical guidelines that can be used by both manufacturers in avoiding misleading advertising and by their own review bodies in the adjudication of complaints.

Implementation options for product information

Countries have developed a variety of mechanisms to ensure that sufficient product information is available to the public. These include both voluntary and regulatory mechanisms, including:

- Health warning labels
- Use directions

- Content labels
- Categorization of products as "organic," "green" or "recyclable"
- More detailed product information available on request from producers
- Register of consumer information

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

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

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

Paragraph 9 establishes a framework of requirements concerning national pollution inventories or registers. The framework is meant to guide the further development of these mechanisms among the Parties. In addition, in article 10, paragraph 2 (i), the Parties undertook to continue to work on this area by considering the next steps. That work resulted in the Kiev Protocol on Pollutant Release and Transfer Registers (see box). Further guidance on the Protocol can be found in the separate Implementation Guide Guidance to Implementation of the Protocol on Pollutant Release and Transfer Registers for the PRTR Protocol.²⁰⁷

Comment [MSOffice523]: Text moved up (editorial team)

Comment [MSOffice524]: Deletion (editorial team)

Comment [WX525]: Edit (editorial team)

Comment [o526]: Typographical correction in endnote (Czech Republic)

The PRTR Protocol

At the first Meeting of Signatories to the Aarhus Convention, a Task Force on pollution inventories or registers was established, and this group recommended that a legally binding instrument be negotiated on pollutant release and transfer registers (PRTRs). The UNECE Committee on Environmental Policy took up the recommendation and established the open-ended intergovernmental Working Group on PRTR. At the first Aarhus Convention Meeting of Parties in Lucca, Italy in 2002, this Working Group was officially taken over by the MOP, and the Parties made the decision that the legally binding instrument would be a Protocol to the Convention. Finally, the Parties decided to hold an extra-ordinary meeting on the occasion of the fifth Ministerial "Environment for Europe" Confence (Kiev, May, 2003) to adopt and sign the Protocol (decision I/3). Thirty-six states and the European Community Union signed the Protocol in Kiev. It came into force on 8 October 2009. As of June 2011-October 2010 there were 267 Parties to the Protocol.

Comment [M527]: Updated (editorial team)

Article 5, paragraph 9, sets out general parameters to guide the development of these pollution inventories or registers in signatory countries. Since the adoption of the Convention, the term "pollutant release and transfer registers" (PRTR) has become standardized to describe the types of information tools covered under this paragraph. In addition, in article 10, paragraph 2 (i), the Parties have undertaken to continue to work on this area by considering the next steps. These next steps could include, for instance, the development of a formal annex or a protocol to the Convention. At their first meeting in April 1999, the Signatories established a dedicated task force to make specific recommendations concerning the implementation of pollution inventories or registers.

~~Several existing international, regional, and domestic programmes will provide guiding principles that help define the potential scope and composition of pollution inventories or registers under the Convention. For those Parties that are not also parties to the Protocol, the Protocol still serves as an important guide to the implementation of this paragraph. In addition, several existing international, regional, and domestic programmes provide guiding principles that help define the potential scope and composition of pollution inventories or registers under the Convention. Following Agenda 21, which refers to the use of emission inventories, the Organisation for Economic Co-operation and Development (OECD) developed a guidance manual on *Pollutant Release and Transfer Registers* (PRTRs), with reference to systems already in use by several countries, including some of the Convention's European signatories.²⁰⁸ These existing registers illustrate functional forms that such registers and inventories could take in response to the Convention's guidelines.~~

What is a pollution inventory or register?

A pollution inventory or register is a database of potentially harmful releases (emissions) to air, water and soil, as well as of wastes transferred off-site for treatment or disposal. Typically, facilities releasing one or more of a list of specified substances must report periodically as to what was released, how much, and to which environmental media. This information is then made available to the public both as raw data and in the form of analyses and reports. The development and implementation of such a system adapted to national needs represents one component towards developing a means for governments, enterprises and the public to track the generation, release, further use and disposal of various hazardous substances from "cradle to grave".

The **United States Emergency Planning and Community Right-to-Know Act of 1988** ~~was is believed to be~~ the first law of this kind. It requires the collection and public dissemination of toxic substance release and transfer data to all environmental media for the particular purposes of assessing environmental quality, implementing pollution prevention strategies, and developing adequate emergency response policies, as well as providing a means for the guarantee of information rights. The law makes the pollution inventory the main vehicle for the attainment of its goals, and sets out exact definitions and procedures that create a framework for the reporting systems necessary to accomplish the goals. The voluntary **Netherlands National Emissions Inventory**, although much less comprehensive, ~~contains~~ ~~was the first such instrument in Europe and contained~~ similar kinds of information, while also plotting maps of diffuse pollution sources in addition to the industrial sources.

Comment [W528]: Edit (editorial team)

Comment [o529]: Confirmed : Netherlands

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

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

Comment [MSOffice530]: Text moved up (editorial team)

Why develop ~~pollution inventories~~ PRTR system?

The most dynamic aspect of ~~public pollution inventories~~ PRTRs is their ability to stimulate pollution

prevention and reduction. A company that reveals the quantities of pollutants that it is releasing into a neighbourhood becomes the focus of public scrutiny and this can cause a reassessment of accepted levels of releases. Mere publication of the quantities of chemicals released into the environment begins to involve the public in the decision-making underlying continued pollution of the environment, and by reducing releases, a company and/or regulator can demonstrate publicly their commitment to environmental improvement.

Reporting releases can often yield a double dividend. Many companies have found that the quantitative analysis of waste streams and the associated costs (in lost materials or disposal costs for example) can actually result in changes to operations that produce considerable financial savings.

The information gathered under inventory programmes can be (and has been) used for a variety of purposes. The initiation of pollution reduction programmes (by individual companies or by sectors) has been one result, but data can be analysed to set priority targets (particular substances or geographic areas) at local or national level, and a consistent, regional system can achieve the same goals at an international level and could be used at international level if they were sufficiently comparable. Inventory data can be used to judge compliance with permit conditions, or to analyse the effectiveness of pollution control laws. Educational programmes use inventory data to illustrate pollution problems.

What type of information can a ~~pollution inventory or register~~ PRTR include?

Inputs: Inputs can include chemicals and substances used in production processes or brought on-site for storage. They can also include water, energy and resources (raw materials) that go into production processes.

Releases: Releases can include emissions from industrial facilities or production processes (or other point sources) such as chemicals, water and energy of specific substances. Releases of things other than pollutants could include releases of water and energy. Releases can also include emissions from diffuse sources such as agriculture, forestry, construction, roads and urban areas, in which case decisions have to be taken on the unit area to be used for reporting. Data about releases from diffuse sources are usually generated by authorities based on methodologies involving estimation or calculation. Reports on releases can be usefully organized according to environmental medium, such as releases to ~~fresh~~ surface water, groundwater, marine waters, air and soil. Releases into a public wastewater treatment system may also be considered releases for reporting requirements.

Transfers: Transfers refer to substances moved to another place, either for further use, recycling, storage, or disposal. The transfers can be to on-site and off-site storage, treatment or disposal sites. Some facilities treat their waste, or store substances, on the premises where it was generated (on-site). Some transfer it to a separate holding, storage or disposal facility (off-site). The definition of "transfers" may also include the amount of a substance that ends up in a finished product that is shipped off-site.

Article 5, paragraph 9, must be carried out through the development of a coherent national system. However, this system does not need to supplant existing information mechanisms. Countries can follow a series of different paths to reach a national system and integrate their existing procedures accordingly. Some countries, such as **the Czech Republic**, are developing developed all of the elements of a pollutant release and transfer register at once, prior to their EU membership. Others may choose to implement the different elements of a pollutant release and transfer system step by step. Thresholds are often used in early stages of PRTR, both with respect to the size of facilities required to report, and to the amounts of substances released and/or transferred. These thresholds are gradually reduced over time.

Implementation options for pollution inventories and registers

Step 1—Gather information: Parties can require private entities to monitor, keep records and report inputs, releases and transfers of substances and products into environmental media or disposal sites. For example, Poland has a fairly well-established system of requiring reporting from most enterprises to public authorities. Poland has long had mandatory self-reporting requirements, linked to its system of pollution charges. These requirements include annual (and, for large polluters, quarterly) reporting to the appropriate regional authority about emissions of regulated pollutants into the air and water and disposed of as waste. Since 1997 these ~~pollution release and transfer PRTR~~-type registers have ~~started to become been~~ publicly accessible.

Step 2—Organize the information: Under national law, public authorities can be obliged to compile the reported information and place the raw data in some type of inventory or register that organizes the information by different criteria. Mechanisms ensuring the adequate flow of information from the private sector to the public authorities usually ~~mean~~require different reporting schemes for the different environmental media. In practice, these have tended not to be integrated and are proved difficult to use for the coherent prevention, control and minimization of pollution. However, good PRTR systems take some countries take or are developing an integrated approach to reporting and to their own internal organization of the reported information. A new Croatian law requires the information collected under ~~this~~-its reporting system to be organized in a register consisting of data on sources, types, quantities, manner and place of introduction, and release or disposal of harmful substances into the environment. The registers are maintained by the county or town department responsible for environmental matters. In order to establish a uniform manner of registering data, the State Directorate has prepared and provided to county and town register subscribers common programme equipment for the development and maintenance of the register. Beginning in 1998, seminars were held for officials using the equipment and in charge of collecting data.²⁰⁹

Step 3—Make the information publicly accessible: Countries ~~developing a pollutant release and transfer system can put the information in the public sphere. For example, under Council Directive 96/61/EC concerning integrated pollution prevention and control, the results of release monitoring as required under the permit conditions must also be made available to the public, as well as the three year inventory. In the United States, Toxics Release Inventory data are available on paper, CDROM, microfiche and via the Internet. developing a PRTR system should make the information publicly available. In PRTR systems, data may be available on paper, CD-ROM, microfiche and via the Internet.~~ Public outreach programmes and training aim to increase public awareness and use of the data.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

As discussed in detail above, article 4, paragraphs 3 and 4, lists the exceptions that public authorities can invoke to withhold information requested under article 4.

Article 5, paragraph 10, states that the obligations in article 5 to collect and disseminate certain kinds of information will not prejudice the right of Parties to employ these exceptions to refuse a request for information under article 4. But there are limits within article 4 itself as to the conditions under which grounds for refusal can be asserted.

So, if there is an imminent threat to public health or to the environment, the public authority has a duty to disseminate this information in accordance with article 5, and it is unlikely that it would be able to claim an exception under article 4. Where threats are imminent, or in an emergency, none of the exemptions that are theoretically applicable under article 4 could be applied, because each of them includes a "public interest test". Thus, in a hypothetical situation where there is a leak, or an imminent threat of a leak, in a nuclear power station, the environmental and human health implications would take precedence over any ~~national~~public security interest, and require information to be disclosed. However, if a person requests information about ~~a~~the potential for a leak at a

nuclear facility in the future and the government refuses to give the information claiming a ~~national~~ public security exception under article 4, paragraph 4 (b), the applicant's claim might not automatically prevail ~~over the national security exception~~.

In short, notwithstanding the wording of article 5, paragraph 10, the ~~duties~~ duty to disseminate certain information ~~according to~~ under article 5 might in certain circumstances prevail ~~over refusals to release it, based on an exception under article 4~~ over the grounds for refusing disclosure in article 4, taking into account the public interests served by disclosure.

Comment [M531]: Edits (editorial team)

Pillar II

PUBLIC PARTICIPATION IN DECISION-MAKING

Public participation in decision-making is the second "pillar" of the Convention. Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar.

In its ideal form, public participation involves the activity of members of the public in partnership with public authorities to reach an optimal result in decision-making and policy-making. There is no set formula for public participation, but at a minimum it requires effective notice, adequate information, proper procedures, and appropriate taking account of the outcome of public participation. The level of involvement of the public in a particular process depends on a number of factors, including the expected outcome, its scope, who and how many will be affected, whether the result settles matters on a national, region or local level, and so on. ~~Many speak of a "ladder" of participation, in which members of the public have the most power—even approaching direct democratic decision-making—with respect to local matters with no impact outside the community. As issues become more complex and involve more global issues and affect larger numbers of people, the role of individual members of the public diminishes and the role of politicians and public authorities that must bear responsibility for such decisions becomes greater. The involvement of the public can pass through various stages as one climbs up the ladder—from direct decision-making to administrative status, participation, consultation, to the right to be informed only.~~ In addition, different persons may have different status in connection with participation on a particular matter. Those who are most affected by the outcome of the decision-making or policy-making should have a greater chance to influence the outcome. This is behind the distinction between "public" and "public concerned."

Comment [FL532]: Deletion (editorial team)

Purpose of the public participation pillar

All ~~good~~ ~~responsible~~ public authorities take advantage of the interest and the energy of the public. As decisions become increasingly complex, this factor becomes less a matter of good practice and more a matter of ~~urgency~~ ~~necessity~~. ~~The importance of fully integrating environmental considerations into governmental decision-making requires public authorities to be in possession of accurate, comprehensive and up-to-date information (see also preambular paragraph 16). The public can be a major source of this information. Fortunately, the public often has the desire to take part in the process of gathering information and discussing options for decision-making, both out of self-interest and because of their responsibility to protect the environment. But this requires an open, regular and transparent process in which the public can have confidence. By providing such a framework in which the public can exercise its rights to information, association and participation, Parties can achieve two goals simultaneously—improve the ability of authorities to carry out their responsibilities and provide the necessary conditions for the people~~ ~~members of the public~~ to enjoy their rights and meet their own obligations.

Comment [FL533]: Edit (editorial team)

Comment [FL534]: Deletion (editorial team)

Comment [FL535]: Deleted in accordance with Croplife's comments.

The articles in the second pillar serve as a reminder to public authorities that it is vitally important to allow public participation to do its job fully. While it may be tempting to cut corners to reach a result that might appear on the surface to be the best, there are countless cases where unexpected or hidden factors became apparent only through a public participation process, with the result that potentially costly mistakes were avoided.

Furthermore, even where the original proposal is not substantially changed as a result of public participation, the successful implementation of the final decision can be promoted through the active and real participation of the public during the decision-making. Conversely, public participation that is merely pro forma—that takes place when options are foreclosed—can injure the chances for successful implementation of a decision because of the questionable legitimacy of the process.

It must be emphasized that public participation requires more than simply following a set of procedures; it involves public authorities genuinely listening to public input and being open to the possibility of being influenced by it. Ultimately, public participation should result in some increase in the correlation between the views of the participating public and the content of the decision. In other words, the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input.

What is public participation under the Convention?

"Public participation" is not expressly defined in the Convention. The preamble, however, recites some of the values and considerations at the heart of public participation. The most fundamental of these is the role of public participation in ensuring a mechanism for the public to assert the right to live in an environment adequate to health and well-being, and to fulfil its duty to protect the environment. The preamble also reminds us that public participation enhances the quality and implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns, and enables public authorities to take due account of such concerns. Public participation also furthers accountability of and transparency in decision-making and strengthens public support for decisions on the environment.

In the main text, the Convention shows how public participation should work in the case of certain decision-making and policy-making processes. From this, it ~~can be deduced~~ is evident that public participation should be timely, effective, adequate and formal, and contain information, notification, dialogue, consideration, and a response. The public participation provisions of the Convention are divided into three parts, according to the kinds of governmental processes covered. Article 6 covers public participation in decisions on specific activities with a potential significant effect on the environment, for example decisions on the proposed siting, construction and operation of large facilities, or of certain types of facilities, often over a certain size, as well as other activities for which an environment impact assessment procedure including public participation is required under national law. Article 6 also covers public participation regarding genetically modified organisms to the extent feasible and appropriate, decisions on the deliberate release of GMOs. At its second session, the Meeting of the Parties adopted an amendment to the Convention, whose provisions, when in force, will supersede those of article 6 with respect to decisions on the deliberate release and placing on the market of GMOs. Article 7 covers public participation in the development of plans, programmes and policies relating to the environment, which include sectoral or land-use plans, environmental action plans, and environmental policies at all levels. Article 8 covers public participation in the preparation by public authorities of laws and regulations.

Comment [WX536]: Edit (editorial team)

The Convention establishes firm obligations that Parties must meet in providing for timely, adequate and effective public participation. Among these are requirements concerning notification, timing, relevant information, commenting, response, and communication. The Convention also urges Parties to promote public participation through other mechanisms, such as encouraging project proponents to interact with the public at a preliminary stage. More precise obligations are established under article 6, in recognition that a high level of involvement of the public, adequately guaranteed by law, is appropriate in specific types of decision-making, reflecting the principle that those who are affected should have the right to influence the decision-making process. Greater

flexibility is offered to Parties in meeting the obligations of articles 7 and 8, especially with respect to policies and draft laws.

Article 3, furthermore, reminds Parties that the Convention's provisions, including the provisions in articles 6, 7 and 8, are minimum requirements and that Parties have the right to provide more extensive public participation in decision-making.

Public participation under international law

Aspects of public participation can be found in a number of other international instruments. As early as 1982, the World Charter for Nature, adopted by the United Nations General Assembly in its resolution 37/7 of 28 October 1982, provided persons with the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment (para. 23). In Europe, the Council of Europe Resolution No. 171 (1986) of the Standing Conference of local and regional authorities of Europe on regions, environment and participation included very specific provisions on public participation in environmental decision-making.

Prior to the adoption of the Aarhus Convention, the UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) contained the most developed public participation provisions of any UN/ECE convention. In its article 2, paragraphs 2 and 6, and article 4, paragraph 2, it established that the assessment of proposed activities with a potential significant transboundary environmental impact should take place with the participation of the public in the areas likely to be affected. The 1992 [United Nations Framework Convention on Climate Change](#), article 6 (a) (iii), requires Parties to promote and facilitate public participation in addressing climate change and its effects and developing adequate responses. The 1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents, in its article 9, paragraph 2, requires a Party under whose jurisdiction an industrial accident may occur to give opportunities for participation to the public in affected areas, without regard to borders.

The general principles developed through these and other international instruments were set forth in the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro on 14 June 1992. Its principle 10 states that environmental issues are best handled with the participation of all concerned citizens, and declares that each individual shall have the opportunity to participate in decision-making processes, facilitated by the widespread availability of information. Agenda 21, also adopted at the Rio Conference, provides details on the methods and best practices for achieving sustainable development, and gives a great deal of attention to public participation.

More recent international instruments have followed the direction taken by the Rio Declaration [and in some cases, the Aarhus Convention itself](#). The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 1994), at articles 3 (a) and 4.2 (e) and (f), repeats earlier formulations calling for public participation in relevant decision-making and the need for Parties to facilitate action. It also specifically mentions public participation in several types of processes, including policy planning, decision-making, and implementation and review of national action programmes.

Several instruments have followed the direction of the Aarhus Convention itself. [Such instruments include the –Protocol on Water and Health adopted in London in 1999 under the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which, in its preamble, takes note of the Aarhus Convention and in article 5, paragraph 1, includes the three Aarhus Convention pillars among the principles and approaches in by which the Parties to the Protocol shall be guided in](#)

implementing the Protocol. Article 6, paragraphs 2 and 5, expressly provide for public participation in the establishment of targets for the standards to be maintained for protection against water-related disease and in the development of water management plans.

~~and the~~ The Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment adopted Kiev in 2003 under the Espoo Convention also acknowledges the Aarhus Convention and the importance of providing for public participation in SEA in its preamble. The SEA Protocol includes public participation in its definition of SEA in article 2, para 6 and in article 5, para 3 and article 6, para 3, provides for public participation in the screening and scoping of plans and programmes. Article 8 sets out more detailed requirements for public participation in the SEA of plans and programmes. The SEA Protocol entered into force on 11 July 2010

Comment [WX537]: Inserted (editorial team)

~~A project under the auspices of the Economic and Social Council of the United Nations has resulted in the draft declaration of principles on human rights and the environment. Its paragraph 18 states that all persons have the right to “active, free and meaningful participation in planning and decision making activities and processes that may have an impact on the environment and development”, including prior assessment of proposed activities. Finally, the Sofia Guidelines on Access to Environmental Information and Public Participation in Environmental Decision making, endorsed by the environment ministers of the UNECE region in 1995, included nine detailed paragraphs on public participation and was the starting point for the negotiation of the Aarhus Convention.~~

The Aarhus Convention and environmental assessment

Public participation is often identified with environmental assessment. Environmental assessment has been described as one of the more successful policy innovations of the 20th century²¹⁰. It is a formal process which by the time of the Convention’s negotiation was already used in more than 100 countries and international organizations to help decision-makers consider the environmental consequences of proposed actions. When it is applied to specific activities (development projects), environmental assessment usually takes the form of environmental impact assessment (EIA) or –when applied to strategic activities like planning or programming, strategic environmental assessment (SEA) - (see box below).

The scope of application of the second pillar of the Aarhus Convention is, however, much broader than the scope of application of environmental assessment. For example article 6 applies also to the reconsideration or updating of the operating conditions of specific activities, which in many countries, unless related to a major change in the activity, are not subject to an EIA procedure but rather to environmental permitting, e.g. the IPPC permit required in EU Member States (see commentary to article 6). Similarly, article 7 applies to plans and programmes “relating to the environment” which is a much broader concept than plans and programmes “likely to have significant environmental effects” which are usually subject to SEA (see commentary to article 7). The Aarhus Convention does not stipulate that an environmental assessment must be a mandatory part of public participation procedures nor does it regulate the situations where environmental assessment is required.

Thus, one can conclude that while public participation is a mandatory part of environmental assessment, an environmental assessment is not a mandatory part of a public participation procedure under the Aarhus Convention, as the Convention covers a broader scope.

Concepts of EIA and SEA

The Guidelines For Incorporating Biodiversity-Related Issues Into Environmental Impact Assessment Legislation Or Processes And In Strategic Impact Assessment (Decision VI/7 adopted by the Conference of the Parties to the UN Convention on Biological Diversity (UNEP/CBD/COP/6/20) provide the following explanation of the EIA and SEA and the differences between them.

“Environmental impact assessment is a process of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse....”

“Strategic environmental assessment is the formalized, systematic and comprehensive process of identifying and evaluating the environmental consequences of proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of decision-making on a par with economic and social considerations.

“Strategic environmental assessment, by its nature, covers a wider range of activities or a wider area and often over a longer time span than the environmental impact assessment of projects. Strategic environmental assessment might be applied to an entire sector (such as a national policy on energy for example) or to a geographical area, (for example, in the context of a regional development scheme)....”

Formatted: Justified

Despite the differences between EIA and SEA processes, the applicable legal frameworks, at both the national and international level, have many similar features that distinguish them from other procedures applied in environmental decision-making. They both relate to proposed or planned - as opposed to existing - activities, and they both involve preparation of documentation meeting certain requirements, including a discussion of the environment likely to be affected, of alternatives to the activity, and of the potential impact of the proposed activity and its alternatives. They also include similar procedural steps, including “screening” to determine which activities require assessment and “scoping” to determine the scope of the assessment. An important feature that distinguishes EIA and SEA from other procedures applied in environmental decision-making is that they do not necessarily need to be applied -to decision-making which is strictly or exclusively “environmental”. In practice, both EIA and SEA are often applied in relation to decisions where environmental considerations constitute only some of the factors, and not necessarily the most important ones, to be taken into account by the authority competent to make the decision. As the decision-making authority will not necessarily be an environmental authority, both EIA and SEA procedures usually require environmental authorities to be consulted before taking the decision. Finally, all the international instruments related to environmental assessment, whether they are concerned with environmental impact assessment (EIA) or strategic environmental assessment (SEA), and whether binding or non-binding, make public participation a core element of the assessment procedure (see box).

Elements of EIA and SEA procedures

The Espoo Convention, in article 1 (vi), defines EIA as follows:

““Environmental impact assessment” means a national procedure for evaluating the likely impact of a proposed activity on the environment;”

Article 2 paragraph 2, of the Espoo Convention stipulates that this requires:

‘the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.’

The SEA Protocol, in article 2, paragraph 6, defines SEA as follows:

“Strategic environmental assessment” means the evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.’

Environmental assessment is a very useful tool in ensuring effective public participation in decision-making: without environmental assessment documentation, the public usually have no easy access to reports or studies -evaluating the environmental and health risks of an activity that would enable the public to develop and express their own science-based opinions on the issue. However, while environmental assessment, in the form of EIA or SEA, plays an important role in facilitating the effectiveness of public participation under articles 6 and 7 of the Convention, EIA and SEA are not mandatory under the Convention.

Article 6 versus article 7 decisions

Because different national regulatory frameworks may provide for decisions of various names and legal character, it is not always obvious whether a particular type of decision amounts to a permit decision under article 6 or a decision to adopt a plan or programme under article 7 of the Convention. As observed by the Compliance Committee, the “Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions”²¹¹ The Committee has held that the issue must be determined on a contextual basis, taking into account the legal effects of the particular decision.²¹² It has also held that in determining whether a particular decision is an article 6 or 7 decision, its label under the domestic law of the Party is not decisive, rather it will depend on the legal functions and effects of the decision.²¹³

For example, in ACCC/C/2006/16 (Lithuania), the Compliance Committee had to determine the legal nature of decisions called “detailed plans” in Lithuanian law. The Committee held that, under Lithuanian law, such decisions:

“have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention.”²¹⁴

In its findings on communication ACCC/C/2005/12 (Albania), the Committee held that a challenged decision on an industrial and energy park had:

“more the character of a zoning activity, i.e. a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not). This would link it more closely with article 7.”²¹⁵

In contrast, the Committee found that another of the decisions challenged by the communicants:

“simply designates the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, it is more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant.”²¹⁶

In the light of the above findings of the Compliance Committee, it has been one commentator has suggested that certain elements may assist with classifying a decision as falling under article 6 or article 7.²¹⁷ An article 6 decision is typically (i) an individual decision issued by an administrative organ, (ii) usually upon an individual application by an applicant for a permitting decision (usually a developer or operator of an existing installation), (iii) permitting a particular activity (development project) to be undertaken by the applicant, (iv) in a specific place and under specific conditions, and (v) usually following the general requirements set by the plans or programmes setting the framework for such activities.

Comment [M538]: Edit (editorial team)

In comparison, a typical article 7 decision (plan or programme) has a legal nature of: (i) a general act (often adopted finally by a legislative branch), (ii) initiated by an administrative authority, which (iii) sets, often in a binding way, the framework for certain categories of specific activities (development projects) and which (iv) usually is not sufficient for any individual activity to be undertaken without an individual permitting decision.

Implementing public participation

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

	General requirements	Implementation guidance
Article 6	<ul style="list-style-type: none"> • Conduct public participation early in decisions on activities with a possible significant environmental impact • Give notice to the public concerned • Establish reasonable time-frames for phases of public participation • Provide all relevant information to the public concerned • Provide opportunities for the public to make comments • Take due account of the outcome • Inform the public of the final decision with reasons 	<ul style="list-style-type: none"> • Develop criteria for evaluating significance for of non-listed activities • <u>Identify which decisions “permit” activities and of these decisions, which should be subject to public participation requirements</u> • Ensure that decision makers have a legal basis to take environmental considerations into account • Develop incentives for applicants to engage in early dialogue • Set guidelines and standards for the quality of relevant information • Establish clear procedures for submitting comments in writing or at hearings • Supervise how public authorities take comments into account • Clearly define any exemptions • Flexibility in setting time-frames • May facilitate public participation through early dialogue with the applicant • May apply information exemptions • May limit application to decisions on GMOs if not “feasible and appropriate” • <u>Establish clear procedures for promptly informing the public of the final decision</u> • <u>(For Parties that have not ratified the GMO amendment) May limit application to decisions on GMOs if not “feasible and</u>

Formatted: Justified

Comment [M539]: Deletion – see insertion below (editorial team)

Formatted: Font color: Auto

		<p>appropriate"</p> <ul style="list-style-type: none"> • <u>(For Parties that have ratified the GMO amendment) Ensure early and effective information and participation on decisions on GMOs, in accordance with the modalities in annex I bis</u>
Article 7	<ul style="list-style-type: none"> • Establish a transparent and fair framework for public participation in plans and programmes relating to the environment • Identify participating public • Conduct public participation early in development of plans and programmes relating to the environment • Give necessary information to the public • Establish reasonable time-frames for public participation • Take due account of the outcome 	<ul style="list-style-type: none"> • <u>Develop a list or clear criteria for identifying plans, programmes and policies relating to the environment</u> • Develop clear rules for participation • Develop mechanisms for notification • Set guidelines and standards for the quality of necessary information • Develop tools for the identification of the participating public • Supervise how public authorities take comments into account • Establish policies for public participation in policy-making • Flexibility in means (practical and/or other provisions) • Flexibility in setting time-frames • Broad latitude in how to provide public participation in preparation of policies
Article 8	<ul style="list-style-type: none"> • Promote public participation in the preparation of laws and rules with potential environmental impact • Establish sufficient time-frames for public participation • Publish or publicize drafts • Provide opportunities for the public to make comments • Take due account of the outcome 	<ul style="list-style-type: none"> • Develop clear rules for participation • Develop criteria for evaluating significance • Establish a reliable and regular vehicle for publishing drafts • Establish clear procedures for submitting comments in writing or at hearings • Supervise how public authorities take comments into account • Flexibility in setting time-frames • Broad latitude in how to provide public participation in preparation of laws and rules • Flexibility in taking due account of outcome

Comment [M540]: Insertion (editorial team)

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

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

Comment [M541]: Edited for clarity (editorial team)

Comment [M542]: Deleted for clarity (editorial team)

The Convention recognizes that people have the right to take part in basic decisions affecting their lives. It also recognizes that the quality of these decisions can be improved through the active involvement of the public concerned. Public participation in decision-making pulls together many of the threads of the Convention into concrete results, and thus is one of its most important subjects. Article 6 is to be enforced by article 9, paragraphs 2 and 3.

Provision	Obligation	Implementation guidance
Article 6, paragraph 1	Requires Parties to guarantee public participation in decision-making with a potentially significant environmental impact	<ul style="list-style-type: none"> • List of activities (annex) • Non-listed activities • National defence exemption
Article 6, paragraph 2	Sets requirements for notifying the public concerned about the decision-making	<ul style="list-style-type: none"> • Early in the process • "Adequate, timely and effective" • Minimum contents • <u>Means of notification</u> • <u>Sufficient scope of public concerned</u>
Article 6, paragraph 3	Sets time-frames for public participation procedures within a decision making process	<ul style="list-style-type: none"> • Specific time limits must be established <u>for different phases</u> • Must provide enough time for notification, preparation and effective participation by the public
Article 6, paragraph 4	Requires that public participation take place early in decision-making	<ul style="list-style-type: none"> • Options are open • Public participation may not be pro forma
Article 6, paragraph 5	Encourages exchange of information between permit applicants and the public	<ul style="list-style-type: none"> • <i>Before</i> permit application • Provide explanations • Enter into dialogue
Article 6, paragraph 6	Requires public authorities to provide the public concerned with access to all information relevant to the decision-making	<ul style="list-style-type: none"> • Free of charge • As soon as available • Article 4, paragraphs 3 and 4, exceptions may apply • Minimum contents

Formatted: Justified

Article 6, paragraph 7	Procedures for public participation	<ul style="list-style-type: none"> • In writing or public hearing • <i>Any</i> comments, information, analyses or opinions • Public to judge relevance 	<p>Formatted: Justified</p>
Article 6, paragraph 8	Parties must ensure that decision takes due account of public participation	<ul style="list-style-type: none"> • <u>Reasons and considerations provide evidence of public participation and due account taken</u> 	<p>Formatted: Normal, Left, Indent: Left: 0", Space Before: 0 pt, Border: Top: (No border), Bottom: (No border), Left: (No border), Right: (No border), Between : (No border), Bar : (No border)</p>
Article 6, paragraph 9	Public must be informed of final decision	<ul style="list-style-type: none"> • Promptly • <u>Practical arrangements to make publicly accessible the texts along with reasons and considerations</u> • <u>Reasons and considerations</u> 	<p>Formatted: Justified</p> <p>Formatted: Default Paragraph Font, Font: 9 pt</p> <p>Formatted: Font: 9 pt</p>
Article 6, paragraph 10	Public participation if activities are reconsidered or changed	<ul style="list-style-type: none"> • Public authority • Paragraphs 2 to 9 apply 	<p>Formatted: Justified</p> <p>Formatted: Justified</p>
Article 6, paragraph 11 (original)	Decisions on GMOs	<ul style="list-style-type: none"> • Article 6 shall apply • To extent "feasible and appropriate" 	<p>Formatted: Justified</p>
<u>Article 6, paragraph 11 (amended)</u>	<u>Decisions on whether to permit deliberate release and placing on the market of GMOs</u>	<ul style="list-style-type: none"> • <u>Article 6 shall not apply</u> 	<p>Formatted: Justified</p>
<u>Article 6 bis</u>	<u>Decisions on whether to permit deliberate release and placing on the market of GMOs</u>	<ul style="list-style-type: none"> • <u>Early and effective information and participation</u> • <u>In accordance with modalities in annex I bis</u> 	<p>Formatted: Justified</p> <p>Formatted: Justified</p>

Article 6 sets certain requirements for public participation during decision-making on specific activities. It applies in the first place to decisions on whether to permit the proposed activities. This means mainly specific administrative decisions—in other words, decisions made to permit a particular proposed project, activity or action to go forward. The forms of such decisions will vary from one administrative system to another. Article 6 can apply, for example, to spatial-planning decisions, development consents, and construction and operating permits, including secondary decisions such as those relating to safety and emissions. Other examples of types of permitting include permits for water or other natural resource use, as well as permits for discharges of pollutants into the water, air or soil. Many countries also require permits for particular types of activities, such as construction or soil excavation.

Article 6 and the environmental impact assessment (EIA)

Comment [o543]: Deletion (editorial team)

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

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

EIA ~~procedure~~ is ~~normally often~~ linked closely to decisions that determine whether or not a proposed activity may proceed and may therefore be regarded as part of the decision-making process. In theory, an EIA ~~procedure~~ may reveal the likelihood of negative environmental effects from a proposed project and yet the decision may be to proceed with the project. In another situation, the converse may be the case, i.e. the EIA ~~procedure~~ may reveals a probability of no significant environmental effects and yet the decision ~~may be~~ not to proceed. Given that EIA ~~procedure~~ —often involves the most detailed examination of the environmental consequences of proceeding with a proposed activity, the findings of the EIA ~~procedure~~ often ~~effectively correlate with~~ determine the decision itself (see commentary to article 6 paragraph 8).

Comment [WX544]: Edit (editorial team)

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held that:

“the Convention does not make the EIA a mandatory part of public participation; it only requires that when public participation is provided for under an EIA procedure in accordance with national legislation (paragraph 20 of annex I to the Convention), such public participation must apply the provisions of its article 6. Thus, under the Convention, public participation is a mandatory part of the EIA, but an EIA is not necessarily a part of public participation. Accordingly, the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in particular the decisions that there is no need for environmental assessment, even if such decisions are taken in breach of applicable national or international laws related to environmental assessment, and cannot thus be considered as failing to comply with article 6, paragraph 1, of the Convention”^{Z18}

Comment [E545]: Edit footnote : at request of Germany

International and regional instruments on EIA

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

Both, significantly, oblige parties or member States to take the necessary measures to establish an EIA procedure for specified activities (Espoo Convention, article- 2, paragraph- 2, and EIA Directive, article- 2 (1) that allows the public to participate. The Directive, for example, requires member States to ensure that projects likely to have significant effects on the environment "are made subject to a requirement for development consent and an assessment with regard to their effects". As the European Community-Union is a Party Signatory to the Aarhus Convention, its EIA Directive will have been to be adapted to it through the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC ("Public Participation Directive").

Even if the Aarhus Convention does not establish an EIA regime per se, its article 6 does establish a kind of review of the environmental impacts of particular activities, where decision-making in relation to them takes place. That is because it is implicit in the Convention that public comments in relation to environmental matters must be taken into account (art. 6, para. 8). For them to be taken into account, the decision maker must have a legal basis for doing so. Consequently, the law must allow environmental considerations to be one of the factors in decision-making. Furthermore, the specific requirements of article 6 with respect to notification and its contents, procedures for taking public comments into account, and the effect of the public participation on the resulting decision, significantly corresponds owe a lot with to the emerging international norms of EIA.

Comment [M546]: Edit (editorial team)

Public participation in the OVOS/expertiza system

A specific form of decision-making incorporating with EIA procedures may be found in many countries in the UNECE region, which have developed the concept of "state expertiza". This is a separate permitting procedure, requiring permission (that is, a positive conclusion) for planned activities which have a potentially significant impact on the environment to go forward. The proposed activities are subjected to a "state environmental expertiza" conducted by the competent environmental authorities or by external experts nominated by the competent environmental authorities, and to the so-called "OVOS" procedure. The OVOS is a procedure during which the developer collects all the necessary information concerning the potential impact on the environment of the proposed activity and compiles the relevant impact assessment documentation-. The OVOS procedure is not itself a permitting procedure but is closely connected to the development of the overall project documentation-. In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the OVOS and expertiza should be considered jointly as a decision-making process involving a form of an EIA procedure and that the conclusions of environmental expertiza should be considered as a decision whether to permit an activity. The Committee noted however that there are some differences with respect to public participation under the regulatory framework of the OVOS/expertiza system and the EIA procedure applied in other countries. For example, in the OVOS/expertiza system it is usually the developer who is responsible for organizing public participation at the OVOS stage of the procedure, including notifying the public, making available the relevant information and collecting the public's comments, while at the expertiza stage public participation is provided

Comment [M547]: Edit (editorial team)

through so-called “public environmental expertiza”²¹⁹.

Comment [M548]: Edit (editorial team)

~~The Compliance Committee, in its findings on communications ACCC/C/2007/16 (Lithuania) and ACCC/C/2009/37 (Belarus),—It held, however, that relying on the developer at the OVOS stage to carry out the public participation was not in line with the Convention. The Committee recommended appropriate changes be made in the Party concerned’s legal framework be made.~~²²⁰

Comment [M549]: Edit (editorial team)

Comment [E550]: Edit footnote : at request of Germany

~~In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee— The Committee also held— that since the organization of public environmental expertiza by the public authority was not a mandatory part of the decision-making it could ~~ann~~not be considered as a primary tool to ensure the implementation of article 6. It may however have a role as an additional measure to complement the public participation procedure required as a mandatory part of the decision-making.~~²²¹

Comment [M551]: Edits (editorial team)

Comment [E552]: Edit footnote : at request of Germany

Multiple permits

Most UNECE countries require some type of assessment of the potential environmental impact of certain projects or activities before issuing a permit. This assessment is typically carried out by authorities at the level most relevant to the proposed activity or by an applicant or proponent of a project under their supervision. For example, local authorities will generally have authority to approve projects with solely local impact, while regional authorities may approve projects with an impact throughout a watershed. Some countries also require separate issuance of more than one permit, each of which may have environmental consequences.

In this regard, the Compliance Committee has had to address the question as to whether the Convention requires the public participation procedures in article 6, paragraphs 2 to 10, to be applied in all, or all environment-related, permitting processes or just some of them. In its report to the third session of the Meeting of Parties (Riga, 11-13 June 2008)²²² the Committee expressed the view that:

“not all the decisions required within national frameworks of regulatory control in relation to activities listed in annex I to the Convention should necessarily be considered as “decisions on whether to permit proposed activities” to which the full range of public participation procedures should apply. On the other hand it does not mean that it would necessarily be sufficient to provide for public participation according to article 6 in only one such decision. In fact, many national frameworks require more than one such permitting decision, and to limit public participation opportunities to only one such decision would not always be sufficient to fulfil the requirements of the Convention. Furthermore, development of large-scale projects often has long span and certain significant elements as projected at an early stage might later require substantial modification. While public participation at an early stage remains crucial, significant modifications of the project’s elements might call for further consultations at later stages”²²³.

The Committee held that it therefore:

“considers that the issue will have to be decided on a contextual basis, taking the legal effects of each decision into account. Of crucial importance in this respect will be to examine to what extent such a decision indeed “permits” the activity in question. If there are more than one such permitting decision, some kind of significance test seems to be the most appropriate way to understand the requirements of the Convention. The test should be: does the permitting decision, or range of permitting decisions, to which all the elements of the public participation procedure set out in article 6, paragraphs 2 to 10, apply embrace all the basic parameters and main environmental implications of the proposed activity

in question? If, despite the existence of a public participation procedure or procedures with respect to one or more environment-related permitting decisions, there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the above basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention²²⁴.

Decisions on whether to permit certain kinds of activities vs other types of decisions

Besides regulatory decisions, in many countries there may be a range of decisions, often taking the form of resolutions, which allow for contracts or agreements to be concluded between public authorities or between public authorities and private companies. Such decisions may in practice limit the range of options available to some extent. Such decisions may have various names and legal character. One possible example could be an agreement between a city council and a private developer for a housing development. This might include an obligation for the city council to take the steps necessary to reclassify part of the lands where the houses would be constructed, from “non-residential” to “residential”. Another example might be a resolution by local authorities to launch a tender procedure for a concession for a private operator carry out public services related to waste management. Such decisions would not necessarily require public participation under article 6 or 7 of the Convention. This was noted by the Compliance Committee in its findings on communication ACCC/C/2007/22 (France), in relation to resolutions by local authorities regarding a contract with a private company regarding a waste disposal plant. In its findings, the Committee found that “while there may be many good reasons to provide public participation also before adopting municipal resolutions of this kind” they are not subject to article 6 or 7 of the Convention, despite the fact that they narrowed down the scope of options allowed under the applicable plans, so long as they “neither had any legal effect on these plans, nor conferred any right to construct or operate the waste treatment centre or to use the site, nor in any other respect did they entail legal effects amounting to that of the applicable planning instruments.”²²⁵

In its findings on communication ACCC/C/2007/21 (EC/European Community), the Compliance Committee held that in general a decision of a financial institution to provide a loan or other financial support is legally not a decision to permit an activity, as is referred to in article 6 of the Convention.²²⁶

Comment [M553]: Edit (editorial team)

Comment [E554]: Edit footnote : at request of Germany

Integrating environmental considerations into decisions on specific activities
Multiple permits in European Union law

The requirements relating to public participation in decisions whether to permit proposed activities subject to article 6 of the Convention have been included into two EU directives: Council Directive 85/337/EEC of 27 June 1985 (as amended) on the assessment of the effects of certain public and private projects on the environment (“EIA Directive”) and Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (codified version) which replaced Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (“IPPC Directive”).

The EIA Directive requires EIA procedure, including public participation in line with the requirements of article 6, to be conducted before the issuing of a decision (so called

“development consent”) to permit a project (specific activity) likely to have significant effects on the environment. If national law provides for a consent procedure comprising more than one stage, the EIA Directive has been interpreted by the European Court of Justice²²⁷ to require that the EIA procedure must be carried out at an early stage where the basic parameters are set, and - if not all effects on the environment are identifiable at the early stage- at a later stage as well.

Comment [MSOffice555]: Edit : EU (footnote added)

The IPPC Directive requires that no installation subject to the Directive is to be operated without a permit issued in accordance with the Directive and that public participation in line with the requirements of article 6 must be conducted before the issuing of a permit.

Thus, in light of the EIA and IPPC Directives, public participation is required in all EU Member States at an early stage in the approval of an activity (when the basic parameters, including its type, size and location, are being decided) and then again at later stages (up until the stage where the precise technology and resulting emissions are approved in the integrated permit). Furthermore, a new development consent (with EIA and public participation) is required in the case of any changes or extensions to projects subject to the EIA Directive that are already executed and which are likely to have significant effects on the environment, or where an IPPC permit (with public participation) is periodically reconsidered and updated.

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

While EIA is the most familiar process within decision-making covered by article 6, the article also applies to other decision-making where EIA type procedures do not apply. For example, in most countries in addition to the EIA procedures which may apply while granting development consents for activities covered by article 6, such activities may require special environmental permits before starting operation. As is the case for integrated permits under the IPPC Directive (see box), such permits will also require public participation under article 6. Furthermore, while EIA procedures do not typically apply to existing activities unless a significant change is involved, the reconsideration or updating of operating conditions for activities covered by article 6 usually takes the form of such environmental permits and require public participation under article 6, paragraph 10. Finally, article 6 ~~it might~~ may potentially apply ~~in accordance with national law~~ to a variety of, for example, to specific regulatory decisions regarding proposed activities which may have a significant effect on the environment, with a potential environmental impact such as rate-setting or approvals for the introduction of new products into commerce or of alien species into the environment, or decisions to initiate a remedial action in case of environmental damage. It may apply to decisions for the renewal or modification of existing permits or approvals for the introduction of new products into

Comment [MSOffice556]: Insertion : Denmark

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

The obligation to provide opportunities for public participation may apply to different environmentally significant decisions in the course of a particular approval process, depending on what kind of permit system a Party uses. As a result, in implementation, Parties may be obliged to establish mechanisms to guarantee the participation of the public at several steps along the way in the conception, initiation, development, operation, and even closing-down of projects, facilities, and other activities with potential significant effects on the environment. The key question is whether the particular decision-making meets the triggering requirements of article 6, paragraph 1.

As discussed earlier, the Compliance Committee has held that the names of decisions under the domestic law of a Party are not decisive to determining how they should be categorised under the Convention, rather this is to be determined by the legal functions and effects of the decisions.²²⁸ While decision-making on plans, programmes and policies in general is regulated by article 7 (see commentary to article 7), article 6 may apply when such planning is concerned with a concrete activity. For example, the **United Kingdom's Town and Country Planning General Regulations (1992)** regulate the issue of *planning permission*. Despite the term, such decisions are normally considered as specific decisions concerning development of a specific land plot.

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

In understanding article 6, it must be kept in mind that, through article 9, paragraph 2, the public has access to justice to defend its rights and interests with respect to the procedures of article 6. (See also the commentary to article 9, paragraph 2.)

Finally, it should also be made clear that rights under the Convention are independent of the rights of parties to an administrative proceeding as determined under applicable domestic law. Parties to a proceeding may have specific legal rights in addition to those granted to the public or to the public concerned under the Convention. Members of the public or of the public concerned under the Convention might also have the right to become parties to the proceeding.

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

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

Subparagraphs (a) and (b) together establish a test for determining whether certain proposed activities shall be subject to article 6. They are linked by their consideration of the potentially significant impact of proposed activities on the environment.

Subparagraph (a) makes use of an annex of listed activities that are presumed to have a potential significant effect on the environment. Subparagraph (b) establishes an obligation for Parties to include under article 6 other activities not contained in the annex that may have a significant effect on the environment. Paragraph 1 as a whole has been drafted with reference to article 2 (1) of the EIA Directive, its annexes, and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC).⁴²⁴ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (codified version). The Conventions uses the term “proposed activity” which is also found in the Espoo Convention and is broad enough to cover both the terms “project” in the EIA Directive and the “installation” used by the IPPC Directive.

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

"Proposed activity"

While not defined in the Aarhus Convention, the term "proposed activity" is used in the Espoo Convention, which defines it as "any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure" (art-icle 1 (v)).

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

Finally, some activities that would normally fall under subparagraph (a) may be exempt from the requirements of article 6, if they exclusively or mainly involve research and the development and testing of new methods, with certain restrictions (see commentary to annex I, paragraph 21).

Article 6, paragraph 1 (b), requires that, for decisions on proposed activities not listed in annex I, each Party shall determine, in accordance with its national law, whether the activity ~~might~~ may have a significant impact on the environment. If this is the case, article 6 must be applied. To answer any questions about who shall decide on the application of article 6 to activities not listed in annex I, the Convention provides that "Parties shall determine whether such a proposed activity is subject to these provisions". Parties are given wide latitude to develop ways in which this determination shall be made. Although the text of the Convention is not very clear on this point, the word “Parties” used in subparagraph (b) should most likely be understood in the context of the chapeau of the paragraph which is addressed to “each Party”. That is to say, it is up to each Party to make such a determination.

Comment [M557]: Edit (editorial team)

It is not clear from the wording of the subparagraph whether Parties must develop other categories of activities for the application of the article in addition to those found in annex I, or whether they must develop guidelines for the application of the Convention's principles by individual public authorities in decision-making on a case-by-case basis. However, it is worth mentioning that if a Party does develop additional categories of

activities subject to ~~for~~ EIA procedure, these activities would already fall under subparagraph (a) by virtue of paragraph 20 of annex I as long as public participation is required. Furthermore, paragraph 22 of annex I provides that subparagraph (b) will be applied to changes or extensions of activities listed in annex I that in and of themselves do not meet the threshold requirements of annex I. These provisions might indicate that the Convention, even though it does not expressly use the term "case by case" as it does in the following subparagraph, assumes that determinations under subparagraph (b) will be done case by case. By way of comparison, the EC Directive on EIA establishes a mandatory list of activities subject to ~~for~~ EIA procedure, and a list of activities requiring screening. The screening may be done case by case, or according to thresholds or criteria, or both (Dir. 85/337/EEC as amended, art-icle 4, paragraph- 2).

In the **Netherlands, Provincial Councils** have authority to require EIA in certain localities where special conditions, such as environmental sensitivity, prevail. In Norway, ministry-level authorities may extend EIA requirements to particularly controversial proposals.²²⁹ Slovenia also has legal provisions ~~Other legal provisions~~ regarding the power of public authorities to require EIA for non-listed activities ~~can be found in Bulgaria, Romania and Slovenia. In Bulgaria, the Environmental Protection Act, in its article 20, paragraph 3, gives discretionary power to the competent authorities to require EIA for projects recommended by concerned natural or legal persons.~~²³⁰ ~~In Romania, the relevant authorities are empowered to make a discretionary decision to require EIA based on certain criteria listed in the Environmental Permitting Procedure for identifying significant environmental impact.~~²³¹

Whether done case by case, or according to thresholds or criteria, or both, a determination under article 6, paragraph 1 (b) that a proposed activity is subject to the provisions of article 6 does not mean that the activity should be necessarily subject to an EIA procedure also. Thus, while screening for the purpose of EIA might serve as a useful mechanism to assure compliance with article 6 paragraph 1 (b), it should not be considered as the only means to determine whether an activity should be subject to provisions of article 6.

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

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

- Comment [MSOffice558]: Confirmed : Norway
- Comment [M559]: Edit (editorial team)
- Comment [MSOffice560]: Deletion: Bulgaria
- Comment [MSOffice561]: Deletion : Romania
- Comment [MSOffice562]: Deletion : Bulgaria
- Comment [MSOffice563]: Deletion : Romania

What is environmentally "significant"?

Paragraph 1 of appendix III to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context stipulates that:

"In considering proposed activities . . . , the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria:

"(a) Size: proposed activities which are large for the type of the activity;

"(b) Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;

"(c) *Effects*: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment."

EC Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended ~~by Council Directive 97/41/EC of 3 March 1997~~, includes an annex (annex III) on selection criteria for determining whether a particular project should be subject to EIA procedure. The criteria include:

- Characteristics of projects, such as the size, the cumulation with other projects, the use of natural resources, the production of waste, pollution and nuisances, and the risk of accidents;
- Location of projects, such as the environmental sensitivity of geographical areas likely to be affected by projects, including for example, wetlands, coastal zones, mountains, forest areas, nature reserves and parks, landscapes of historical or cultural significance, or densely populated areas;

Characteristics of the potential impact, including the extent of the impact in terms of geographical area and affected population, the transfrontier nature of the impact, the magnitude and complexity of the impact, the probability of the impact, and the duration, frequency and reversibility of the impact.

Following the above criteria a special Guidance for EIA screening were issued by the European Commission²³². Some countries may have developed further substantial guidelines for determining "significance" that may be of use to Parties in implementing the Convention. ~~The United Kingdom's Circular from the Department of the Environment (Circular 2/99) on Environmental Impact Assessment is one example. Romania also has criteria for establishing significance.~~

Comment [MSOffice564]: NFPs and NGOs are invited to provide relevant examples.

Formatted: Justified

As well as the question of how to determine significance, it is also important to consider who will determine it. It must be emphasized that the test of significance should be applied objectively and not in a manner to avoid public participation. In countries with developed EIA practice, authorities and applicants frequently have their determinations that potential impacts are not significant, overturned by the courts. In these cases, the public has often employed independent scientists and experts to challenge official findings.

While subparagraph (a) refers to "decisions on whether to permit", subparagraph (b) refers to "decisions on" proposed activities. This difference reflects the fact that the

activities listed in annex I, because of their recognized environmental significance, can be expected to be the subject of sophisticated permitting procedures, whereas the kinds of activities falling under subparagraph (b) might not ordinarily be subject to fully-developed permitting procedures. Furthermore, the flexibility in subparagraph (b) enables article 6 to be applied to additional forms of decision-making as their environmental significance is realized. ~~This is also consistent with the system set up by the EIA Directive.~~

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

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

When a Party deems that the application of article 6 to proposed activities would have an adverse effect on national defence purposes, the Party may decide not to apply it. The phrase "on a case-by-case basis if so provided under national law" is problematic. It is subject to at least two possible interpretations. The first is that decisions about the application or non-application of article 6 in national defence cases may be done on a case-by-case basis only if provided under national law. Otherwise, if the national law is silent, such decisions could not be made on a case-by-case basis. Presumably, this means that they would have to be made according to clear criteria, which should be found in law, that is, in a transparent and clear framework for implementation of the Convention.

The second interpretation is that the two phrases between the commas are to be read as independent elements. This would have been made more apparent if the drafters had placed a comma between "on a case-by-case basis" and "if so provided under national law". That would establish two tests before a Party could decide not to apply article 6 in a particular case. First, the national law would have to provide a legal basis for decisions not to apply article 6 in cases of national defence. Secondly, determinations could not be made categorically, but would have to be made on a case-by-case basis.

In either case, the final phrase requires that a determination be made that the application of the exemption in the particular case would have an adverse effect on national defence. Therefore, in the case of the first reading, the mere fact that a particular activity falls into a national defence category would not be enough to avoid the application of article 6. A further determination would have to be made that in the particular case an adverse effect would result. This somehow supports the second reading of the provision, because it means that *in any case* there will need to be some specific inquiry into the facts and circumstances. If the second reading is correct, then the phrase at the end adds little to what has gone before. It only confirms what will be the inquiry during the case-by-case determination—whether the application of article 6 would have an adverse effect on national defence.

Therefore, if a Party wants to provide for a national defence exemption, it can meet both readings of this provision by establishing clear national legal criteria for use of the exemption, while requiring in a particular case an inquiry into whether the application of article 6 would have an adverse effect on national defence.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of:

Paragraph 2 establishes minimum standards for the public concerned to be informed of information necessary for it to participate effectively in environmental decision-making. The obligation is stated in the passive voice in recognition of the fact that Parties can place the obligation of notification and information on different actors. In some systems it may be appropriate to place the responsibility to provide the notice on the authority/ies responsible for the ultimate decision-to provide the notice, while in others it may be appropriate to place this obligation on other authorities or bodies or sometimes on the proponent or applicant. Parties must ensure that the obligation is placed upon someone, and act as the guarantors of the process.

According to article 2, paragraph 5, "the public concerned" is the public affected or likely to be affected by the environmental decision-making or having an interest in it. The term should be seen in the light of the non-discrimination provision in article 3 paragraph 9, which means that the obligation to inform the public concerned includes also, where appropriate, the public across national borders. (See commentary to article 2, paragraph 5 and article 3 paragraph 9). In its findings on communication ACCC/C/2004/03 (Ukraine) the Compliance Committee noted that "generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance, seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention."²³³

The reference to "environmental decision-making" must be considered in the light of article 6, paragraph 1—that is, a new term is not being introduced here. Rather, the decision-making that is at issue is any decision-making included by virtue of article 6, paragraph 1, not any decision-making which is labelled environmental under national law.

How to inform the public concerned

The article provides for two methods of informing the public for the purposes of this article—public notice and individual notice. Public notice means the dissemination of particular information to as many members of the public as possible, making use of the customary means for general and widespread transmission of information. For the purposes of this article, public notice would be considered adequate so long as it effectively targets at least the public concerned with the decision. It would be considered timely so long as it targets the public concerned early enough in the procedure for public participation to be effective (see also article 6, paragraph 4). The Convention requires notice to be given to the whole concerned public at an early stage of the proceeding.

Means of notification may include publication in a newspaper or other generally available printed media, dissemination through mass media (TV, radio), through electronic means or posting of notices in areas with heavy traffic or places frequented by the local population (e.g. bus stations, churches, shops etc). The EIA Directive mentions, for example, bill-posting within a certain radius, publication in local newspapers, and the organization of exhibitions with plans, drawings, tables, graphs, models as valid means of notification.²³⁴

In its report to the third session of the Meeting of the Parties (Riga, 11-13 June 2008), the Compliance Committee observed with respect to its examination of the national reports submitted by the Parties that "there are a significant number of good practices and several advanced practical solutions to effective notification of the public concerned with regard to decision-making. These include notification in several newspapers, using local authorities as mediators, individual notification based on mailing lists, and notification in the locality of the planned activity or at places frequently visited by the public concerned." The Committee noted however that "[u]nfortunately, countries usually rely on only one of the means of notification" and suggested that "simultaneous use of several methodologies would often be significantly more effective."²³⁵

Comment [P565]: Text moved up (editorial team)

Means of notification may include publication in a newspaper or other generally available printed media, dissemination through electronic mass media (TV, radio, Internet), through electronic means or posting of notices in areas with heavy traffic or places frequented by the local population (e.g. bus stations, churches, shops etc). The EIA Directive mentions, for example, bill posting within a certain radius, publication in local newspapers, and the organization of exhibitions with plans, drawings, tables, graphs, models as valid means of notification.²³⁶

Comment [P566]: Text moved up (editorial team)

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that “journalists’ articles commenting on a project in the press or tv programmes in general do not *per se* constitute a public notice for the purpose of public participation as required under article 6, paragraph 2, of the Convention”.²³⁷

Comment [E567]: Edit footnote : at request of Germany

Individual notice—that is, dissemination of particular information to certain classes of persons individually—is possible in appropriate situations. Individual notice is especially important where individual interests might be affected by the decision. The Seveso Directive establishes zones in the immediate vicinity of facilities engaging in potentially dangerous activities. A similar approach is followed in many UNECE countries that use the concept of "sanitary zones". These zones can help to identify potentially affected people, who may then be individually notified. Individual notification is also especially relevant since the "public concerned" may include non-governmental organizations whose goals include environmental protection.

Giving individual notice Means of notification in Poland

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

Under the Polish Act on Access to the Information on the Environment, Public Participation and the Environmental Impact Assessment of 3 October 2008, the notification of the public is the responsibility of the competent authority (i.e the authority responsible for making the decision or adopting a strategic document) and shall be provided by the following means:

- placing the information on the internet homepage of the authority (via a so-called “Public Information Bulletin”).
- publishing the information in the customary way at the seat of the authority (usually by placing the information on the notice board).
- posting notices in the vicinity of the proposed project and
- in the case of a proposed plans, programs, policies etc.,
- by publication in a newspaper of applicable geographical circulation, and
- where the seat of the competent authority is located in a community other than the community relevant to the subject of the notification, by publication in the local press or in a manner commonly used in the locality or localities relevant to the subject of the notification.

In addition, the Administrative Procedure Code requires those having a legal interest in the decision-making (usually immediate neighbours) to be notified by individual notice (usually by registered letter).

Comment [P568]: Inserted (editorial team)

Formatted: Justified

Criteria for notice

The inclusion of the terms "adequate, timely and effective manner" adds much to the basic obligation. This is meant to draw attention to practical problems of notification. Notification needs to be considered flexibly to be effective. A key concept is "penetration". A set of tools can be used to set up a hierarchy of information, with deep

penetration of general information to the public, combined with a much more focused outreach to smaller target groups. Furthermore, the general information can be much more effective if it points the direction to further information. The contents of the notification cannot be everywhere nor would it be effective to try to spread it everywhere in every case.

In today's information-saturated society, it may be extremely difficult to command the attention of those the public authorities would like to reach. Efforts must be made to ensure that the public concerned is not only reached, but that the meaning of the notification is understandable and all reasonable efforts have been made to facilitate participation (see also commentary to article 3, paragraph 2). Thus, a small announcement in a newspaper among hundreds of advertisements would perhaps not be considered effective. Local television broadcasting at a time when most people are at work might also be ineffective. Whether a particular means of notification is considered effective will of course depend on the particular conditions. Internet Web sites as state-of-the-art notice boards are a powerful tool in reaching the public in some parts of the UNECE region, and are spreading fast. Not only can they work as systems for general notification, but through electronic manipulation they can also pinpoint those persons who may have a more direct interest in the decision-making.

Furthermore, as can also be seen by reference to article 6, paragraph 6 (f), the timeliness, adequacy and effectiveness of notification might require more than a single notification at one point in time. If further information comes to light that may have relevance to the environmental decision-making procedure, an additional notification may be necessary. This is specifically acknowledged in this paragraph, at subparagraph (d), where the phrase "as and when this information can be provided" clearly shows that Parties have an obligation to ensure that the notification is updated when necessary.

Adequacy of the notice

In its findings on communication ACCC/C/2005/16 (Lithuania), the Compliance Committee found that:

"it has been clearly shown that what the public concerned was informed about were possibilities to participate in a decision-making process concerning "development possibilities of waste management in the Vilnius region" rather than a process concerning a major landfill to be established in their neighbourhood. Such inaccurate notification cannot be considered as "adequate" and properly describing "the nature of possible decisions" as required by the Convention".²³⁸

Effectiveness of the notice

In its findings on communication ACCC/C/2005/16 (Lithuania), the Compliance Committee held that:

"the requirement for the public to be informed in an "effective manner" means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate. Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being "effective" established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies".²³⁹

The Compliance Committee affirmed the above view in its findings on communication ACCC/C/2007/22 (France).²⁴⁰

Timing/Timeliness of notice

Comment [P569]: Text moved down to reflect order of Convention (editorial team)

Comment [P570]: Edit (editorial team)

Article 6, paragraph 4, sheds further light on the purpose behind giving notice early in an environmental decision-making procedure. Early public participation means that the public may participate when all options are open and participation may be effective. Article 6, paragraph 2, continues with minimum requirements as to the content of notification. The use of the term "*inter alia*" indicates that the notification can and should include more information than that specified in the subparagraphs. The use of the construction "informed of" allows Parties flexibility in determining whether to provide the actual documentation (such as the application itself under article 6, paragraph 2 (a)) in the notice, or to inform the recipient of the availability of the actual documentation at a convenient location.

In considering how to implement article 6, paragraph 2, it should also be remembered that paragraph 6 requires that all information relevant to the decision-making, with certain restrictions, should be made available to the public free of charge at the time of the public participation procedure. (See also commentary to article 6, paragraph 6.)

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee, noting that under Belarus law hearings shall be organized no earlier than 30 days from the date of the public notice, held:

"the Committee appreciates a flexible approach to setting the time-frames aiming to allow the public to access the relevant documentation and prepare itself, and considers that while a minimum of 30 days between the public notice and the start of public consultations is a reasonable timeframe, the flexible approach allows to extend this minimum period as may be necessary taking into account, inter alia, the nature, complexity and size of the proposed activity."²⁴¹

Comment [E571]: Edit footnote : at request of Germany

Effectiveness of the notice

In its findings on communication ACCC/C/2005/16 (Lithuania), the Compliance Committee held that:

"the requirement for the public to be informed in an "effective manner" means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate. Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being "effective" established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies".²⁴²

The Compliance Committee affirmed the above view in its findings on communication ACCC/C/2007/22 (France).²⁴³

Comment [E572]: Edit footnote : at request of Germany

Comment [P573]: Text moved down to reflect order of Convention (editorial team)

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

This provision requires the notification to include information about the proposed activity and the application. Public authorities must at least make the application available for inspection by the public in accordance with article 6, paragraph 6, as it is surely relevant to the decision-making. However, notification may include information on the

type of activity, the proposed technology, if any, the exact location and on the project applicant, and any other information that is necessary for the public to fully understand the scope and potential consequences of the proposed activity.

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

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

The term "the nature of possible decisions" refers to the range or scope of decisions that may be taken with regard to the proposed activity. For different types of procedures, a different description may be necessary. These might, for instance, include permits (water, air, waste, etc.), permissions (planning, development and construction permissions, etc.), consents (e.g. construction consents), and the other types of decision-making described in the introduction to article 6, above. The terms used to name various decision-making procedures vary from country to country. The notification should explain what type of decision is being made and its legal force.

Where a proposed decision has already been developed, the Convention requires information about the draft decision (for example, a copy of the draft or a description of where it can be viewed) to be included in the public notification. Obviously, a draft decision cannot be a final document, but rather a proposal as to the content of the future decision that is being made, which must be open to discussion through the public participation procedure. (See also commentary to article 6, paragraph 6.) For example, an indication in a notice of "air emission permit" would constitute the nature of the decision, while a draft permit for a particular facility, including conditions, would be a draft decision.

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

The notification should identify the public authority responsible for making the decision. Identification should be complete enough to enable the public concerned to contact the identified person or body. Maximum information is consistent with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth and fourteenth paragraphs). This provision is a requirement similar to that of transparency and effectiveness in the way that environmental information is made accessible (see commentary to article 5, paragraph 2 (b) (iii)).

(d) The envisaged procedure, including, as and when this information can be provided:

It is not entirely clear from the text of the Convention whether the "envisaged procedure" refers to the whole decision-making process or to the public participation procedure within it. Most of the points under subparagraph (d) pertain to public participation procedures. However, subparagraph (d) (ii), referring to the "opportunities for the public to participate", can be read to refer to the public participation procedures within a larger decision-making process. It would be consistent with both these views for Parties to provide information about the whole decision-making procedure, and in fact this information could also help to facilitate public participation by providing more background information to the public concerned. This provision may, therefore, be interpreted to require the notification to include a description of the type of decision-making, with details provided about the stages at which public participation will take place.

The details that shall be provided, at a minimum, in respect of the decision-making and the public participation procedures pertaining to it are set forth in this subparagraph. Significantly, the Convention reinforces its own obligation for early notification by providing that a lack of information about these details should not serve to delay the notification. This also confirms that the notion that supplemental notification may have to

be given "as and when" information can be provided. "As and when" is a different formulation that conveys the same meaning as "as soon as". The term "as and when" does *not* mean "information about when" the information will be made available.

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

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

(i) The commencement of the procedure;

Presumably, the decision-making procedure will already have started and the public participation procedure will start with the notification. The notification, therefore, is informing the public concerned of an event. In such a case it is logical to interpret this provision as requiring the notification to stipulate that the decision-making procedure started on a certain date and that the public participation procedure is beginning with the sending of this notification.

(ii) The opportunities for the public to participate;

As a part of the description of the procedure, the notification must include information about the opportunities for the public to participate in it. A certain level of detail is required for the notification to be "adequate, timely and effective". Therefore, the notification may include, *inter alia*, information about how and when the public can gain access to further information about the proposed activity or the decision-making, the manner in which the public may participate (including, where applicable, submission of comments in writing or the possibility of presenting comments, suggestions or alternatives at a public hearing (see [article- 6, paragraph- 7](#))), and opportunities for appeal.

(iii) The time and venue of any envisaged public hearing;

If the envisaged procedure includes public hearings (see article 6, paragraph 7), the notification must also include sufficient information for the public concerned to understand where and when the public hearing will take place. [The requirement for timely notice must allow enough time between the notice and the date of the hearing \(see commentary to article 6 paragraph 3\).](#)

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

[This requirement must be seen in the context of article 6, paragraph 6. However it should be noted that while this provision relates to examination of the information "by the public" the latter provision relates to the "public concerned".](#)

The notification must identify the public authority that possesses information relevant to the proposed activity and must indicate where relevant information can be examined by the public in accordance with article 6, paragraph 6. The identification of the public authority should be complete enough to enable the public concerned to contact the identified person or body, consistently with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth and fourteenth paragraphs).

This provision recognizes that the public concerned may also take advantage of the provisions of article 4 to gain access to information additional to that deposited for public inspection in accordance with article 6, paragraph 6. This acts as a safety valve in case full information is not provided, inadvertently or otherwise, by the public authority in accordance with article 6, paragraph 6.

The place where the relevant information is to be deposited for examination does not need to be the same as the seat of the competent authority. If the seat is far away from the location of the activity it may be reasonable to make the information available for the public to inspect the relevant documentation in places closer to local population, for example, at the premises of the local authorities or at local schools or libraries.

"Relevant information" versus "environmental information"

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

Formatted: English (U.K.)

Formatted: Justified

The term "relevant information" must be considered to be consistent with the term used in article 6, paragraph 6, where it refers to all information relevant to the decision-making.

So subparagraph (d) (iv) does not relate only to the sources of the information covered by sub-paragraph (d) (vi) below. However, this provision must be read together with it, as it requires the notification to indicate what relevant environmental information is available. But environmental information under subparagraph (d) (vi) is not as broad as *all* the information relevant to the decision-making. However, it may provide the basis for requests for information under article 4.

Where and when it is possible to find information can heavily influence the capabilities of the public to obtain real, as opposed to formal, access to information. Similar provisions in domestic law and practice often provide times for viewing information outside normal business hours, so that working people also have the opportunity to participate effectively.

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

The notification must identify the public authority or other official body to which comments or questions may be submitted. The identification of the public authority should be complete enough to enable the public concerned to contact the identified person or body, consistently with article 3, paragraph 2 (on facilitating public participation), and the preamble (eighth and fourteenth paragraphs). In many cases, the public authority or official body identified here will be the same as that identified in subparagraph (d)(iv).

Here the Convention speaks not only of public authorities but also of "any other official body". Parties are given flexibility to determine whether the public authority should receive comments or questions, or whether this function might be better served by another official body. It is not entirely clear what the Convention means by "other official body", given the fact that the definition of public authority in article 2, paragraph 2, is so broad. That article specifically includes within the definition of "public authority" persons performing public administrative functions under national law, as well as any persons having public responsibilities or functions or providing public services in relation to the environment that fall under the control of government or persons performing

administrative functions under national law. An official body receiving comments or questions pursuant to the requirements of the Convention would almost certainly be performing public administrative functions under national law, and therefore would already fall under the definition of "public authority".

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that the above functions must not necessarily always be placed on the authority competent to issue a decision whether to permit a proposed activity.²⁴⁴ In fact, in many countries the above functions are being delegated to various bodies or even private persons, for example the "planning inspector" in the United Kingdom or "commissaire d' enquête" in France. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a "public authority" in the meaning of article 2, paragraph 2(b) or 2(c). The Committee noted that:

"To ensure proper conduct of the public participation procedure, the administrative functions related to its organization are usually delegated to bodies or persons who are quite often specialising in public participation or mediation, are impartial and do not represent any interests related to the proposed activity being subject to the decision-making."²⁴⁵

However, while the developers (project proponents) may hire consultants specialising in public participation, neither the developers themselves nor the consultants hired by them can ensure the degree of impartiality necessary to guarantee proper conduct of the public participation procedure. Therefore, as observed by the Compliance Committee in its findings on communication ACCC/C/2006/16 (Lithuania), "reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention".²⁴⁶

The notification must also inform the public concerned about the timetable for the public concerned to submit comments or questions to the relevant public authority or the other official body. The timetable should take into account the principles relating to early and effective public participation (see commentary to article 6, paragraph 4).

The reference in sub-paragraph (v) to questions relates to the requirement, although not clearly indicated in the Convention, that the public not should only be able to inspect the documents as required under article 6, paragraph 6 but should also have a possibility to ask questions and seek clarification regarding the activity in question or the procedure for decision-making.

(vi) An indication of what environmental information relevant to the proposed activity is available; and

Finally, the notification must also include an indication of what environmental information relevant to the proposed activity is available. (For the definition of "environmental information," see the commentary to article- 2, paragraph- 3.) In a typical EIA proceeding, the environmental information might include such items as analyses, summaries, sampling or monitoring data, background documentation, expert opinions, feasibility studies, draft impact statements, forecasts and agency reports. Article 6, paragraph 6, provides some further guidance as to "relevant" information.

As already explained, the obligation to give notification as to the matters found in article 6, paragraph 2, is a continuing one, and may require further physical notices to be given to the public concerned as additional information becomes available. Subparagraph (d)(vi) is one of those most likely to require the use of supplemental notification, as it is common for additional environmental information to come to light during a decision-making procedure.

Finally, this provision needs to be read in connection with article 6, paragraph 6, providing for the right of free and prompt inspection or examination of all information relevant to the decision-making, subject to certain limitations. Where that documentation is already available at the time of the notification, subparagraph (d) (vi) can be satisfied through a general description of the information, together with the information required under subparagraph (d) (iv) concerning possibilities for inspection.

The information specified in paragraph 6 relates basically to the typical content of EIA documentation. The relevant information includes however also the application for the decision and other documents required in given procedure to be submitted by the project proponent.

Documentation relevant to decision-making in Poland

The Polish Act on Access to the Information on the Environment, Public Participation and the Environmental Impact Assessment of 3 October 2008 provides a special possibility for the public to access the “documentation relevant to the decision-making”. Such documentation, apart from standard access to information possibilities, should be displayed and made available for immediate and free of charge examination (usually at the seat of the competent authority but sometimes also in other places) by any person. Often the entire documentation is available directly on the webpage of the competent authority.

The “documentation relevant to the decision-making” is defined separately for individual decisions (Article 33.2 of 2008 Act) and for documents (Article 39.2 of 2008 Act). In case of individual decisions it includes:

- the application for a decision together with the required attachments (i.e EIA report, maps etc),
- any formal statements of the competent authority (for example concerning screening or scoping),
- statements of other authorities available at the time of public participation.

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

As mentioned above, article 6 applies to any decision-making on activities listed in annex I and any other decision-making with a potential significant impact on the environment. While this does not refer exclusively to decisions that require an EIA, these are perhaps the most significant form of decision-making falling under article 6. Thus, it is important for the public to be notified that the activity falls under a national or transboundary EIA procedure, as that procedure can carry specific public participation rights and obligations.

Understanding the EIA procedure

The EIA procedure provides enhanced opportunities for effective public participation. In many countries early and effective public participation in decision-making regarding specific activities happens mainly through EIA procedure, because of the strict requirements as to the EIA documentation and of the procedures available. EIA documentation (often called the Environmental Impact Statement or Report) usually needs to meet certain requirements stipulated by law, including a requirement to include a non-technical summary. Such documentation provides the public with easy access to information and evidence regarding the activity itself, its alternative solutions, and the evaluation of related environmental and health risks. This assists the public to develop and express its own science-based opinion on the issue. In many countries, EIA procedure allows the public to participate in the “scoping” phase, i.e. at the stage of designing the terms of reference for the EIA documentation, the public can have input into the scope of assessment. In such countries, the public thus have the possibility to participate at least twice during a given decision-making procedure: both at the stage of scoping and later on, when the EIA documentation is ready. Many countries also have an institutionalised mechanism for quality checking of EIA documentation (sometimes in the form of independent EIA Commissions) which in some countries also provides for public participation.

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

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

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

Article 6, paragraph 2 (e), also requires Parties to give notice if the activity is subject to a trans-boundary EIA procedure. As indicated in the judgement of the International Court of Justice (ICJ) in the case concerning Pulp Mills on the River Uruguay (20 April 2010) "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource". Transboundary procedure is currently required in a number of international treaties and bilateral agreements.²⁴⁷ The most elaborated international standard in this respect is that set by the Espoo Convention (see box). This standard is often further elaborated in bilateral agreements between the Parties to that Convention.

The fact that an activity may be subject to a transboundary EIA procedure is of interest not only to the public concerned from the potentially affected country but also for the public concerned from the country where the activity is to take place. Conducting a transboundary procedure usually means the need for longer than standard timelines for the procedural steps in the procedure and sometimes also the need for additional evidence and information in order that the public may participate effectively.

biosphere reflection" have been suggested.¹³²

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

The Espoo Convention on Environmental Impact Assessment in a Transboundary Context

In 1991, the Convention on Environmental Impact Assessment in a Transboundary Context was adopted in Espoo (Finland). It has been ratified by many of the countries that are Parties Signatories to the Aarhus Convention. The Espoo Convention lists activities likely to cause a significant adverse transboundary impact and provides for environmental impact assessment procedures that include participation from within the entire potentially affected area, across State boundaries.

Although the Espoo Convention deals mainly with relationships between Parties affected by a transboundary activity, it requires a Party of origin (that is, the country from which a potential trans-boundary impact originates) to notify the public of the affected country (article- 34), the public to submit comments (article- 4) and to take due account of the comments submitted (article- 6, paragraph- 1).

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

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

If the public notice relates to a transboundary procedure other than an EIA procedure, good practice would be to read the requirement in article 6 paragraph 2 (e) widely to require notice to be given of any other transboundary procedure also. By way of illustration, the IPPC Directive envisages special transboundary consultations if the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State likely to be significantly affected so requests. In such cases, the public notice informing the public about the application for a permit should include information about the transboundary consultations to take place.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

The theme of adequate time-frames for public participation running throughout the Convention (see especially article 3, paragraph 1) is repeated in article 6, paragraph 3.

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

This provision of the Convention also refers to "the different phases". Considering the rationale behind the need for adequate time-frames (giving information, allowing the public to prepare, and effective participation), the reference to "phases" should relate directly to the phases of the public participation procedures. Thus, each phase during the public participation procedures must include reasonable time-frames taking into account the fundamental requirements of public participation. In complex cases where public participation may take place at several points in the decision-making process, the reference to different phases may also be taken to refer to phases in the overall decision-making process. Thus, Parties must ensure that all stages of the decision-making where public participation takes place include time-frames that allow for the effective implementation of the related requirements in article 6, including time for the public to digest the information provided in the notification according to paragraph 2, time to seek additional information from the public authorities identified in the notification, time to examine information available to the public, time to prepare for participation in a hearing or commenting opportunity, and time to participate effectively in those proceedings.

As noted by the Compliance Committee in its Report to the third session of the Meeting of the Parties to the Aarhus Convention (Riga, 11-13 June 2008):

“there are considerable differences in time frames provided in national legal frameworks for the public to get acquainted with the documentation and to submit comments. The requirement to provide ‘reasonable time frames’ in article 6, paragraph 3, implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. Thus a time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project.”²⁴⁸

The Compliance Committee’s report would seem to suggest that the time-frames should be differentiated depending on the characteristics of the proposed activity. The Committee did not make clear, however, whether such differentiation should be categorical or on an *ad hoc* basis. In most EU countries the time-frames are fixed and often the only differentiation may be between large projects with bigger impacts (usually Annex I projects under the EIA Directive) and smaller projects with local impact (usually Annex II projects under the EIA Directive). Time-frames in relation to public participation regarding plans and programmes are usually much longer.

Reasonable time-limits in the EIA Directive

Before it was amended by the Public Participation Directive to implement the Aarhus Convention, the EIA Directive required the establishment of:

“time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period”

while after the amendment it requires that:

“Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article”.

Thus, the focus of “reasonable time-frames” in the amended EIA Directive changed from what was reasonable to the developer to what was reasonable for the public concerned.

Bearing in mind that the time-frames are usually fixed already in the legislation, whether or not they are reasonable in any given case may depend on a number of factors. The first and most obvious of these is the number of days fixed for the public participation.

In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee stated that a “time frame of only 10 working days, set out in the...EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3.”²⁴⁹

In contrast, in its findings on communication ACCC/C/2008/22 (France), the Compliance Committee held that it was “convinced that the provision of approximately six weeks for the public concerned to exercise its rights under article 6, paragraph 6, of the Convention and approximately the same time relating to the requirements of article 6, paragraph 7, in this case meet the requirements of these provisions in connection with article 6, paragraph 3, of the Convention.”²⁵⁰

The difference between the above two findings noted above is not only regarding the number of days envisaged for public participation but also that in the French case the time-frames provide not only a reasonable timeframe but also a give a clear indication of the period for inspecting the documents and the period for commenting²⁵¹. The Convention does not expressly require such a differentiation but it would seem to be very appropriate.

Another important point is the initial day from which the time-frame for public participation should be calculated. In many countries it is deemed to start immediately following the public notice. However, often national law may require several different forms of public notice, and for practical reasons it may not be possible to make these different forms of notice available all at the same time. Good practice would indicate that the timeframe should be counted from the date the last notice required under national law was posted.

Yet another issue is the timing of the public participation. There are certain periods in public life which are traditionally considered as holidays and not much is expected to happen. For example, the days of the major religious festivals for each country, national days and to a certain extent, the main summer vacation period. In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held: “a period of 20 days for the public to prepare and participate effectively cannot be considered reasonable, in particular if such period includes days of general celebration in the country”.²⁵²

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

In its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee held that a minimum of 30 days between the public notice and the start of public consultations was a reasonable time-frame to allow the public to access the relevant documentation and prepare itself, and expressed its appreciation for this flexible approach which would enable the minimum period to be extended as might be necessary

taking into account, inter alia, the nature, complexity and size of the proposed activity (see commentary to article 6, paragraph 2 above). However, the Committee took a less favourable view of the Party concerned's setting of a maximum time-frame for public consultations and the submitting of comments. The Committee held that it "does not consider appropriate a flexible approach whereby only the maximum time-frame for public participation procedures is set, as this is the case...in relation to the time-frames for public consultations and submitting the comments. Such an approach, regardless of whatever is the maximum time-frame, can not prevent setting in individual cases the time-frames that would not be reasonable. Thus, such an approach whereby only maximum time-frames for public participation are set can not be considered as meeting the requirement of setting reasonable time-frames under article 6 paragraph 3 of the Convention".²⁵³

Comment [E574]: Edit footnote : at request of Germany

While not specifically mentioned in the Convention, reasonable time-frames may also benefit the public authorities, by providing sufficient time to manage the process of public participation and to process the information provided by the public.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

Paragraph 4 requires Parties to provide public participation "early" in a decision-making process. It follows on paragraph 3, which provides for reasonable time-frames. One is about the pace, while the other is about getting started.

"Early" means when all options are open and effective public participation can take place. This does not prevent a public authority from taking a position or determining a preliminary opinion as to a possible decision about the proposed activity. However, the public authority must still be in the information gathering and processing stage and must be open to persuasion by members of the public to change its position or opinion. ~~Obviously, this prevents the public authority from taking steps to implement a preliminary decision prior to its finalization based upon, inter alia, the outcome of the public participation. Even if no decision has formally been made, taking other steps that might have the effect of decreasing the range of available options may breach article 6. Such a step might include the entering of an agreement between the public authority and a private company. In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee found that "entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention."²⁵⁴ While entering an agreement may not constitute the taking of a decision, it may still narrow down the range of available options to be considered in the decision-making process.~~

Comment [FL575]: Edits (editorial team)

Early public participation in complex decision-making

Comment [FL576]: Insertion (editorial team)

Decision-making in relation to large activities may be complex and long, involving several stages and parallel processes. In a particular decision-making process, the effectiveness of public participation may depend not only on effective public participation at one stage of the decision-making, but on public participation taking place more than once.

For example, a permit to fill a wetland may be ancillary to the construction of a factory, but the permitting procedure for the factory might not provide an opportunity to receive public comments on that aspect of the project. In that case, article 6, paragraph 4, might be interpreted to require public participation in the separate decision on the filling of the wetland, because to do otherwise would be to delay public participation to a point when it could no longer be effective.

In complex decision-making, public participation, to be effective, should take place at each stage where a (primary or secondary) decision by a public authority may potentially have a significant effect on the environment. Especially in decision-making on activities listed in annex I, where a cluster of permits may be required for complex activities, any permit that has a bearing on the environmental significance of the proposed activity should be covered under the Convention.

The requirement for ‘early public participation’ applies not only to the entire chain of decision-making procedures but also to each of the decisions in that chain. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee made it clear that “Within each and every such procedure where public participation is required it should be provided early in the procedure when all options are open and effective public participation can take place.”²⁵⁵

Comment [MSOffice577]: Text moved up (editorial team)

In its findings on communication ACCC/C/2006/16 (Lithuania) However, the Committee found that “[t]he requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage.”²⁵⁶

Comment [MSOffice578]: Edit (editorial team)

Furthermore, in the same case the Committee made it clear that “...taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programs) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details.”²⁵⁷

A key issue when examining compliance with the obligation to provide ‘early public participation’ is to check if public participation was provided at the previous stages. In its findings on communication ACCC/C/2005/12 (Albania) the Committee found it important to “make clear that once a decision to permit a proposed activity in a certain location has already been taken without public involvement, providing for such involvement in the other decision-making stages that will follow can under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide “early public participation when all options are open. This is the case even if a full environmental impact assessment is going to be carried out. Providing for public participation only at that stage would effectively reduce the public’s input to only commenting on how the environmental impact of the installation could be mitigated, but precluding the public from having any input on the decision on whether the installation should be there in the first place, as that decision would have already been taken.”²⁵⁸

Some countries have taken an integrated approach to environmental decision-making, whereby the consideration of environmental impact is maximized in a single procedure as far as possible. This approach might allow for a single public participation procedure to take place. However, attention must be given to the effectiveness of public participation, so that a single public participation procedure in the context of complex decision-making should be examined to determine whether it is timely and effective for all aspects of the decision-making.

~~The requirement for ‘early public participation’ appl only to the entire chain of decision-making procedures but also to each of the. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee made it clear that “Within each and every such procedure where public participation is required it should be provided early in the procedure when all options are open and effective public participation can take place.”²⁵⁹~~

Comment [MSOffice579]: Text moved up from here (editorial team)

Early public participation and EIA procedure

The above requirement for early public participation is especially relevant to EIA procedure where it is sometimes being interpreted as requiring mandatory public participation at the scoping phase²⁶⁰, or even at the stage of screening²⁶¹. In practice, as at 2009 sixteen of EU Member States provided for scoping as a separate procedural stage

Comment [MSOffice580]: Edits (editorial team)

Comment [MSOffice581]: Edited footnotes (editorial team)

~~with mandatory public participation. Moreover, some countries found it useful to provide mandatory public participation screening and nine Member States provided for mandatory public participation in screening.²⁶² The above approaches have not however to date been explicitly enshrined in the applicable EU law.~~

Comment [MSOffice582]: Edits (editorial team)

Comment [MSOffice583]: Edit : EU

In its findings on communication ACCC/C/2005/4 (Hungary) the Compliance Committee noted that “the Convention does not in itself clearly specify the exact phase from which the EIA should be subject to public participation. Indeed to do so would be particularly difficult, taking into account the great variety of approaches to conducting EIA that exist in the region”.²⁶³ However, in its findings on ACCC/C/2006/16 (Lithuania), the Committee “welcome[d] the approach of the Lithuanian law which envisages public participation at the stage of scoping. This appears to provide for early public participation in EIA decision-making”.²⁶⁴

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

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

Comment [MSOffice584]: Deleted (editorial team)

Considering that some countries place obligations on the *proponent* of an activity to conduct the public participation procedures relating to it, early involvement of the proponent may be extremely valuable. According to the discussion under paragraph 1 with respect to "proposed activity", a prospective applicant is a person who intends to submit an application for a decision by a public authority on an activity or a major change to an activity in accordance with an applicable national procedure.²⁶⁵

The responsibilities that Parties should encourage prospective applicants to take on where appropriate are specified according to three steps. The first of these is identifying the public concerned. (For a discussion of the definition of "public concerned", see the commentary to article 2, paragraph 5.) The Convention takes note of the fact that the proponent, due to his or her familiarity with the local conditions, may help to identify those members of the public who are likely to be affected by the environmental decision-making and should do so prior to applying for the permit. The second step is for the applicant to enter into discussions with the public concerned. This has obvious benefits, including increased understanding of the goals and parameters of the proposed activity by the public, and increased understanding of the nature of the public's concerns by the applicant. Direct communication between the applicant and the public not only reduces burdens on the public authority, but lessens the figurative distance that information has to travel, thereby increasing its reliability. Dialogue between the proponent and the public can help to narrow the differences and issues to be discussed in the public participation procedures. Similarly, providing information on the objectives of the application before applying for a permit can reduce burdens on public authorities by allowing the proponent to modify the application in view of public reactions *even before the permit application is submitted*.

Comment [WX585]: Inserted (editorial team)

The provisions of article 6, paragraph 5, apply to the period before the permit application is submitted (while the applicant is still a "prospective" one), and in no way restrict the definition of the public concerned, for example by giving a right to the proponent to identify the public concerned to the exclusion of other members of the public who assert an interest in the environmental decision-making. Encouraging

applicants to be responsible towards the public does not affect the primary obligations of the Parties under the Convention, moreover, and should not be considered a substitute. For example, article 6, paragraph 2, places the obligation on the Parties to inform the public concerned, which naturally requires an objective determination by the Party of which members of the public meet the definition of the "public concerned".

The advisory nature of paragraph 5 is confirmed by the use of the wording "should, where appropriate, encourage". The Convention does not require Parties to oblige prospective applicants to take these steps. Some Parties may consider it appropriate for the public authorities to play a more substantial role in public participation because of the authorities' objectivity and impartiality. The reference to "appropriate" therefore may also include recognition of the fact that applicants may attempt to use such a process for propaganda purposes to influence the public concerned, even going so far as to lobby a subset of the public during "consultations", and that Parties need to guard against this.

As noted by the Committee in its findings on communication ACCC/C/2006/16 (Lithuania) it is implicit in certain provisions of article 6 of the Convention that the relevant information should be available directly from the public authority, and that comments should be submitted to the relevant public authority (article 6, paragraph 2 (d) (iv) and (v), and article 6, paragraph 6).²⁶⁶ The above observations do not mean however that the responsibility for performing some or even all the above functions related to public participation should always be put on the authority competent to issue a decision whether to permit the proposed activity. In fact in many countries the above functions are delegated to various bodies or even private persons. Such bodies or persons, performing public administrative functions in relation to public participation in environmental decision-making, should be treated, depending on the particular arrangements adopted in the national law, as falling under the definition of a "public authority" in article 2, paragraph 2 (b) or (c). However, such bodies or person must be impartial and not represent any interests related to the proposed activity being subject to the decision-making. Only these qualities can guarantee proper conduct of the public participation procedure.

Comment [E586]: Edit footnote : at request of Germany

While the developers (project proponents) may hire consultants specialising in public participation, neither the developers themselves nor the consultants hired by them can assure the impartiality necessary to guarantee the proper conduct of the public participation procedure. Therefore, as observed by the Committee in its findings on communication ACCC/C/2006/16 (Lithuania) "reliance solely on the developer for providing for public participation is not in line with these provisions of the Convention".²⁶⁷

Comment [E587]: Edit footnote : at request of Germany

However, the above commentary should not be read as excluding their involvement, under the control of the public authorities, in the organization of public participation procedures (for example conducting public hearings) or prohibiting the imposition of special fees on them to cover the costs related to public participation. Furthermore, any arrangements requiring or encouraging them to enter into public discussions before applying for a permit are in line with the paragraph 5 of article 6 provided they are meant as supplementary to the mandatory public participation procedures.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4.

Paragraph 6 requires Parties to impose an obligation on public authorities to provide the public concerned with access to all available information relevant to a decision-making procedure covered by article 6, subject to certain limitations. It is similar to the administrative legal norm that provides that persons with standing as parties in an administrative proceeding should have access to all documentation in the case. Yet the Convention goes further, since it allows for similar rights to be given to all members of the public concerned, whether or not they meet the test of legal standing. Paragraph 6 provides that *all information relevant to the decision-making* shall be made available. Consistent with the other provisions of the Convention, this means information in whatever form. It should not be interpreted in a way that would limit the availability of information to reports or summaries.

Examination, upon request, free of charge

"Examination" refers to the opportunity to study the information and to make notes. As a practical matter, this obligation can be met through the establishment of reasonable hours at a convenient location where the information can be kept in an accessible form. If the national law of a Party requires it, a member of the public concerned may need to submit a request to examine the relevant information. Otherwise a request is not required. Moreover, the Convention prohibits the imposition of fees or other charges for simple examination of the relevant information. The public authority can still impose reasonable charges for other services, for example photocopying, consistent with the other provisions of the Convention.

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee observed that the Convention requires "authorities to give the public concerned access to the relevant information free of charge, but only "for examination". Thus this provision does not allow making a charge for the examination of the information in situ but does not forbid making a charge for copying".²⁶⁸

Comment [E588]: Edit footnote : at request of Germany

Available at the time of the public participation procedure

The "time" of the public participation procedure is also important, because the obligation to make information accessible is triggered by the start of the public participation procedure. This question is also relevant in considering how to implement paragraph 2, on notification. It is common sense that the public participation procedure starts, at the latest, at the time of notification under paragraph 2, because that paragraph expressly provides for early notification of, *inter alia*, the start of a public participation procedure. Moreover, the notification should include an indication of the public authorities from which information can be obtained. Thus, a notification according to paragraph 2 can also fulfil at least part of the information requirements required under this paragraph, and public authorities should take that into account in the development of their public participation procedures.

In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee observed that "this provision applies "at the time of the public participation procedure". Therefore outside the time of public participation procedure, the right to examine information under article 6, paragraph 6, does not apply and the public needs to rely on the rights of access to information under article 4".²⁶⁹

Comment [E589]: Edit footnote : at request of Germany

While the "time" of the public participation procedure should start with the early notification it covers all the consecutive stages of the procedure providing "reasonable time-frames for the different phases" (see commentary to article 6, paragraph 3). The possibility to inspect documents under article 6, paragraph 6, should be provided at least up until the end of the commenting period under article 6, paragraph 7, and should

coincide with the information-gathering stage of decision-making so that the public has a chance to indeed access "all information relevant to the decision-making".

Legal obligation

The reference to the "information-legal obligation stemming from article 6, paragraph 6's requirement to give access to "all information relevant to the decision-making...that is available at the time of the public participation procedure" is open to at least two interpretations. One possible interpretation is that it does not require the generation of information to meet the minimum standards, but rather requires this information to be made available *if it exists*. But if that were the case, there would be clearer ways to express this. Another possible interpretation is that the inclusion of "available" is meant to be interpreted positively to clarify that the information should include *any* information that is in any way available at any time during the public participation procedure. This would take into account the possibility that the information might not always be in the direct possession of the public authority, but rather may be available *because it is in the possession of another*, for example the proponent of the activity. It might also take into account that some information might be available at the start of the procedure, even as early as the notification stage, but that other information might come to light during the procedure itself. The Convention goes on to list the information that is in every case *relevant* to a decision-making procedure, indicating a minimum standard. This standard is based on the usual requirements for EIA documentation (see box on EIA documentation below) and for an application for a pollution permit (see box on application for an integrated pollution permit below). Consequently, bearing in mind the obligation in article 5 paragraph 1 (a) that public authorities possess and update environmental information which is relevant to their functions, the second interpretation of the meaning of "available" appears to be more in the spirit of the Convention. To hold otherwise would mean that decision-making could proceed without considering all the relevant information. Thus, the implication is that public authorities should generate be in the possession of the listed information because it is "relevant to their functions". On this view, it is not a separate substantive obligation but rather a reflection of the obligation included in article 5, paragraph 1 (a).

Environmental impact assessment documentation

Appendix II to the Espoo Convention describes the minimum contents of the EIA documentation that, in combination with its article 4, allows the public to gather relevant information on the project:

"CONTENT OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION:-

"Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with article 4:

- (A) A description of the proposed activity and its purpose;
- (B) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
- (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
- (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
- (e) A description of mitigation measures to keep adverse environmental impact to a minimum;
- (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
- (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
 (i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)."

Formatted: Justified

Providing information "as soon as it becomes available"

Finally, the relevant public authority must give access to the information "as soon as it becomes available". This obviously imposes an obligation on the public authorities to make new information available to the public in the same manner as the original information, as soon as it comes to light. The principle found in this obligation is ~~the same as that~~ also to some extent found in the Espoo Convention, which requires its Parties to inform the other concerned Parties immediately ~~upon the discovery of~~ additional information on a significant transboundary impact of a proposed activity ~~which was not available at the time a decision was made with respect to that activity and which could have materially affected the decision, becomes available before work on that activity commences~~ (Espoo Convention, article 6, paragraph 3).

Comment [MSOffice590]: Edit (editorial team) in light of comments by Sweden's Espoo Convention NFP.

Comment [MSOffice591]: Edit (editorial team) in light of comments by Sweden's Espoo Convention NFP.

Grounds for refusal

The Aarhus Convention also makes it clear that the grounds for refusal to disclose information found in article 4, paragraphs 3 and 4, may also be applied to the information required to be made available under this paragraph, subject of course to the limitations on the use of such exceptions found in article 4 (see, for instance, commentary to article 4, paragraphs 3, 4 and 6). In accordance with article 4, paragraph 6, for example, the public authority must separate exempt materials from the rest of the information and make all the remaining information available for public examination.

"Relevant information" and confidentiality

In its report to the third session of the Meeting of the Parties (Riga, 11-13 June 2008), the Compliance Committee addressed the issue of confidentiality of the relevant information covered by article 6, paragraph 6, in particular in the context of EIA procedures. It observed that:

"The question of confidentiality of information in the context of EIA procedures has been raised in several communications and has also been addressed in a number of national implementation reports by the Parties. The correct interpretation and application of the exceptions contained in article 4, paragraphs 3 and 4, are central to ensuring that the public has access to environmental information and can effectively participate in the decision-making processes. As the Committee has stated in earlier findings and recommendations (e.g. ECE/MP.PP/C.1/2005/2/Add.3, para. 31), the Convention aims to provide the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore effective. If a competent authority is considering whether it may refuse to disclose environmental information, the possible grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by the disclosure. In particular, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility of exempting parts of them being an exemption to the rule."²⁷⁰

Comment [E592]: Edit footnote : request by Germany

Earlier, in its findings on communication ACCC/C/2005/15 (Romania) the Compliance Committee had observed that:

-"The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it by no means justifies a general exclusion of such studies from public disclosure. This is in particular so in situations where such studies form part of "information relevant to the decision-making" which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure."²⁷¹

Comment [E593]: Edit footnote : at request of Germany

Furthermore, in the same findings the Committee recalled that it had stated:
 "...in its findings and recommendations with regard to communication ACCC/C/2004/3 and submission ACCC/S/2004/1 that article 6, paragraph 6, aimed at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to a requirement to publish an environmental impact statement. Although that provision allows that requests from the public for certain information may be refused in certain circumstances related to intellectual property rights, this may happen only where in an individual case the competent authority considers that disclosure of the information would adversely affect intellectual property rights. Therefore, the Committee doubts very much that this exemption could ever be applicable in practice in connection with EIA documentation. Even if it could be, the grounds for refusal are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Decisions on exempting parts of the information from disclosure should themselves be clear and transparent as to the reasoning for non-disclosure. Furthermore, disclosure of EIA studies in their entirety should be considered as the rule, with the possibility for exempting parts of them being an exception to the rule. A general exemption of EIA studies from disclosure is therefore not in compliance with article 4, paragraph 1, in conjunction with article 4, paragraph 4, and article 6, paragraph 6, in conjunction with article 4, paragraph 4, of the Convention."²⁷²

Comment [MSOffice594]: Inserted (editorial team)

Comment [E595]: Edit footnote : at request of Germany

Formatted: Justified

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

The Convention goes on to establish minimum standards for the information that shall be made available to the public concerned for examination. It does this by determining a non-exhaustive list of the information that in all cases is relevant to the decision-making covered by article 6. This list draws heavily on domestic and international experience relating to environmental impact assessment, in which certain documentation is generally required to be made available to the public. The Convention specifically provides that the information made available under this paragraph is subject to the provisions of article 4.

The Convention does not, however, determine how the information is to be generated nor who should bear the cost of generation. Many EIA-type laws require similar information to be generated (see box on EIA documentation above). Similar information is also required by recent legislation to be included in the application for a pollution permit, for example for an integrated pollution permit under the IPPC Directive (see box below). Parties are free to follow the example of such laws by placing the burden of information generation and its associated costs on the shoulders of the applicant, applying the "polluter pays" principle.

Application for an integrated pollution permit

Article 6 of the IPPC Directive requires that:

"Member States shall take the necessary measures to ensure that an application to the competent authority for a permit includes a description of:

- (a) the installation and its activities;
- (b) the raw and auxiliary materials, other substances and the energy used in or generated by the installation;
- (c) the sources of emissions from the installation;
- (d) the conditions of the site of the installation;
- (e) the nature and quantities of foreseeable emissions from the installation into each medium as well as identification of significant effects of the emissions on the environment;
- (f) the proposed technology and other techniques for preventing or, where this not possible, reducing emissions from the installation;
- (g) where necessary, measures for the prevention and recovery of waste generated by the installation;

(h) further measures planned to comply with the general principles of the basic obligations of the operator as provided for in Article 3;
 (i) measures planned to monitor emissions into the environment;
 (j) the main alternatives, if any, studied by the applicant in outline.
 An application for a permit shall also include a non-technical summary of the details referred to in points (a) to (j).”

(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;

The first item of information that the competent public authority must make available for examination by the public concerned is a description of the site, that is, the location where the proposed activity is planned to take place. Next, the information must include a description of the physical and technical characteristics of the proposed activity. Such a description will often already be required as an element of the applicant's submission to the public authority. The description must include an estimate of the residues and emissions expected as a result of the proposed activity. This establishes a link between these physical and technical characteristics and the potential environmental impact of the proposed activity.

The reference to the application of article 4 has special significance with respect to emissions. Article 4, paragraph 4 (d), and the last sentence of article 4, paragraph 4, impose strict limitations on exemptions to information related to emissions into the environment. (See commentary to article 4, paragraph 4.)

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

The public authority must also give the public concerned access to a description of the significant effects of the proposed activity on the environment. (With respect to "significance", see the commentary to article 5, paragraph 1 (b) and ~~article 6, paragraph 1(b)~~.) As article 6, by virtue of its paragraph 1, applies to proposed activities that *may have* a significant effect on the environment, the wording in paragraph 6 (b) must be taken to refer to a description of the potential significant effects of the proposed activity on the environment. Such a requirement is already part of the documentation that must be submitted to authorities in the permitting procedure in many UN/ECE countries.

In many countries with OVOS/expertiza system ~~Ukraine, for example~~, not only must an environmental impact statement (EIS) be prepared by an applicant for a decision relating to a proposed activity with potential effects on the environment, but the EIS is also to be disseminated to the public at the applicant's cost.¹³⁴

Various countries have established factors to be taken into account in the estimation of the significant environmental effects of proposed activities in their national legislation. These laws may provide good examples of ways to meet this requirement of the Convention, covering such issues as description of the site, determination of the impact area, and evaluating the scope of potential effects. Public authorities must first determine the scope of the expected effects on the environment. The geographical area in which such effects can reasonably be expected is known as the "impact area". Hungary's Decree on EIA²⁷³ provides an example of how one country defines the impact area of a particular project. It demands that the area to be examined in ~~an~~ the EIA documentation ~~S~~ should be the area of presumable direct and indirect impacts determined with as much accuracy as possible on the basis of data available during the preparation of the EIS/A documentation. Furthermore, areas falling outside the impact area must be presumptively unable to be affected by the proposed activity. Factors include the area in which emissions may be detectable, taking into account the characteristics of the emissions, the carrying effect of

environmental media, and the applicable conditions; the area from which environmental resources will be taken; and the possibility of a failure or accident.

In **Ukraine**, the EISA documentation contains information on the purpose and means of the activity, and the factors that potentially have an impact on the environment, including possible emergencies, impact on human health, quantitative and qualitative indicators of the assessment of environmental risk, and measures foreseen to comply with environmental standards and norms.²⁷⁴

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

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

(d) A non-technical summary of the above;

This provision underlines the fact that the Convention requires access to information in whatever form. It also gives some indication of the detail and quality of information that the negotiating parties expected would be made available under subparagraphs (a) to (c). A non-technical summary allows the main points of the specified information to be understood by a layperson. The fact that a non-technical summary is a separate element of the materials that the public authority must make available for examination by the public concerned, indicates that the above-described information would be of a detailed and technical nature. The non-technical summary must cover all the points found in subparagraphs (a) to (c).

The non-technical summary assists the members of the public concerned in digesting and understanding the often highly technical information contained in the documentation. Preparation by the public authority of the non-technical summary or requiring the proponent to do so is one of the ways in which Parties can meet the obligation in article 3, paragraph 2, to ensure that officials and authorities assist and provide guidance to the public in facilitating participation in decision-making.

Guidelines for non-technical summaries in Hungary

Hungary has established guidelines for non-technical summaries of EIA documentation. This model may be useful in designing ways to implement this requirement in other countries as well. Article 13 of its Act on Environmental Protection²⁷⁵ requires the non-technical summary to contain:

- A description of the "essence" of the activity;
- Expected impacts on the environment;
- Delineation of the impact area;
- Evaluation of environmental impacts;
- Expected impacts on living standards and social conditions in the affected communities;
- Environmental protection measures planned.

Comment [MSOffice596]: Insertion (editorial team)

Formatted: Justified

(e) An outline of the main alternatives studied by the applicant; and

The competent public authorities must also give the public concerned access to an outline of the main alternatives studied by the applicant. Typically, decision-making processes relating to proposed activities with potential environmental impacts involve the study of different alternatives for the implementation of the proposed activity. A major impetus behind the analysis of alternatives is the need to take the environment into account and to minimize environmental impact. Some of the alternatives might come from the public concerned as a result of preliminary discussions carried out under article 6, paragraph 5. The public can propose an alternative through its right to comment, guaranteed by article 6, paragraphs 2 (d)(v), 7 and 8.

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

The competent public authorities must also make available to the public concerned the main reports and advice issued to the public authority at the time of the notification under paragraph 2. Paragraph 2 requires notification to be given in an adequate, timely and effective manner. Moreover, because notification under paragraph 2 is a continuing obligation (see commentary), the issuance of new reports and advice to the public authority should trigger an additional obligation to notify the public concerned. The obligation to update information is also found in the lead to this subparagraph, which requires the public authorities to give all relevant information to the public concerned "as soon as it becomes available".

"Reports and advice"

The Convention uses the terms "reports and advice" to cover a broad range of input to the public authority, whether coming from consultants, the proponent, co-authorities, expert bodies, or members of the public. Such reports and advice may include, inter alia, studies of alternatives, cost/benefit analyses, technical or scientific reports, and social or health impact assessments. It should also include opinions submitted by other authorities, in particular those required by law to submit their views - like environmental or health authorities and their advisory bodies. It should also cover opinions, if any, of bodies designated to evaluate the quality of the EIA documentation.

The term "in accordance with national legislation" is an indication that the matter may already be the subject of detailed legal provisions. Here it may be interpreted as a recognition of the usual case in which the law requires certain reports and advice to be issued to the public authority in the normal course of administration of a particular decision-making procedure.

Environmental impact assessment documentation

~~Appendix II to the Espoo Convention describes the minimum contents of the EIA documentation that, in combination with its article 4, allows the public to gather relevant information on the project.~~

~~"Appendix II~~

~~"CONTENT OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION~~

~~"Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with article 4:~~

~~"(A) A description of the proposed activity and its purpose;~~

~~"(B) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no action alternative;~~

~~—(Continued on next page.)—~~

■ (Continued from preceding page.)

~~"(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;~~

~~"(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;~~

~~"(e) A description of mitigation measures to keep adverse environmental impact to a minimum;~~

~~"(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;~~

~~"(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;~~

~~"(h) Where appropriate, an outline for monitoring and management programmes and any plans for post project analysis; and~~

~~"(i) A non technical summary including a visual presentation as appropriate (maps, graphs, etc.)."~~

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

Paragraph 7 differs from most of the other provisions of article 6 in that here the Convention grants rights not only to the public concerned, but to the ~~whole public generally~~. While the public concerned has stronger rights with respect to the notification and examination provisions of this article, any member of the public has the right to submit comments, information, analyses or opinions during the public participation procedures. The public authority cannot reject any such comments, information, analyses or opinions on the grounds that the particular member of the public was not a part of the public concerned. In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee confirmed that legislation that limits the right to submit comments to the public concerned, and requires that comments be "motivated proposals", i.e. containing reasoned argumentation²⁷⁶ fails to guarantee the full scope of the rights envisaged by the Convention.

Comment [MSOffice597]: Edit (editorial team)

Comment [E598]: Edit footnote : at request of Germany

Moreover, because article 9, paragraph 2, is the means for enforcing all of article 6, and because it applies only to the "public concerned", it appears to be the intention of the Convention that any member of the public who actually participates in a public participation procedure, by submitting comments in writing or at a hearing, gains the status of a member of the "public concerned."

The relevancy of the comments, information, analyses or opinions is measured in the first place by the submitter. As long as the member of the public considers the matter to be relevant to the proposed activity, it must be received by the public authority. Naturally, the weight given to the particular comments, information, analyses or opinions will depend upon its objective relevance to the proposed activity, which will be reflected in the manner in which the matter is taken into account under article 6, paragraph 8. The relevant public authority or other official body for taking comments will have been identified in the notification to the public concerned under article 6, paragraph 2 (d) (v), together with the time-frame for submitting the information.

The Convention mentions two possible means for the submission of comments, information, analyses or opinions—written submissions, or public hearings or enquiries with the applicant. The latter offer the opportunity for the applicant to present the project, and respond to questions and comments. The public hearing also provides a venue for dialogue among stakeholders. As observed by the Compliance Committee in its findings

on communication ACCC/C/2009/37 (Belarus), “the organization of discussions on the proposed project in the newspapers and through TV programmes is not a sufficient way to assure compliance with article 6, paragraph 7, of the Convention”.²⁷⁷

Comment [MSOffice599]: Edit (editorial team)

Comment [E600]: Edit footnote : at request of Germany

Public hearings

In most UN/ECE countries, public hearings may be held within the EIA procedure and other decision-making processes. The hearings should be held after a sufficient period of time from the moment of notification to allow the public to study the materials and other information relevant to the proposed activity, and to come up with opinions, suggestions, comments, alternatives or questions. Public hearings usually bring members of the public together with the public authority responsible for decision-making and the applicant or proponent of the proposed activity. Experts and other authorities may also be involved in the hearing. Such a meeting is an opportunity for the public to submit, in writing or orally, the comments, information, analyses or opinions that it considers relevant to the proposed activity. In many countries the law requires that a record of the hearing be prepared, either immediately or within a couple of days after the hearing (usually within a week). The record should provide the minutes of the proceedings and include the list of participants as well as a list of all comments and suggestions submitted. In some countries the record of hearing must be signed by its participants in order to prove that the facts and views expressed have been recorded correctly.

Formatted: Justified

While the Convention does not establish particular standards for public hearings, rules for their conduct should be made in accordance with the other provisions of the Convention, in particular article 3, paragraphs 1 and 2. Parties may also establish procedures for the public to submit comments in writing.

While public hearings are useful tools for public participation, they should not be considered as the only way to allow the public to submit their views. The possibility to submit comments, information, analyses or opinions should be provided during the entire commenting period, which - together with the possibility to inspect documents under article 6 paragraph 6 - should coincide with the information-gathering stage of the decision-making. The public should not be limited to providing their views orally during the hearings but should be able to do so also in written form, including electronically.

Article 4, paragraph 2, of the Espoo Convention requires Parties to arrange for the submission of comments to the competent authority of the Party of origin. Article 3 provides in its last paragraph that the concerned Parties, i.e. the Party of origin and the affected Party, must "ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin".

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

The Aarhus Convention obliges Parties to ensure that the decision-maker takes due account of the outcome of the public participation. This is not limited to public participation concerning the environmental aspects of the proposed activity, but applies to the outcome of all public participation. In many UN/ECE countries general administrative law already requires decisions to be reasoned and given in writing (see also commentary to article 6, paragraph 9, below). In such systems, taking due account of the outcome of the public participation might be interpreted to require the written reasoned decision to include a discussion of how the public participation was taken into account. Of course, the decision-making authority must have a legal basis for taking due account of the public participation and any other factors in decision-making. Therefore, the legislative guidance

on the legal standard to be applied to the factors in the particular decision-making is very important for the implementation of this provision of the Convention.

The Convention does not specify what taking “due account” means in practice. Some Parties have developed guidance to assist on this issue. For example, the European Union’s online guide on the Aarhus Regulation states that taking due account of the outcome of the public participation “means that the Commission will duly consider the comments submitted by the public and weigh them in the light of the various public interests in issue”.²⁷⁸ In 2008, Austria’s Council of Ministers adopted Standards on Public Participation to assist government officials, which inter alia state that “‘Take into account’ means that you review the different arguments brought forward in the consultation from the technical point of view, if necessary discuss them with the participants, evaluate them in a traceable way, and then let them become part of the considerations on the drafting of your policy, your plan, your programme, or your legal instrument.”²⁷⁹

Comment [FL601]: Insertion (editorial team)

Taking due account does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment. However, the relevant authority is ultimately responsible for the decision based on all information, including comments received, and should be able to show why a particular comment was rejected on substantive grounds. In its findings on communication ACCC/C/2008/29 (Poland), the Compliance Committee observed that:

“the requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed”²⁸⁰

Comment [E602]: Edit footnote : at request of Germany

In its findings on communication ACCC/C/2008/24 (Spain), the Committee found that:

“it is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take ‘due account’ under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to ‘make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based’. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.

The Committee cannot assess, on the basis of the information provided, if indeed all the comments were ignored, as alleged by the communicant. Nevertheless, the Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.”²⁸¹

Comment [E603]: Edit footnote : at request of Germany

Some countries employ a “best practice” in handling comments received, by requiring the relevant authority to respond directly to the substance of the comments. For this purpose, comments that are substantially identical may be grouped together. Some countries require the substance of all comments to be addressed in a written document justifying the final decision, which may be called a “response document”. This written document may also be used to satisfy the requirements of paragraph 9, below, which requires decisions to be given in writing along with the reasons and considerations on which they are based.

Comment [M604]: Text moved out of text box on “Taking the outcome of public participation into account” and edited (editorial team)

Comment [M605]: Text moved up (editorial team) and edited

Simple logistical ways to facilitate the taking of due account

Standards for taking into account the outcome of public participation continue to be a point of development in the countries of the UNECE region. Taking due account of the outcome of public participation can be facilitated by certain logistical measures, such as the registration of written comments and the recording of public hearings. A table documenting the comments submitted and the ways in which they have changed the draft, may be a good method when many comments are received, because similar arguments can be clustered in the table. For comments not taken on board, the table can be used to record why they were rejected. Where the wording of the proposed text is important, e.g. legislative proposals, it may be useful to integrate comments directly in the draft text, using track changes to make them visible. In some situations, it may be possible to meet with those who submitted comments to explain which arguments will or will not be taken on board and why.²⁸² The above types of measures may also become important where an aggrieved person uses article 9, paragraph 2, to challenge a particular decision-making process.

Comment [FL606]: Text moved from box on “Taking due account of the outcomes of public participation” to here (editorial team)

Comment [M607]: Insertion (editorial team)

The need for authorities to seriously consider the outcome of public participation and to address it in decision-making, policy-making and law-making is given special attention ~~in several provisions of~~ the Convention. Provisions relating to taking due account of the outcome of public participation can be found in all three articles relating to public participation. Article 7 specifically incorporates article 6, paragraph 8, with respect to plans and programmes relating to the environment, while article 8 uses a slightly different formulation.

Comment [FL608]: Edit (editorial team).

The different wording used in article 8 is a clue to the intention behind article 6, paragraph 8, and consequently to article 7 as well. Article 8 talks about the obligation to take into account the result of the public participation "as far as possible" in the context of executive regulations and generally applicable legally binding normative instruments. As discussed under article 8, below, the Convention establishes *less rigid* requirements for public participation in the context of law-making, where the process is affected by the mutual respect between the executive and legislative branches of government. Even so, the requirement to take into account public participation "as far as possible" establishes an objectively high standard to show in a particular case that public comments have been seriously considered. According to the structure of the Convention, therefore, the requirement to take into account the outcome of public participation in the context of article 6, where the rights and interests of particular members of the public are directly affected, must be something more than "as far as possible"; rather ~~should~~ the paragraph should be strictly construed to require the establishment of definite substantive and procedural standards.

Taking the outcome of public participation into account

~~Standards for taking into account the outcome of public participation are in development in the countries of the UN/ECE region. Taking due account of the outcome of public participation can be facilitated by certain logistical measures, such as the registration of written comments and recording of public hearings. Such measures may also become important where an aggrieved person uses article 9, paragraph 2, to challenge a particular decision-making process. In general, it can be said that taking account of the outcome of public participation requires the relevant authority to consider seriously the substance of all comments received, regardless of their source, and to include the substance of the comments in the motivation of the final decision.²⁸³ It does not require the relevant authority to accept the substance of all comments received and to change the decision according to every comment. However, the relevant authority is ultimately responsible for the decision based on all information, including comments received, and should be able to show why a particular comment was rejected on substantive grounds.~~

Comment [FL609]: Text moved up (editorial team)

Comment [FL610]: Deletion (editorial team)

In its findings on communication ACCC/C/2008/29 (Poland), the Compliance Committee observed that:

~~“the requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision. In particular, this provision should not be read as requiring that the final say about the fate and design of the project rests with the local community living near the project, or that their acceptance is always needed”.~~²⁸⁴

Comment [E611]: Edit footnote : at request of Germany

In its findings on communication ACCC/C/2008/24 (Spain), the Committee found that:

~~“it is quite clear to the Committee that the obligation to take due account in the decision of the outcome of the public participation cannot be considered as a requirement to accept all comments, reservations or opinions submitted. However, while it is impossible to accept in substance all the comments submitted, which may often be conflicting, the relevant authority must still seriously consider all the comments received. The Committee recalls that the obligation to take ‘due account’ under article 6, paragraph 8, should be seen in the light of the obligation of article 6, paragraph 9, to ‘make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based’. Therefore the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account.~~

~~The Committee cannot assess, on the basis of the information provided, if indeed all the comments were ignored, as alleged by the communicant. Nevertheless, the Committee notes that a system where, as a routine, comments of the public were disregarded or not accepted on their merits, without any explanation, would not comply with the Convention.”~~²⁸⁵

Comment [E612]: Edit footnote : at request of Germany

Comment [FL613]: Text moved out of box into main body (editorial team)

~~Some countries employ a “best practice” in handling comments received, by requiring the relevant authority to respond directly to the substance of the comments. For this purpose, comments that are substantially identical may be grouped together. Some countries require the substance of all comments to be addressed in a written document justifying the final decision, which may be called a “response document”. This written document may also be used to satisfy the requirements of paragraph 9, below, which requires decisions to be given in writing and for the decision to be motivated by the “reasons and considerations on which [it] is based”. As to what the public authority, after taking the public participation into account, should ultimately decide, article 6 is silent. As observed by the Compliance Committee in its findings on communication ACCC/C/2007/242 (France) “in many national laws, the question of whether an application for a permit concerning an activity that is potentially harmful to the environment should be approved may, at least in part, depend on the usefulness of the project, this is not a requirement of the Convention. The Convention Parties may apply different criteria for approving and dismissing an application for authorization, for instance with regard to the standard of technology, the effects on health and the environment, and the usefulness of the activity in question. However, these issues are not addressed by the Convention.”~~²⁸⁶

Comment [E614]: Edit (editorial team)

Comment [E615]: Edit footnote : at request of Germany

~~Notwithstanding the above, should the public authority not take due account of the outcome of the public participation, This provision also it is implicit in article 6, paragraph 8, implies that the any failure to take due account of the outcome of public participation is a procedural violation that may invalidate the decision. In appropriate circumstances a member of the public whose comments were not duly taken into account will be able to challenge the final decision in an administrative or judicial proceeding on this basis under article 9, paragraph 2. It is therefore very important that authorities pay serious attention to the requirement that due account be taken of the outcome of public participation. Article 6, paragraph 8, is similar to article 8 of the EIA Directive.~~

Comment [FL616]: Edits (editorial team)

Comment [FL617]: Deletion (editorial team)

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures.

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

The timeliness of notification of the decision must be judged in the context of the other requirements of the Convention. One of these is the opportunity of members of the public who wish to appeal some aspect of the decision-making to do so. While the time limit for appeal would not begin to run until the notification under most legal systems, a delay in notification might affect the subject matter of appeal. An example would be if the proponent of an activity is notified of an approval and proceeds with construction, while a member of the public whose comments were not adequately taken into account has not received notice of the final decision. Obviously, it is important for the public to receive notice so that it can challenge the decision upon valid grounds *before* there is an opportunity for the proponent to proceed so far with a particular activity that the status quo cannot be preserved or can be restored only at great cost.

The general administrative law of a Party may also include provisions about the notification of parties to a proceeding, and this provision of the Convention does not affect those obligations. It is customary for notification of decisions to parties to include specific information of interest to them, such as information about opportunities for appeal. Bulgaria's ~~administrative procedure act~~ administrative law, for example, requires the appellant in administrative appeals of decisions by public authorities to be notified within seven days after a decision is made in the appeal.²⁸⁷ Such requirements should be taken into account in designing requirements for informing the public of final decisions under this paragraph.

Comment [MSOffice618]: Confirmed and amended : Bulgaria

Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

The Convention requires the text of a reasoned decision to be made accessible to the public. A similar provision can be found in article 9 of the EIA Directive. By including the reasons and considerations on which a particular decision is based, the decision-maker can show that it examined the evidence presented by the participants and considered their arguments on any relevant question of law. In accordance with the first sentence of paragraph 9, this provision also applies to the general public and not only to the public concerned or to those members of the public who participated in the decision-making. The general administrative law of a particular Party may also provide for general publication of decisions in particular cases. ~~Bulgaria's administrative law, for example, requires the decision in an administrative appeal of a decision by a public authority to be reasoned, unless all the demands of the complaint have been met and no rights of other citizens are affected.~~²⁸⁸ In Croatia administrative decisions have to include the reasoning in support of the decision and be publicized. Failure to adhere to either of these two requirements will invalidate an administrative decision.²⁸⁹

In its findings on communication ACCC/C/2006/16 (Lithuania), the Compliance Committee underlined that:-

“the Convention does not require the decision itself to be published. It only requires that the public be informed about the decision and has the right to have access to the decision together with the reasons and considerations on which it is based. The public shall be informed “promptly” and “in accordance with the appropriate procedures”. The Convention does not specify here, as opposed to article 6, paragraph 2, any further requirements regarding informing the public about taking the decision thus leaving to the Parties some discretion in designing “the appropriate procedures” in their national legal frameworks. Similarly, the Convention does not set any precise requirements as to documenting “the reasons and considerations on which the decision is based “except for the requirement to provide evidence of taking due account of “the outcome of public participation” as required under article 6, paragraph 8.”²⁹⁰

The Committee added that:

“Whether informing the public 15 days after the adoption of the decision can be considered to be prompt depends on the specific circumstances (e.g. the kind of the decision, the type and size of the activity in question) and the relevant provisions of the domestic legal system (e.g. the relevant appeal procedures and their timing).”²⁹¹

The Committee concluded that:

“whatever time period for informing the public about the decision is granted by domestic legislation, it should be “reasonable” and in particular bearing in mind the relevant timeframes for initiating review procedures under article 9, paragraph 2. Moreover, the manner in which the public is informed and the requirements for documenting the reasons and considerations on which the decision is based should be designed bearing in mind the relevant time frames and other requirements for initiating review procedures under article 9, paragraph 2, of the Convention.”²⁹²

Comment [E619]: Edit footnote : at request of Germany

Reasoned decisions

There are many ~~reasons-advantages to be gained from~~ for giving reasons in a decision. Among them:

- Formulating reasons requires the decision maker to identify the issues, process evidence systematically, and to state and explain conclusions. This increases the reliability of the decision;
- A reasoned decision on file can assist future decision makers facing similar circumstances, and can assist bodies in developing clear, consistent and regular decisions;
- Reasons may assure the parties that the hearing has given them a meaningful opportunity to influence the decision maker and to limit the risk of error;
- Public exposure to the reasons behind a decision increases confidence and shows that relevant arguments and evidence have been understood and properly taken into account;
- Reasons may provide the basis for further proceedings, such as appeals, acting as a further control over the quality of decision-making;
- Authorities can be held accountable for their decisions and acts if the reasons are shown;
- Reasons help to uphold decisions under review, by showing that they are not made arbitrarily or contrary to law.²⁹³

Comment [FL620]: Edit (editorial team)

Formatted: Font: 12 pt, English (U.K.)

As mentioned above under paragraph 8, the requirement to take due account of the outcome of public participation may be interpreted to require the reasons and considerations to address the substance of all comments received, in addition to meeting other legal requirements. In so doing, the authority can also satisfy the requirement that the decision should set forth the "reasons and considerations" on which it was based. In some countries response documents are delivered directly to anyone who made comments, and simultaneously made available to the general public. Countries where this is not yet in practice might adopt this mechanism. Accessibility should be considered in the light of articles 4 and 5 and article 6, paragraph 6. In its findings on ACCC/C/2009/37 (Belarus), the Compliance Committee held that the Belarus public authorities had failed to ensure that the public concerned was promptly informed of the decision regarding the construction of a hydropower plant project and, hence, that Belarus was not in compliance with article 6, paragraph 9, of the Convention.²⁹⁴

Comment [E621]: Edit footnote : at request of Germany

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis*, and where appropriate.

This provision supplements paragraph 22 of annex I, which brings under this article significant changes or extensions of covered activities. ~~Whereas that paragraph takes the approach found in article 7 of the Espoo Convention (and in EIA legislation in many countries); Whereas that provision follows the approach found in EIA legislation in many countries~~ and triggers obligations on the basis of physical changes ~~or advances in knowledge~~, paragraph 10 ~~in effect supplements paragraph 1 on the basis triggered in the case~~ of subsequent administrative procedures. ~~Such administrative procedures are usually not related to EIA-legislation but rather to environmental licensing, like for example integrated environmental permitting. In many countries environmental licenses are granted only for a limited period of time (usually up to 10 years) and thereafter need to be renewed and/or updated. In addition, reconsideration of the operating conditions of existing activities in certain circumstances is a routine practice in many countries. In EU Member States the reconsideration of permit conditions is covered by the IPPC Directive. (see box below). Further~~ The administrative procedures relating to the ~~reconsideration~~ of operating conditions for a covered activity require the application of full public participation procedures under article 6.

Comment [FL622]: Edit (editorial team)

Reconsideration of permit conditions under the IPPC Directive

Article 15 of the IPPC Directive requires that:

1. Member States shall ensure that the public concerned is given early and effective opportunities to participate in the procedure for:

- (a) issuing a permit for new installations;
- (b) issuing a permit for any substantial change;
- (c) updating of a permit or permit conditions for an installation in accordance with Article 13(2)(a).

The procedure set out in Annex V shall apply for the purposes of such participation.

Article 13(2)(a) of the IPPC Directive requires that:

1. ~~Member States shall take the necessary measures to ensure that competent authorities periodically reconsider and, where necessary, update permit conditions.~~

2. The reconsideration shall be undertaken in any event where:

- (a) the pollution caused by the installation is of such significance that the existing emission limit values of the permit need to be revised or new such values need to be included in the permit;
- (b) ~~substantial changes in the best available techniques make it possible to reduce emissions significantly without imposing excessive costs;~~
- (c) the operational safety of the process or activity requires other techniques to be used;
- (d) ~~new provisions of Community or national legislation so dictate.~~

Comment [FM623]: Edit : Czech Republic

Mutatis mutandis means "with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary"²⁹⁵ and requires that the paragraphs be applied with the least possible change—only to be made when necessary. The reference to "and where appropriate" indicates that certain reconsiderations or updating of operating conditions for an activity will not necessarily require the reapplication of all the paragraphs noted. It may be interpreted to allow Parties *not* to apply article 6 to reconsiderations or updating of operating conditions, if they deem it inappropriate. However, implicit in the concept of "*mutatis mutandis*", as applied in the light of the objectives of the Convention, is the presumption that, in case of any doubt, the provisions *should* be applied. Furthermore, from an administrative point of view, it may be more efficient to develop a single set of procedures that could be applied in all cases, rather than to make a case-by-case determination.

Formatted: Justified, Tabs: 1.55", Left

PUBLIC PARTICIPATION AND GENETICALLY MODIFIED ORGANISMS

For a number of years, the safety of genetically modified organisms (GMOs) has been an issue of concern among certain consumers, producers and governments. They Some consider that due to potentially harmful consequences for the environment and human health, decisions on the deliberate release of GMOs need to be taken in full awareness of the principles of sustainable development, in particular the responsibility for future generations of potential risks. As a result, laws and regulations regarding GMOs have been subjected to a high level of scrutiny as to their potential health and environmental impacts.

In light of this, the Aarhus Convention atypically gives special treatment attention to information and decisions and to information pertaining to genetically modified organisms (GMOs). Besides article 6, paragraph 11, on public participation in decision-making, GMOs are also discussed in the twentieth preambular paragraph to the Convention. The provision on product labelling under article 5, paragraph 8, is also relevant to the consideration of GMOs under the Convention.

At the time the Aarhus Convention was adopted at the 4th Ministerial Conference “Environment for Europe” in Aarhus, Denmark, 1998 the Signatories recognised the importance of discussed the application of the provisions of the Convention to the deliberate release of GMOs in the environment. Because of the controversial nature of GMOs at the time that the Convention was negotiated, the negotiating parties intentionally kept could not reach agreement and agreed to keep open the issue for further determination in the light of future developments. As a matter of principle, however, for some there appears to be no fundamental difference between decisions relating to the release of GMOs and any other decision-making with potential significant effects on the environment. Thus some Many countries that apply public participation laws do not distinguish between decision-making on GMOs and decision making on other environmental matters. So while most these countries were prepared to treat GMO decisions like any others, a few countries insisted on special provisions. As a consequence of their insistence, during the negotiation of the Convention, the negotiating parties could not reach agreement on the extent to which its provisions should apply to the deliberate release of GMOs in the environment and agreed to keep the issue open for further determination in the light of future developments. At the time of the Convention’s adoption at the 4th Ministerial Conference “Environment for Europe” in Aarhus, Denmark, (23-25 June in 1998), the The Signatories requested the Parties to further develop the Convention in the field of GMOs. Consequently a Task Force on GMOs and later, a Working Group on GMOs, were established. At their first meeting (Chisinau, April 1999), The the Signatories to the Aarhus Convention established the a Task Force on GMOs, with Austria as the lead country, at their first meeting (Chisinau, April 1999). The Task Force was mandated to monitor developments in other forums and to make recommendations for the future treatment of GMOs under the Convention.

Beside considerable differences in the national biosafety frameworks of the Signatories as of 1999, in particular concerning the level of public participation in the decision-making processes related to GMOs, the Task Force identified major open questions for the implementation of the Convention regarding the phrasing of the original article 6, paragraph 11. As the term “deliberate release” is used only in article 6, paragraph 11, and not defined anywhere else in the Convention, it was unclear to which activities with GMOs article 6, paragraph 11, would apply. The Task Force discussed various procedural options for overcoming this legal uncertainty and defining the scope of the Convention with regard to decisions on GMOs.

At their second session (Cavtat, Croatia, 3-5 July 2000), the Meeting of the Signatories established a Working Group on GMOs, led by Austria. In the course of discussions in the Working Group on GMOs, the majority of Signatories did not support a legally binding option regarding decision-making on GMOs and a compromise was

therefore reached by the development of non-binding “Guidelines on access to information, public participation and access to justice with respect to genetically modified organisms”.²⁹⁶ These Guidelines were adopted at the first session of the Meeting of the Parties (Lucca, Italy, 21-23 October 2002) and are often referred to as the “Lucca Guidelines”. At its first session, the Meeting of the Parties also adopted decision I/4 outlining further work on the issue, possibly including a legally binding approach to develop the Convention in this area.²⁹⁷ and (ECE/MP.PP/2/Add.5) the task of exploring possible legally binding options, including a draft amendment to the Convention, was assigned to the new Working Group on GMOs.

The report on the implementation of the Lucca Guidelines prepared for the second session of the Meeting of the Parties²⁹⁸ (ECE/MP.PP/2005/5) included noted that the countries of Eastern Europe, Caucasus and Central Asia considered that the Lucca Guidelines, due to their advisory nature, could not secure a minimum standard in public information, public participation and access to justice for the public in countries having no proper national biosafety legislation in place. After years of difficult negotiations in the Working Group a compromise was reached so that at the ~~Second~~second session of the Meeting of the Parties (Almaty, 25-27 May 2005) a new Article 6 bis and annex I bis on GMOs was adopted, the so-called GMO amendment to the Convention (also sometimes called the “Almaty amendment”).²⁹⁹ As at May 2011, the GMO amendment was not yet in force.

Comment [M624]: Edits (editorial team in light of Croplife and PRRI comments)

Synergies with the Convention on Biological Diversity and its Cartagena Protocol on Biosafety

In decision II/1 adopting the GMO amendment, the Parties to the Aarhus Convention recognised the need to cooperate with other international organizations and forums, in particular the Cartagena Protocol on Biosafety, with a view to maximizing synergy and avoiding duplication of effort, including through encouraging the exchange of information and collaboration between the respective secretariats. The Riga Declaration adopted at the third session of the Meeting of the Parties (Riga, 11-13 June 2008) recognized the value of further collaboration with bodies of the Cartagena Protocol in activities aimed at supporting the application of the Lucca Guidelines on GMOs and the implementation of the Almaty amendment on GMOs.³⁰⁰

Formatted: Font: (Default) Times New Roman

The Cartagena Protocol on Biosafety was drafted by the Parties to the Convention on Biological Diversity (CBD) in the same period as the Aarhus Convention was being negotiated. The Cartagena Protocol was adopted on 29 January 2000 after long and intense negotiations and entered into force on 11 September 2003. The Conference of the Parties to the CBD serves as the Meeting of the Parties to the Protocol.

Formatted: Font: (Default) Times New Roman

Like the CBD, the Cartagena Protocol does not use the term "genetically modified organism". Instead it refers to "living modified organisms resulting from biotechnology"³⁰¹ The extent of any difference in the scope of these two terms has not been settled in practice.

The objective of the Cartagena Protocol, in accordance with the precautionary approach, is “to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focusing on transboundary movements” (Cartagena Protocol, Article 1). According to article 23 of the Cartagena Protocol, Parties are required to “promote and facilitate public awareness, educations and participation”, “to consult the public in the decision making process regarding living modified organisms”, and to “make the results of such decisions publicly available”. These provisions are kept rather general, supplemented by obligations concerning the exchange of information within the Biosafety Clearing-House mechanism.

At their fifth session (Nagoya 11-15 October 2010), the Parties to Cartagena Protocol adopted the Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress.³⁰² The objective of the Supplementary Protocol is to contribute to the conservation and sustainable use of biological diversity, taking also into account risks to human health, by providing international rules

and procedures in the field of liability and redress relating to LMOs. Being a Supplementary Protocol, the provisions of the Cartagena Protocol on public awareness and participation, including article 23, apply to processes under the Supplementary Protocol.

While the objective of the Aarhus Convention is “to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (article 1), the CBD and Cartagena Protocol focus more particularly on the protection of biological diversity for its own sake. However, despite their different foci, the provisions of the Cartagena Protocol and the GMO Amendment to the Aarhus Convention overlap on the issue of public participation in decision-making. In this regard, the two instruments should not be seen as contradicting but rather as complementing one another. In light of the GMO Amendment, the Aarhus Convention might be considered as the more elaborated in respect of the modalities for public participation. It lays down more detailed requirements whereas in respect of public participation, article 23 of the Cartagena Protocol is of a rather more framework nature (although at their fifth session (Nagoya, 11-15 October 2010), the Parties to the Cartagena Protocol adopted a Programme of Work on Public Awareness, Education and Participation Concerning the Safe Transfer, Handling and Use Of Living Modified Organisms). Conversely, in respect of access to information, the Cartagena Protocol, in its article 20 establishing the Biosafety Clearinghouse mechanism, defines more clearly than the Aarhus Convention what kind of scientific, technical, environmental and legal information and information shall be made publicly available.

In accordance with the recognition of the need to cooperate with the Cartagena Protocol in decision II/1 adopting the Aarhus Convention’s GMO amendment³⁰³, the two instruments have subsequently collaborated in a number of respects. This collaboration has included the convening of joint workshops on access to information and public participation with respect to GMOs back to back with the fourth and fifth sessions of the Meeting of the Parties to the Cartagena Protocol (Bonn, 12-16 May 2008³⁰⁴ and Nagoya, 11-15 October 2010)³⁰⁵. The secretariats of the two instruments have also collaborated in the intersessional periods in various respects. For example at the invitation of the Cartagena Protocol secretariat, the Aarhus Convention secretariat provided comments on the draft work programme on public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms prior to the finalization of its text.

~~The Convention on Biological Diversity and its Cartagena Protocol on Biosafety~~

~~While the Aarhus Convention was being drafted, a protocol on biosafety was also being negotiated by Parties to the Convention on Biological Diversity (CBD). The negotiation of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity was finalized in early 2000 after a long and controversial debate. Article 23 of the Cartagena Protocol refers to public awareness and public participation, resulting in overlap and synergies with the Aarhus Convention.~~

~~The Convention on Biological Diversity does not use the term “genetically modified organism”. Instead it refers to “living modified organisms resulting from biotechnology” (arts. 8 (g) and 19, para. 3). The same is true for the Cartagena Protocol on Biosafety (see Article 3).~~

~~The objective of the Cartagena Protocol, in accordance with the precautionary approach is “to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focusing on transboundary movement” (Cartagena Protocol, Article 1). According to Article 23 of the Cartagena Protocol, Parties are required to “promote and facilitate public awareness, education and participation”, “to consult the public in the decision making process regarding living modified organisms (LMOs)”, and to “make the results of such decisions publicly available” (Article 23, Paragraph 1 and 2). These provisions are kept rather general, supplemented by obligations concerning the exchange of information within the Biosafety Clearing House mechanism (BCH).~~

~~While the Cartagena Protocol focuses on the protection of biological diversity, the objective of the Aarhus Convention in general is “to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being” (Article 1). In this way, the Convention ties together environmental and human rights. Building on that, the purpose of the GMO Amendment is to clarify mechanisms for public participation in decision on GMOs.~~

Formatted: Font: (Default) Times New Roman

Formatted: Font: (Default) Times New Roman

Despite their different focus, the provisions of the Cartagena Protocol and the GMO Amendment to the Aarhus Convention regarding public participation overlap. In light of the GMO Amendment, the Aarhus Convention can be considered as more elaborated, laying down more detailed requirements and modalities for public participation, while Article 23 of the Cartagena Protocol is of a rather framework nature. Conversely the Cartagena Protocol, in its Article 20 promoting the exchange of scientific, technical, environmental and legal information by establishing the BCH mechanism, defines more clearly than the Aarhus Convention what kind of information has to be made publicly available. Nevertheless in form and content the two instruments are not contradicting but complementing one another.

Decision II/1 of the Meeting of the Parties to the Aarhus Convention, which adopted the GMO amendment, recognised the need to cooperate with other international organizations and forums, in particular the Cartagena Protocol on Biosafety, with a view to maximizing synergy and avoiding duplication of effort, inter alia through encouraging the exchange of information and further collaboration between the secretariat of the Convention and that of the Cartagena Protocol.

Back to back with the 4th Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol (COP/MOP-4) in Bonn, Germany, 2008 an international expert meeting on access to information, public participation and access to justice with respect to GMOs took place in Cologne, Germany.³⁰⁶ High importance was attached to the fact that the three pillars of the Aarhus Convention, (public information, public participation and access to justice), build upon each other and to the topic of appropriate implementing legislation and mechanisms. Additionally the need for higher political will and additional financial resources for promoting the Convention's principles with respect to GMOs has been identified and a cross-sectoral approach involving governments, scientists, civil society and business, was considered useful in this respect. In their discussions the experts expressed support for an intense future cooperation between the Cartagena Protocol and the Aarhus Convention.

In keeping with this, the Riga Declaration adopted by the Meeting of the Parties to the Aarhus Convention at its third session (Riga, 11-13 June 2008) recognized the value of further collaboration. In this regard, a joint workshop on access to information and public participation in GMOs was held back to back with the 5th Conference of the Parties to the Convention on Biological Diversity serving as the Meeting of the Parties to the Cartagena Protocol (COP/MOP-5) in Nagoya, Japan in October 2010.³⁰⁷ At COP/MOP-5, Parties to the Cartagena Protocol adopted a work programme on public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms. On the invitation of the CBD secretariat, the Aarhus Convention secretariat had earlier provided comments on the draft work programme.

Comment [M625]: Edits (editorial team in light of Croplife and PRRI comments)

Formatted: English (U.S.)

Original article 6, paragraph 11

Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

The Convention places an obligation on Parties to the Convention ~~but~~ who have not ratified the GMO amendment (see below) to apply article 6 to decisions on whether to permit the deliberate release of genetically modified organisms (GMOs) into the environment, "to the extent feasible and appropriate". The application of article 6 shall be accomplished within the framework of national law.

Comment [H627]: Deletion (editorial team)

Article 50 of Bulgaria's Law on Genetically Modified Organisms requires the Ministry of Environment and Water to organize a public discussion in respect of any application to release a GMO into the environment. The public discussion must be held not later than 45 days after the Consultative Commission on GMOs gives its opinion on the application. The date, location and subject matter of the upcoming public discussion as well as the location where the public may access all relevant information shall be

announced not later than 30 days prior to the date of the discussion in a central daily paper, in the mass media in the region of the proposed release, through placement of notices in town-halls within that region, and on the Ministry website. Any person may submit comments on the application in writing or in electronic form. The applicant or his representatives and the members of the Commission will be invited to participate in the public discussion. Minutes shall be kept of the public discussion and these shall be considered in decision-making regarding the issuance of the permit.³⁰⁸

France's Environment Code regulates decision-making on the deliberate release of GMOs into the environment³⁰⁹ and placing on the market in that country.³¹⁰ Assessment of the risks associated with the release of a GMO is carried out by France's Biomolecular Engineering Commission, in respect of the environment and public health, and by the French Food Health Security Agency in respect of food safety. The Biomolecular Engineering Commission includes representatives of civil society, and also organizes seminars on cross-cutting issues which are open to NGOs. The opinions of the Biomolecular Engineering Commission and the French Food Health Security Agency in respect of the risk assessments are published on the internet³¹¹ In respect of applications to carry out a GMO field trial, an information sheet is posted in the local mayor's office and a public consultation procedure is initiated via the internet.³¹² For applications for placing on the market, a public consultation procedure is carried out at European Community level via the internet.³¹³

Comment [FL628]: Insertion (editorial team)

Formatted: English (U.S.)

New article 6, paragraph 11

Without prejudice to article 3, paragraph 5, the provisions of this article shall not apply to decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.

For those Parties which have ratified the GMO Amendment, upon the amendment's entry into force, the current article 6, paragraph 11, of the Convention will be replaced/superseded by the new article 6, paragraph 11. The new article 6, paragraph 11, states that the provisions of article 6 do not apply to decisions on whether to permit the deliberate release into the environment and placing on the market of GMOs. However, the provision is prefaced by "without prejudice to article 3, paragraph 5". ; together with article 6 bis and annex 1 bis. Nevertheless, according to article 3, paragraph 5 of the Convention Article 3, paragraph 5, states that a Party may introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention. By prefacing new article 6, paragraph 11, in this manner, the GMO amendment may be seen to be reminding Parties that each is still free to apply the more extensive requirements of article 6 to its GMO decision-making if it wishes to do so.

Comment [FL629]: Edits (editorial team)

Original v. amended article 6, paragraph 11 – which applies?

The amendment will enter into force when it has been ratified by at least three fourth of the Parties (article 14, paragraph 4). However, it is not clear from the Convention whether "three fourths of the Parties" means three fourths of the Parties that were Parties at the time the amendment was adopted, or three fourths of the Parties at any time in the future. In light of this ambiguity, the Meeting of the Parties adopted decision III/1 on the interpretation of article 14 of the Convention at their third session (Riga, 11-13 June 2008. Decision III/1 clarifies that the expression "by at least three fourths of these Parties" should be interpreted as meaning at least three fourths of the Parties to the Convention that were Parties at the time of the adoption of the Amendment (ECE/MP.PP/2005/2/Add.2). As there were 35 Parties to the Convention at the time the amendment was adopted, 27 Parties must ratify, accede to or approve the amendment before it can enter into force. Once the 27th of these Parties has deposited its instrument of ratification, approval or acceptance with the Depositary, the amendment will enter into force 90 days later. As of 1 November 2010-June 2011 the amendment had been ratified by 26 Parties, 22 of whom were Parties at the time the amendment was adopted.

Comment [M630]: Update (editorial team)

Upon its entry into force, the GMO amendment will apply to all those Parties which have by that time become party to it, and afterwards individually for those Parties which accede to the amendment after its entry into force. For these Parties it will enter into force on the 90th day after that Party deposits its instrument of ratification, approval or acceptance of the amendment.

Until a Party has deposited its instrument of ratification/accession/approval, the original article 6, paragraph 11 will continue to apply. If a Party chooses never to ratify the amendment, then the original article 6, paragraph 11, will always apply.

However, for any countries that become Party to the Convention itself after the amendment enters into force, the amendment will automatically be considered part of the Convention.

To find out whether the amendment has gained enough ratifications to enter into force or to find out whether a particular country has ratified or acceded to the amendment, go to the relevant webpage of the UN Treaties Office.³¹⁴

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13-b&chapter=27&lang=en

Comment [FL631]: Weblink moved to endnote instead (editorial team).

Article 6 bis

PUBLIC PARTICIPATION IN DECISIONS ON THE DELIBERATE RELEASE INTO THE ENVIRONMENT AND PLACING ON THE MARKET OF GENETICALLY MODIFIED ORGANISMS

Article 6 bis lays down requirements for public participation in decisions on the deliberate release into the environment as well as placing on the market of GMOs. Article 6 bis does not apply to the contained use of GMOs; however, this type of activity is covered by the Lucca Guidelines on GMOs.³¹⁵

Comment [FL632]: Footnote added (editorial team)

1. In accordance with the modalities laid down in annex I bis, each Party shall provide for early and effective information and public participation prior to making decisions on whether to permit the deliberate release into the environment and placing on the market of genetically modified organisms.

Paragraph 1 of article 6 bis contains two main principles, the principle of early and effective information and the principle of public participation. The principle of early information is to be understood by public authorities responsible for decision-making concerning the deliberate release and the placing on the market of GMOs as the obligation to inform the public at the earliest stage of a decision-making procedure. That means in practice that as soon as an appropriate notification has been submitted to the public authority, the public has to be informed, e.g. by public notice, about the proposed activities. The principle of effective information primarily means that the public should be provided with the relevant information as well as in an easily accessible and comprehensible way. The principle of public participation should provide for a transparent decision-making process with the active involvement of the public. Of course the public has to be informed prior to decision-making so that early participation, when all options are open, can take place. In order to give the public the possibility to express an opinion it is therefore very important to include reasonable timeframes in the public participation process. Without prejudice to the provisions of annex 1 bis, each Party shall implement these principles in its national biosafety framework.

Comment [FL633]: Insertion (editorial team)

Comment [MSOffice634]: Edit : PRRI

In general, biosafety frameworks comprise three essential elements that, in combination, are commonly referred to as risk analysis. The core activity is the so called risk assessment, a multidisciplinary, scientific exercise. In the EU, the term “environmental risk assessment” is used, indicating its focus on potential effects impacts

Comment [MSOffice635]: Edit : PRRI

on the environment, taking also into account potential effects on human health (EC 2001).³¹⁶ The second element of risk analysis is the risk management. On the one hand, this means on the one hand, any measures (e.g. isolation distances) intended to limit potential risks resulting from the use of a GMO, i.e. the technical risk management, and on the other hand, the administrative risk management, in the form of decisions possibly imposing conditions for the safe handling and use of a certain GMO. Finally, the third essential element of risk analysis is risk communication covering public information and public participation. A thorough risk analysis therefore requires communication and discussion about the content of the risk assessment (e.g. results of the scientific evaluation) and the risk management (e.g. reasons and considerations a decision is based upon).³¹⁷

Comment [FL636]: Deletion of bracketed reference and replacement with endnote (editorial team).

Comment [WX637]: Edit (editorial team)

Comment [WX638]: Insertion (editorial team)

Comment [FL639]: Reference to be added.

Considering the fact that GMOs are living organisms that may reproduce in the environment their release may be irreversible. A fundamental principle derived from that reasoning that has found its way into almost all national biosafety frameworks around the world is the step-by-step principle. This means that the scale of release of a GMO is gradually increased, only if evaluation of the earlier steps did not reveal suggest potential negative effects for human health and/or the environment. At the legal level this is reflected in the classification of different scopes regarding the activities with GMOs and hence their approval: contained use, deliberate release and placing on the market.

Comment [MSOffice640]: Edit (editorial team)

Comment [MSOffice641]: Edit : PRRI

Comment [MSOffice642]: Deletion : PRRI

The use of an annex to set out the prescribed modalities is interesting. While annexes are considered an integral part of the Convention (article 13), the process for amending them is much less onerous than for amending a provision in the main body of the Convention (article 14, paragraph 4, 5 and 6).

Comment [o643]: Text moved down (editorial team)

2. The requirements made by Parties in accordance with the provisions of paragraph 1 of this article should be complementary and mutually supportive to the provisions of their national biosafety framework, consistent with the objectives of the Cartagena Protocol on Biosafety.

Each Party shall seek to incorporate the provisions of article 6 bis, paragraph 1, into its national biosafety framework. In particular those Parties which that do not yet have a proper national biosafety framework in place consistent with their international obligations have to should take these provisions into account when developing their national biosafety framework. Whenever these national provisions go beyond the requirement of article 6 bis, paragraph 1, specifying early and effective public information and public participation, due account ought to be taken by the Party of any specific and relevant national legislation. Provisions in national legislation concerning public information and public participation may well vary in detail from country to country, but among the Parties they all have to be consistent with the requirements of the Convention or the GMO Amendment respectively.

Comment [MSOffice644]: Edits ; PRRI

Comment [MSOffice645]: Edit (editorial team)

Comment [MSOffice646]: Edit (editorial team)

Comment [MSOffice647]: Deletion : PRRI

Comment [MSOffice648]: Deletion : PRRI

Annex I bis
MODALITIES REFERRED TO IN ARTICLE 6 BIS

1. Each Party shall lay down, in its regulatory framework, arrangements for effective information and public participation for decisions subject to the provisions of article 6 bis, which shall include a reasonable time frame, in order to give the public an adequate opportunity to express an opinion on such proposed decisions.

While in general, article 6 of the Aarhus Convention deals with public participation, article 4 covers access to environmental information. Public participation however cannot be regarded as completely separated from public information, as proper participation by the public implies being informed not only about the proposed activity but about the respective topic in general. So although annex 1 bis provides for the

specification of the requirements for public participation in the field of GMO decision-making, to some extent it likewise relates to adequate provisions on public information.

Comment [o649]: Deletion (editorial team)

Paragraph 1 of annex 1 bis more or less summarizes the basic requirements on public participation laid down in article 6 of the Aarhus Convention for decisions on GMOs. These are in particular the principle of effective information and the basic elements of public participation (further elaborated under paragraphs 4-8 of annex 1 bis). The latter imply that within the public participation procedures, however this may be arranged whatever forms these may take (e.g. public hearings, stakeholder dialogues and consensus conferences), the public is granted an adequate time frames to prepare and to participate effectively during the decision-making process. Access to relevant information is thus considered a prerequisite to the opportunity for the public to provide opinions. The time frame admitted may vary between decisions on the deliberate release of GMOs and decisions on placing on the market of GMOs, but also and also among countries.

Comment [MSOffice650]: Edit : PRRI

In the EU for instance, the public has 30 days to comment on the opinion of the European Food Safety Authority (EFSA), which constitutes the assessment report of a notification concerning the placing on the market of GMOs. In Norway, where specific legislation on access to GMO information is in place, the public generally has six weeks for comments. In Austria, after the public announcement of a notification for the deliberate release of a GMO, the public may submit written comments to the competent authority within three weeks, during which the public has the right/possibility of access to the notification. If the public provides comments, the competent Austrian authority has to hold a public hearing within three weeks after the end of the commenting period.

Comment [MSOffice651]: Confirmed : Norway

Comment [MSOffice652]: Edit : PRRI

Comment [MSOffice653]: Confirmed : Austria

The use of an annex to set out the prescribed modalities is interesting. While annexes are considered an integral part of the Convention (article 13), the process for amending them is much less onerous than for amending a provision in the main body of the Convention (article 14, paragraph 4, 5 and 6).

Comment [o654]: Text moved to here (editorial team)

2. In its regulatory framework, a Party may, if appropriate, provide for exceptions to the public participation procedure laid down in this annex:

For many of the activities listed in annex 1 of the Convention a threshold is established regarding the applicability of the provisions of article 6. The notion behind this provision is that the potential impact of a given activity on the environment is generally proportional to the size of the venture. As balancing potential risks for the environment against potential benefits for the society always results in a compromise depending on the case, each exemption demands a detailed statement of grounds.

Similarly, annex I bis specifying modalities for public participation regarding the deliberate release and the placing on the market of GMOs provides the possibility for exemptions to this procedure. However these exemptions are not mandatory and can be applied at each Party's own discretion. As the two activities of GMOs covered by article 6 bis, deliberate release and placing on the market, differ in scope, exemptions are specifically defined for each of them (see below).

(a) In the case of the deliberate release of a genetically modified organism (GMO) into the environment for any purpose other than its placing on the market, if:

Article 6 bis, paragraph 2 (a), entitles a Party to provide for exemptions to the public participation procedure laid down in the annex regarding the deliberate release of a GMO (other than its placing on the market) if (i) such a release under comparable biogeographical conditions has already been approved within the Party's regulatory framework and (ii) sufficient experience has already been gained with the release of the GMO in question in comparable ecosystems. Both of these conditions are required before a Party is entitled to rely on this exception.

Comment [MSOffice655]: Insert : PRRI

(i) Such a release under comparable bio-geographical conditions has already been approved within the regulatory framework of the Party concerned; and

Except as otherwise provided for in the national biosafety framework of a Party, ~~basically a Party may make an exemption to the obligation for a public participation procedure required for decisions on the deliberate release of GMOs, if under comparable bio-geographical conditions such a release has already taken place~~ been approved. It is important to ~~notice~~ however that a relevant release would have had to be performed within the territory of the Party. Any deliberate release that took place in a comparable bio-geographical region in a neighbouring country for instance, would not represent an adequate basis for granting such an exemption.

Comment [MSOffice656]: Edit : PRRI

Comment [MSOffice657]: Edit : PRRI

Comment [MSOffice658]: Edit (editorial team)

The wording “comparable bio-geographical conditions” ~~may raise questions and should be seen against the background that potential effects of GMOs on the environment are not only dependent~~ depends not only on the type of GMO but ~~just as well also~~ on the prevailing environmental conditions (e.g. climatic factors, number of generations of target pest, occurrence of non-target organisms, wild relatives, agricultural practices etc.). Data gained in a field trial with a GMO in a region under ~~specific~~ a particular set of conditions cannot substitute experimental releases in environments with differing conditions. So any decision to grant an exemption has to be judged on a case-by-case basis and the concept of bio-geographical regions may provide basic guidance in this respect.

Comment [MSOffice659]: Edit : PRRI

Comment [MSOffice660]: Delete : PRRI

Comment [MSOffice661]: Insert (editorial team)

Comment [MSOffice662]: Edit (editorial team)

Comment [MSOffice663]: Edit (editorial team)

(ii) Sufficient experience has previously been gained with the release of the GMO in question in comparable ecosystems;

The biosafety frameworks of many countries, and also the EU biosafety framework, provide for so-called simplified or differentiated procedures. The idea behind this is to streamline the regulatory procedures, if sufficient experience has been obtained ~~of~~with the releases of a particular type of GMO in ~~certain~~ particular ecosystems. Consequently if a GMO notification is subject to a differentiated procedure in a country, but not necessarily only in such cases, paragraph 2 (a) (ii) of annex 1 bis allows for exemptions to the public participation procedure.

Comment [MSOffice664]: Edits : (PRRI and editorial team)

~~It is challenging to define~~ What “sufficient experience” means ~~mean~~ in practice vary from country to country. As one example, according to EU Directive 2001/18/EC certain criteria, specified in Annex V, have to be met before a proposal for a differentiated procedure can be submitted. According to Annex V, for instance, sufficient information on any interaction of particular relevance for the risk assessment needs to be available and the GMO shall not present additional or increased risks to human health or the environment under the conditions of the experimental release. ~~Even then the public is given the opportunity to comment on such a proposal within 60 days~~ Under the Directive, the public has 60 days to comment on the reasoned proposal for the application of a differentiated procedure³¹⁸.

Comment [MSOffice665]: Edit : PRRI

Comment [MSOffice666]: Edit : PRRI

Comment [MSOffice667]: Edit (editorial team)

Comment [MSOffice668]: Delete : PRRI

Comment [MSOffice669]: Insert (editorial team)

(b) In the case of the placing of a GMO on the market, if:

(i) It was already approved within the regulatory framework of the Party concerned; or

Authorizations to the placing on the market of GMOs are normally not granted in an unlimited manner, but usually define a period of validity. In the EU Regulation on GM Food & Feed (1829/2003/EC), for instance, it is arranged that consent has to be renewed every 10 years (article 11.1) at the latest one year before the expiry date of the authorization. ~~So in cases where an authorization is due to expires and a renewal has been applied for, the GMO Amendment to the Aarhus Convention allows for exemptions~~

Comment [MSOffice670]: Edit : PRRI

Comment [MSOffice671]: Edit (editorial team)

Comment [WX672]: Deletion (editorial team)

to the public participation procedure. In the EU a couple of applications for renewal of placing on the market of GM products are under way to date, only a few of them concern the cultivation of a GM plant.

Comment [MSOffice673]: Delete (editorial team)

(ii) It is intended for research or for culture collections.

By way of example, according to EU Directive 2001/18/EC, some few operations with GMOs shall not be regarded as placing on the market (Article 2.4). These Specifically, this concerns operations with GM micro-organisms in contained systems regulated under Directive 90/219/EEC³¹⁹ (amended by Directive 98/81/EC³²⁰), including culture collections, as well as making available GMOs other than GM micro-organisms to be used under contained conditions (e.g. greenhouse) or exclusively for deliberate release.

Comment [MSOffice674]: Edit (editorial team)

Comment [MSOffice675]: Edit : PRRI

Comment [MSOffice676]: Edit : PRRI

Comment [MSOffice677]: Edit (editorial team)

Similarly the GMO Amendment to the Aarhus Convention provides for the possibility of exempting GMO notifications from the public participation procedure, if they are exclusively used for research purposes or culture collections in order not to interfere with the principle of freedom of science and research.

Comment [FL678]: Footnote inserted (editorial team)

Comment [FL679]: Footnote inserted (editorial team)

Comment [MSOffice680]: Edit : PRRI

Comment [WX681]: Edit (editorial team)

Regulation of public participation in decision-making on GMOs in the European Union

In the EU one important legal instrument concerning GMOs is Directive 2001/18/EC on the deliberate release into the environment of genetically-modified organisms. The Directive has been complemented by Commission Decisions with guidance notes on risk assessment³²¹ (EC 2002a) and monitoring³²² (EC 2002b). Additionally there are relevant EU Regulations, which are directly applicable in EU Member States, for instance Regulation 1829/2003/EC on GM food and feed. These pieces of legislation also contain provisions on public participation.

Comment [FL682]: Insertion of endnote and deletion of bracket reference (editorial team)

Comment [FL683]: Deletion (editorial team)

The Council Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically-modified organisms and repealing Council Directive 90/2290/EEC defines GMO as "an organism, with the exception of human beings, in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination".¹⁴⁵ All EU member States and a number of other UNECE member States have passed GMO legislation. Some of them have taken legal measures against the placing on the market of GMOs in recent years, including Austria, France, Greece, Hungary, Luxembourg and Norway.

Comment [MSOffice684]: Confirmed : Austria

Comment [MSOffice685]: Confirmed : Norway

According to EU Directive 2001/18/EC "deliberate release means any intentional introduction into the environment of a GMO...for which no specific containment measures are used..." whereas "placing on the market means making available to third parties..." (EC 2001). Consequently a GMO, as or in products, must be subject to field testing at the research and developmental stage before it can be considered for placing on the market.

Comment [FL686]: Insertion of endnote and deletion of bracket reference (editorial team)

Directive 2001/18/EC mandates human health and environmental impact assessments. Article 4 of the Directive states that "Member States shall ensure that all appropriate measures are taken to avoid adverse effects to human health and the environment which might arise from the deliberate release and placing on the market of GMOs". Article 9, though, holds that if member States consider it appropriate they may consult groups or the public on such aspects of the proposed deliberate release. Article 24 foresees a public information and participation procedure also in case of GMO product notifications.

Directive 2001/18/EC's provisions on public information and public participation regarding GMOs differ depending on the scope of the notification. For a deliberate release of a GMO an EU Member States is required to "consult the public, and where appropriate groups" (Article 9); for the placing on the market "the public may make comments to the Commission" on the assessment report provided (Article 24). In practice, the provisions regarding the deliberate release of GMOs implemented by each Member State also differ in detail concerning the public information and participation.

3. Without prejudice to the applicable legislation on confidentiality in accordance with the provisions of article 4, each Party shall make available to the public in an adequate, timely and effective manner a summary of the notification introduced to obtain an authorization for the deliberate release into the environment or the placing on the market of a GMO on its territory, as well as the assessment report where available and in accordance with its national biosafety framework.

A prerequisite for effective public participation is access to information, i.e. the public is provided appropriate information in time. As a good practice, "timely" in this respect means that the public is granted sufficient time to deal with the information provided and to develop an opinion about the existing application. As an example for of good practice in this respect the Lucca Guidelines propose that ~~the~~ public authorities should encourage potential applicants to enter into discussion with the public concerned and to provide information even before entering the authorization procedure. The Guidelines are consistent in this regard with article 6, paragraph 5, of the Aarhus Convention. Additionally, annex IV of the Lucca Guidelines provides examples concerning the question of how information should be made available, for instance recommending that information for the public is provided free of charge. Moreover, not only passive access to information (e.g. on a website, in registers), but also active dissemination of information using a variety of media is of importance (e.g. reports, labelling of GM products).

Comment [MSOffice687]: Edit : PRRI

Comment [MSOffice688]: Edit (editorial team)

~~Basically.~~ In summary, the information ~~that~~ which needs to be available in the course of a participation procedure has to be information on the content of the notification (see also annex I bis, paragraph 4 (a)-(c)) as well as procedural information (see annex I bis, paragraph 5 (i)-(v)). The Aarhus Convention is not very explicit as to what constitutes GMO information, thus the GMO Amendment provides a more concrete interpretation. The two most important elements of such information are mentioned in paragraph 3 of Annex I bis: the summary of the notification and the assessment report.

Comment [MSOffice689]: Deletion : PRRI

Comment [MSOffice690]: Edit (editorial team)

Comment [MSOffice691]: Edit : PRRI

By way of example, in the EU, the content of the summary of the notifications, the so called summary notification information format (SNIF) is clearly defined in two Commission Decisions, for the placing on the market of GMOs as or in products³²³ (EC 2002e) and for the deliberate release of GMOs respectively³²⁴ (EC 2002d). The Lucca Guidelines refer to a non technical summary, with the aim of increasing understanding of the matter by the public.

Comment [FL692]: Deletion (editorial team)

Comment [FL693]: Insertion of endnote and deletion of bracketed reference (editorial team)

Comment [FL694]: Insertion of endnote and deletion of bracketed reference (editorial team)

In general, the assessment report is based on the scientific evaluations of the intended use of the GMOs, and includes the environmental risk assessment (ERA~~e.r.a.~~), the food safety evaluation etc. In case the competent authorities do not compile the assessment report themselves, they generally rely (as much as possible) on the respective assessment reports compiled by regulatory experts or scientific committees when reaching a decision.

Comment [H695]: Edit - changed throughout text (editorial team)

While in EU Directive 2001/18/EC the term "assessment report" is used, Regulation EC/1829/2003³²⁵ refers to the "opinion of the Authority", i.e. the European Food Safety Authority (EFSA). According to the Regulation the placing on the market of GM food and feed is governed by a community-wide procedure. The task of compiling an assessment report, named "overall opinion" according to the Regulation, is assigned to EFSA while the decision-making rests with the member States on the basis of a proposal for a council decision presented by the European Commission. The EFSA overall opinion contains the scientific opinion of the EFSA GMO panel and, in the case of applications which cover the cultivation of a genetically modified plant, also the ERA~~e.r.a.~~ of by the national competent authority of a Member State which has been assigned by EFSA to conduct ~~at~~ the ERA~~e.r.a.~~ according to Article 6, paragraph 3(c) of Regulation

Comment [FL696]: Endnote inserted (editorial team)

Comment [o697]: Edits (editorial team)

EC/1829/2003.

4. Parties shall in no case consider the following information as confidential:

It is common practice under many regulatory frameworks that certain commercial and industrial information of a company, the disclosure of which may harm the company or research institution's competitive position, may be treated as confidential. Paragraph 4 of annex I bis recognizes that Parties may receive such information in the course of a GMO notification procedure. This implies that a public authority receiving such information in the course of a GMO notification procedure, does not hand this information over to third parties. However, in the same manner as article 4, paragraph (4)(d) of the Convention, paragraph 4 of annex I bis lists certain information which can never be kept confidential.

Comment [MSOffice698]: Insertion : PRRI

Comment [MSOffice699]: Edit (editorial team)

Comment [MSOffice700]: Insertion : PRRI

By way of example, in the EU, according to article 25 of Directive 2001/18/EC, after consultation with the applicant, the competent authority decides,— which of the information indicated as confidential business information (CBI) by the applicant, will be exempted from disclosure in order to protect the company's legitimate economic interest.

Comment [FL701]: Deletion (editorial team)

Under paragraph 4 of article 25 of EU Directive 2001/18/EC, certain pieces of information are listed, which must never be regarded as confidential. Together with article 6, paragraphs 2 and 6 of the Aarhus Convention and Annex III of the Lucca Guidelines they served as a model for paragraph 4 (a)-(c) of Annex I bis of the GMO Amendment to the Aarhus Convention (see below).

Nevertheless, these provisions depict the minimum requirements for information which has to be made public in the course of a public participation procedure. In a number of EU countries, e.g. Austria and the Czech Republic, it is common practice to disclose the whole notification except for its confidential parts (e.g. Austria, and Czech Republic).

Comment [FL702]: Confirmed : Austria

Comment [FL703]: Text moved (editorial team)

Comment [FL704]: Text moved (editorial team)

(a) A general description of the genetically modified organism or organisms concerned, the name and address of the applicant for the authorization of the deliberate release, the intended uses and, if appropriate, the location of the release;

Here the basic pieces of information are mentioned which ought to be communicated to the public as early as possible in an early and effective manner during in the an environmental decision-making procedure. This includes first of all a description of the GMO and the name and address of the applicant responsible for proposed activity with the GMO. Moreover the intended use of the GMO, i.e. the scope of the notification, needs to be part of this information. If the GMO in question is intended to be deliberately released for research purposes, the location of the release should also be made public. Depending on the legal and administrative practice in a country the term "location" may be interpreted in different degrees of accuracy detail or precision. Thus the indication of the respective location may range from the description of the exact plot or the land register to the indication of the local community. In According to the 2009 ruling of the European Court of Justice in the 2009 case of *Commune de Sausheim v. Pierre Azelvandre*,³²⁶ the European Court of Justice held that the requirement in Article 25 (4) of EU Directive 2001/18/EC not to keep confidential the location of the release the location where a deliberate release of GMOs will be carried out falls under Article 25 (4) of Directive 2001/18/EC. So a public request for disclosure of all information submitted by the applicant in the context of the authorisation procedure relating to that release has to be followed. Thus meant that the disclosure of the information concerning the specific location of the site of the release, including grid reference, is mandatory. Any Exemptions relating to public order or other interests are not allowed.

Comment [MSOffice705]: Edit (editorial team) in light of PRRI comments

Comment [MSOffice706]: Deletion (editorial team)

Comment [MSOffice707]: Edits (editorial team) in light of PRRI comments

Comment [MSOffice708]: Edit (editorial team)

Comment [WX709]: Edit (editorial team)

According to Article 31.3 of EU Directive 2001/18/EC Member States are required to establish public registers not only to record the locations of deliberate releases of GMOs but also to record the locations of GMOs grown commercially “in the manner deemed appropriate to the competent authority”. To know where a certain type of GMO is grown is essential for the monitoring of GMOs, such as that required under articles 19 and 20 of EU Directive 2001/18/EC. According to Article 31 (3) of EU Directive 2001/18/EC Member States are required to establish public registers not only to record the locations of deliberate releases of GMOs but also to record the locations of GMOs grown commercially “in the manner deemed appropriate to the competent authority”. In Austria for instance the local community, in which a GMO product may be cultivated, has to give notice of the cultivation to the national competent authority which is obliged to maintain this information in a register.

Comment [MSOffice710]: Edit (editorial team) in light of PRRI comments

Comment [MSOffice711]: Edit (editorial team) in light of PRRI commentns

Comment [MSOffice712]: Confirmed : Austria

(b) The methods and plans for monitoring the genetically modified organism or organisms concerned and for emergency response;

Methods and plans for monitoring of potential adverse effects resulting from the activities specified in Annex I as well as emergency response plans cannot be kept confidential.

Being aware of the potential irreversibility of releases of GMOs as well as the limited experience gained so far and considering the precautionary principle, for example the EU regards monitoring possible effects of GMOs on the environment as important. As noted in the EU Directive 2001/18/EC, monitoring helps both to ~~According to Annex VII of the Directive the purpose of monitoring is on the one hand to “confirm that any assumption regarding the occurrence and impact of potential adverse effects of the GMO or its use in the environmental risk assessment (ERAe.r.a) is correct”.~~ On the other hand the objective of monitoring is to “and also to identify the occurrence of adverse effects of the GMO or its use on human health or the environment which were not anticipated in the ERAe.r.a”.³²⁷

Comment [MSOffice713]: Deletion : PRRI

Comment [MSOffice714]: Edit (editorial team)

Comment [MSOffice715]: Edit (editorial team)

(c) The environmental risk assessment.

Here the GMO Amendment substantiates- the provision of article 6, paragraph 6, of the Aarhus Convention with regard to GMOs. The disclosure of the ERAe.r.a. to the public guarantees that the public is provided extensive information on all environmental aspects associated with the proposed activity with the GMO in question.

There might be a lack of clarity regarding the question what the term e.r.a.-ERA means in practice. The EU for instance defines ERAe.r.a. as “the evaluation of risks to human health and the environment, whether direct or indirect, immediate or delayed, which the deliberate release or the placing on the market of GMOs may pose” (Article 2.8 of Directive 2001/18/EC). With the principles laid down in Directive 2001/18/EC and the legally binding Guidance Notes on risk assessment³²⁸ (EC 2002a) the EU has established a common methodology for carrying out the ERA-~~environmental risk assessment (e.r.a.)~~ of GMOs. In 2010 the European Food Safety Authority (EFSA) published updated guidance for the ERA of GM plants, reflecting the scientific state of the art in this field.³²⁹ Presently a couple of more specific Guidance Documents are being developed by EFSA.

Comment [FL716]: Deletion (editorial team)

Comment [FL717]: Edit (editorial team)

Comment [MSOffice718]: Edit (editorial team)

Comment [o719]: Edit : (editorial team)

5. Each Party shall ensure transparency of decision-making procedures and provide access to the relevant procedural information to the public. This information could include for example:

(i) The nature of possible decisions;

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

(iii) Public participation arrangements laid down pursuant to paragraph 1;

(iv) An indication of the public authority from which relevant information can be obtained;

(v) An indication of the public authority to which comments can be submitted and of the time schedule for the transmittal of comments.

Beside information on the content of the notification (see paragraphs 3 and 4) the public has to be provided with information on the envisaged environmental decision-making procedure. The annex refers to “the public” generally, rather than using the narrower term “the public concerned” which is used in article 6 of the Convention. By using the term “the public”, Parties to the Convention recognise that the mobility of GMOs, including when they are placed on the market, means that it is not possible to identify a discrete subsection of the public as the “public concerned”.

First of all the public authority responsible for the decision-making should find effective means to inform the public concerned about the proposed activity with GMOs by public notice (e.g. in an appropriate national, regional or local newspaper, in the official government gazette, on their internet site, any existing clearing-house mechanism etc.). From this information it should be clear for the public: what kind of activity with GMOs is submitted for decision and what types of decisions may be made (paragraph 5 (i)), and which public authority is responsible for taking the decision (paragraph 5 (ii)). Moreover, it is important that the public is made aware of its rights and opportunities to participate in the decision-making process. Therefore such a public notice should also contain information on the envisaged process according to the provisions of national legislation (paragraph 5 (iii)), for instance, the start of the procedure, any time limits for public consultation and any opportunities for participation (e.g. time and venue of a public hearing). Another very important piece of information for the public is the indication of the public authority or any other official body, where information can be obtained from (paragraph 5 (iv)). Such information may not only include information on the notification, but also any other information that may be relevant in this respect (e.g. reports and advice issued by expert committees or advisory bodies, international and national legislation and policy documents, etc.). This is linked to the first pillar of the Aarhus Convention, the public information. Here, the obligations of public authorities to collect and disseminate further information on GMO activities (e.g. in registers and databases, reports) are addressed. Last but not least the public needs to be informed about the public authority to which comments or questions can be submitted and the respective time schedule and modalities (paragraph 5 (v) and paragraph 6).

Comment [H720]: Deletion (editorial team)

Comment [FL721]: Edit (editorial team)

6. The provisions made pursuant to paragraph 1 shall allow the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed deliberate release, including placing on the market, in any appropriate manner.

Paragraph 6 states that a public authority has to ensure the possibility for proper feedback from the public. Again, the annex gives this right to the public generally, rather than the narrower “the public concerned”. Not only written comments are to be taken into account by the public authority, but for instance also questions and opinions brought forward at a public hearing or inquiry. Equal attention should be paid to any kind of point raised in the course of the public participation procedure (see the commentary on article 6, paragraph 7, and in particular the discussion of the Compliance Committee’s findings in ACCC/C/2006/16 (Lithuania) above).

Comment [MSOffice722]: Deletions : PRRI

Comment [MSOffice723]: Edit (editorial team)

Comment [MSOffice724]: Insertion (editorial team)

In this respect, the Lucca Guidelines, for example, also encourage public authorities to explore other mechanisms and measures (e.g. consensus conferences, round-table discussion etc.) on issues relating to the risk assessment and management of GMOs in order to improve public knowledge, public participation and public awareness of activities involving GMOs.

7. Each Party shall endeavour to ensure that, when decisions are taken on whether to permit the deliberate release of GMOs into the environment, including placing on the market, due account is taken of the outcome of the public participation procedure organized pursuant to paragraph 1.

Paragraph 7 requires the competent authority to ~~include~~ take due account of the outcome of the public participation procedure in taking the final decision on a certain notification. ~~Its interpretation and practical implementation however may raise controversies. On the one hand the outcome of a public participation procedure is believed to be not binding at all and merely regarded as general background information for the public authority responsible for taking the final decision. On the other hand public authorities could attribute a binding character to this outcome and consequently their decision should not be in contradiction to the public opinion. In practice different approaches are possible and will depend on each Party's socio-political circumstances. In Finland and Norway, the relevant legislation expressly provides for for instance ethical considerations to may also be taken into account in decisions on activities with GMOs.~~³³⁰ For a more general discussion of what is meant by taking "due account" of the outcome of the public participation procedure, see the commentary to article 6, paragraph 8 above.

8. Parties shall provide that when a decision subject to the provisions of this annex has been taken by a public authority, the text of the decision is made publicly available along with the reasons and considerations upon which it is based.

This paragraph is consistent with article 6, paragraph 9 of the Convention. Accordingly each Party has to make sure that the text of the final decision and the reasons and considerations on which it is based are made publicly available at for instance a public building or the internet. Additionally the decision should contain a description of how due account has been taken of the outcome of the public participation procedure.

In the Netherlands, the public may make comments on a draft decision prior to it being finalised. Comments by the public have to be answered individually and are taken into account in the final decision. The entire process is available to the public on the internet.³³¹

- Comment [MSOffice725]: Deletion : PRRI
- Comment [MSOffice726]: Deletion : Finland
- Comment [MSOffice727]: Confirmed : Norway
- Comment [MSOffice728]: Edit (editorial team)
- Comment [MSOffice729]: Edit (editorial team)
- Comment [MSOffice730]: Insertion (editorial team)

~~11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.~~

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

The Convention on Biological Diversity does not use the term "genetically modified organism". Instead it refers to "living modified organisms resulting from biotechnology" (arts. 8 (g) and 19, para. 3). The EC Council Directive 90/220/EEC of 23

April 1990 on the deliberate release into the environment of genetically modified organisms¹⁴⁴ defines GMO as "an organism in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination".¹⁴⁵ A number of UN/ECE/UNECE member States have passed GMO legislation or taken legal measures against the introduction of GMOs in recent years, including Austria, Denmark, France, Greece, Hungary, Italy, Luxembourg, Norway and Switzerland.

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

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

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

"[T]he importance of the application of the Convention to deliberate releases of genetically modified organisms into the environment, and request[ed] the Parties, at their first meeting, to further develop the application of the Convention by means of *inter alia* more precise provisions, taking into account the work done under the Convention on Biological Diversity which is developing a protocol on biosafety."

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

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

Public participation and genetically modified organisms

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

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

The binding Community instrument on the GMO issue, Directive 90/220/EEC, mandates human health and environmental impact assessments. Article 4 of the Directive states that member States must ensure all appropriate measures to avoid adverse effects to human health and the environment, including all necessary inspections, control measures and data gathering. Article 7, though, holds that only if member States consider it appropriate may they consult groups or the public on such aspects of the proposed release. Nevertheless, the Directive allows for public participation to come in "through the back-

door". Article 10, paragraph 1, holds that final consent to the release of a GMO product is contingent, in part, on compliance with relevant Community product legislation. This contingency makes proposed GMO products subject to provisions within product legislation that are not delineated by the broader Directive 90/220/EEC.

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

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

Article 7

PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Article 7 covers public participation with respect to plans, programmes and policies. The obligations of authorities and the rights of the public are somewhat less clearly defined than in article 6, although several of the provisions of article 6 are incorporated by reference, at least with respect to plans and programmes. Article 7 allows Parties more flexibility in finding appropriate solutions for public participation in this category of decision-making.

Even if it is not expressly stipulated in the Convention it seems common ground that article 7 relates only to plans, programmes and policies prepared by public authorities and not to those of private persons (who also sometimes prepare plans, programmes or policies "relating to the environment"). This is in keeping with the general approach of the Convention which addresses its obligations to the Parties themselves. An indirect indication to support this view of article 7 is the requirement that the "public which may participate shall be identified by the relevant public authority".

Article 7 distinguishes between plans and programmes on the one hand and policies on the other. As far as plans and programmes are concerned, it incorporates certain provisions of article 6 relating to the time-frames and the effectiveness of opportunities for public participation, as well as the obligation to ensure that public participation is actually taken into account. There is also an express reference to the objectives of the Convention. With respect to policies there is no express incorporation of the provisions of article 6.

The Convention does not define the terms "plans", "programmes" and "policies". These terms do have common-sense and sometimes legal meanings throughout the UN/ECE region, however. ~~The terms were also used without definition in the Espoo Convention.¹⁴⁷ The experience of the Meeting of the Parties to the Espoo Convention may be relevant in interpreting the meanings of "plans, programmes and policies".~~

Provision	Obligation	Implementation elements	Formatted: Justified
First sentence	Requires parties to provide public participation during preparation of plans and programmes relating to the environment	<ul style="list-style-type: none"> • Transparent and fair framework • Necessary information provided 	Formatted: Justified
Second sentence	Incorporates article 6, paragraphs 3, 4 and 8		Formatted: Justified
[Article 6, paragraph 3]	Sets time-frames for public participation procedures	<ul style="list-style-type: none"> • Specific time limits must be established • Must provide enough time for notification, preparation and effective participation by the public 	Formatted: Justified
[Article 6, paragraph 4]	Requires public participation to take place early in process	<ul style="list-style-type: none"> • Options are open • Public participation may not be pro forma 	Formatted: Justified
[Article 6, paragraph 8]	Parties must ensure that the plan or programme takes due account of public participation		Formatted: Justified
Third sentence	Requires the relevant public authority to identify the participating public	<ul style="list-style-type: none"> • Objectives of the Convention 	Formatted: Justified
Fourth sentence	Public participation in preparation of policies relating to the environment	<ul style="list-style-type: none"> • To the extent appropriate • Endeavour to provide 	Formatted: Justified

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

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

~~In 1996 the European Community adopted a proposal for a Council Directive on the assessment of the effects of certain plans and programmes on the environment, COM/96/0511 Final SYN 96/ 0304 (SEA proposal).¹⁴⁸ The purpose of the SEA proposal was to ensure that the environmental consequences of plans and programmes were identified and assessed before adoption. The proposal covered a range of public plans and programmes in several areas such as transport, energy, waste, water, industry,~~

telecommunications, tourism, town and country planning, and land use. It outlined the procedure to be followed and the content of the assessment. The proposal contained provisions for the public to give its opinion and for the results of public participation to be taken into account during the adoption procedure of the plans and programmes. In October 1998, the European Parliament completed the first reading of the SEA proposal. The Commission amended it in February 1999. The negotiations at Council level were proceeding during late 1999. UN/ECE has also discussed the idea of SEA as the subject of the next multilateral environmental agreement under its auspices.¹⁴⁹

It should be noted however that SEA procedures, as set at the international and regional level (see box below) and as regulated at the national level, cannot be considered as fully implementing the requirements of article 7 of the Aarhus Convention. While such procedures are useful tools towards implementation they need to be supplemented by other procedures (see box on plans, programmes and policies relating to the environment).

International and regional instruments for strategic environmental assessment

Two important instruments on SEA are the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment (Kiev, 2003) (the SEA Protocol) and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21.7.2001) (the SEA Directive).

The SEA Directive deals only with plans and programmes, and does not cover policies regarding the environment. While the SEA Protocol's strongest obligations relate to plans and programmes, it does require Parties to "endeavour to ensure that environmental, including health, concerns are considered and integrated to the extent appropriate in the preparation of its proposals for policies and legislation that are likely to have significant effects on the environment, including health". In applying this, each Party "shall consider the appropriate principles and elements" of the Protocol.

The purpose of SEA under both instruments is to ensure that the environmental consequences of plans and programmes are identified and assessed before their adoption. Both instruments cover public plans and programmes in various sectors, including transport, energy, waste, water, industry, telecommunications, tourism, town and country planning, and land use, "which are likely to have significant effects on the environment" (SEA Directive) or "which are likely to have significant environmental, including health, effects" (SEA Protocol). The two instruments prescribe similar procedures to be followed and requirements regarding the content of the assessment documentation. Both instruments refer specifically to the Aarhus Convention and make provision for the public to express their views and for the results of that public participation to be taken into account during the adoption of the plans and programmes.

Comparing article 7 to the SEA Protocol and the SEA Directive

Article 7 applies to plans, programmes and policies "relating to the environment" while the SEA Protocol and Directive are based on the concept of likelihood of significant effects on the environment. The legal scheme for identifying the likelihood of having significant effects is almost identical in both the Protocol and the Directive.³³² They both determine which plans and programmes will be subject to mandatory SEA and those which will require screening (which is a technical word for a test of significance). In addition, the same categories of plans and programmes are excluded from the ambit of both instruments.

<u>SEA Directive</u>	<u>SEA Protocol</u>	<u>Article 7, Aarhus Convention</u>
<u>Applies to plans and programmes "likely to have</u>	<u>Applies to plans and programmes "likely to have a</u>	<u>Applies to plans, programmes and polices "relating to the</u>

Formatted: Centered

Formatted: Justified

<u>significant effects on the environment”</u>	<u>significant environmental, including health, effects”</u>	<u>environment”</u>
<u>Lists eleven sectors (agriculture, forestry etc)³³³ where plans and programmes which set the framework for future development consent for certain types of project are deemed to have significant effect and therefore always require SEA.</u>	<u>Same as SEA Directive</u>	<u>Applies to all plans, programmes or policies relating to the environment</u>
<u>Minor modifications to plans and programmes in the above sectors, as well as those which determine the use of small areas at the local level are not subject to mandatory SEA but are still subject to screening</u>	<u>Same as SEA Directive</u>	<u>Applies to all plans, programmes or policies relating to the environment. Minor modifications and plans and programmes for small areas are not expressly excluded.</u>
<u>Other plans and programmes which set the framework for future development consent of projects are also subject to screening</u>	<u>Same as SEA Directive</u>	<u>Applies to all plans, programmes or policies relating to the environment</u>
<u>Plans and programmes solely for national defence or civil emergencies excluded.</u>	<u>Same as SEA Directive</u>	<u>Plans and programmes solely for national defence or civil emergencies not excluded.</u>
<u>Financial or budget plans and programmes excluded</u>	<u>Same as SEA Directive</u>	<u>Financial or budget plans and programmes not excluded</u>

Article 7 does not envisage any test of “significance” and “likelihood” nor any procedure or criteria for screening. The rule is simple: any plan, programme or policy “relating to the environment” is subject to its regime. In particular, a plan or programme or policy may be considered as “relating to the environment” regardless of whether it “sets the framework” for a development consent for any project or not. For some of the eleven sectors mentioned in the SEA instruments, e.g. telecommunications or tourism, setting the framework for projects deemed to have significant environmental effect could be an important trigger to consider them as “relating to the environment”. However, for other sectors, e.g. waste management or water management, any plan, programme or policy, even if it does not set the framework for a development consent, would seem very much related to the environment. The same applies to some plans, programmes and policies from other sectors than the eleven listed in the SEA instruments. For example, air pollution reduction programmes or noise combating programmes that set the framework for future development projects are subject to screening under the SEA instruments and may or not be found to have significant environmental effects.³³⁴ In any case however they are very much related to the environment. Moreover, there are plans and programmes which by their nature are unlikely to set the framework for a development consent, e.g. strategies for environmental education or programmes for co-operation of authorities with environmental NGOs. Such plans and programmes would not be considered to have significant environmental effects under the SEA instruments but nevertheless are still very much related to the environment and covered by article 7.

The SEA instruments cover minor modifications to plans and programmes and plans and programmes which determine the use of small areas at local level only if mandatory screening determines they may have significant environmental effects. In contrast, article 7 applies to all plans and programmes regarding the environment. It does

not expressly exclude minor modifications or small areas at the local level from its scope.

Plans, programmes and policies relating to the environment

The following types of plans, programmes and policies may be considered as “relating to the environment”:

- Those which “may have a significant effect on the environment” and require SEA
- Those which “may have a significant effect on the environment” but do not require SEA, for example:
 - those that do not set the framework for a development consent
- Those which “may have effect on the environment” but the effect is not “significant”, for example:
 - those that determine the use of small areas
- Those intended to help to protect the environment

Formatted: Justified

Formatted: Justified, Indent: First line: 0.88"

Strategic environmental assessment

~~The Sofia Initiative on Environmental Impact Assessment describes “strategic environmental assessment” (SEA) as “a process that helps governments to assess the environmental impacts of proposed development policies, plans and programmes. SEA enables policy makers to promote public participation in broad environmental policy-making, identify and predict cumulative impacts of broad governmental programmes and take this information into account early in policy-making”.¹⁵⁰ It is a mechanism for organizing public debate about proposed and alternative strategies, for predicting and assessing the environmental impacts of the proposed strategies, and for documenting key findings for use in subordinate decision-making processes. Among the main features of SEASEA is clearly relevant for the integration of environmental concerns into broad national sectoral policies (especially energy, transport, agriculture, forestry, tourism, etc;) and regional and local development plans (i.e. land-use plans, urban development plans, etc;);~~

Formatted: Justified

Formatted: Justified

Formatted: English (U.K.)

Formatted: Justified, Space Before: 0 pt

Formatted: Justified

~~The introduction of SEA relates to the implementation of article 7 of the Aarhus Convention; Most central and east-European countries and newly independent States have already established elementary legal grounds to deal with SEA application and substantive improvements can be achieved by capacity building and expert assistance to SEA experts during pilot SEA applications; Within the UN/ECE region, SEA is legally required in Bulgaria, the Czech Republic, Denmark, Finland, the Netherlands and Slovakia.¹⁵¹ Many other UN/ECE countries (such as Sweden and the United Kingdom) use informal SEA systems.~~

Enforcement of obligations under article 7 by members of the public through the access-to-justice provisions of article 9 requires a national “opt-in” under article 9, paragraph 2—that is, it requires Parties to take legislative steps to adopt guarantees for the rights contained in this article. If Parties already have existing guarantees, these must be maintained under the principles of article 3, paragraphs 5 and 6. If Parties do not have guarantees and do not adopt new legislative guarantees, opportunities for the enforcement of obligations under article 7 must be based on article 9, paragraph 3, which provides for the right of citizens to bring actions in cases of violations of environmental law.

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public.

Understanding “plans and programmes”

The Convention establishes a set of obligations for Parties to meet ~~in~~ regarding public participation during the preparation of plans and programmes relating to the environment.

Comment [MSOffice731]: Edit (editorial team)

Definitions of plans and programmes

The SEA Protocol provides in article 2, paragraph 5, the following definition for “plans and programmes”:

“Plans and programmes and any modifications to them that are:

- a. Required by legislative, regulatory or administrative provisions; and
- b. 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”

Plans and programmes relating to the environment

Article 7 refers to plans and programmes "relating to" the environment rather than plans and programmes potentially affecting the environment, a slightly higher standard. Whether a particular plan or programme relates to the environment should be determined with reference to the implied definition of "environment" found in the definition of "environmental information" (article 2, paragraph 3).

Plans and programmes relating to the environment may include land-use and regional development strategies, and sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation, etc., at all levels of government. They may also include government initiatives to achieve particular policy goals relating to the environment, such as incentive programmes to meet certain pollution reduction targets or voluntary recycling programmes, and complex strategies such as national and local environmental action plans and environmental health action plans. Often such strategies are the first step in action to reach environmental protection goals, followed by the development of plans based on the strategies. Integrated planning based on river basins or other geographical features is another example.

As far as modifications to plans and programmes are concerned the legal situation is not very clear. In contrast to article 6 and the SEA Protocol and SEA Directive, article 7 of the Convention does not specifically address the issue of modifications. Therefore, on a formalistic view, it might be argued that article 7 applies only “during the preparation of plans and programmes” and not during any subsequent modifications of those plans and programmes. Alternatively, it could be said that there is no need for article 7 to explicitly mention modifications, because any modification to a plan or programme in itself amounts to a plan or programme and therefore is subject to article 7. The latter view would seem to be supported by the SEA Protocol’s definition of plans and programmes (see box above) which may be useful in determining the scope of application of article 7 of the Aarhus Convention.

A further issue is plans and programmes that determine the use of small areas at the local level. While the size of the area covered and the level of decision-making may be important factors in determining “significance” or “likelihood”, they may be irrelevant when it comes to determining whether the plans and programmes are “relating to the environment”. Waste or water management plans as well as air pollution reduction programmes or noise combating programmes will be “relating to the environment” regardless of the size of the area covered and the level of decision-making and therefore will require public participation under article 7 even if they only determine the use of small areas at local level.

The Aarhus Convention does not include any provision which would exclude from the ambit of article 7 plans and programmes whose sole purpose is to serve national defence or civil emergencies. Nor does it exclude financial or budget plans and programmes. In cases where such plans and programmes may be “relating to the

environment”, implementation of article 7 may prove difficult if information necessary for the public to participate has been exempted from disclosure under article 4, paragraph 4. Article 4, paragraph 4’s direction that the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure, will be important here.

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

Public participation may be found in the drawing-up of development plans for the allocation of EU financial assistance under EU structural funds. Council Regulation (EC) No. 1260/1999 1083/2006 of 11 July 2006 repealing Structural Funds Regulation (EC) No. 1260/1999 and 24 June 1999 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund requires applicant member States to submit development plans (the analysis of the situation prepared by a member State and the priority needs for attaining the objectives of structural funds, together with the strategy, the planned action priorities, their specific goals and the related indicative financial resources) developed in "partnership" between the public administration and "social and economic" partners, including those representing civil society and environmental partners. The objectives of structural funds are:

- Promoting the development and structural adjustment of regions whose development is lagging behind;
- Supporting the economic and social conversion of areas facing structural difficulties,
- Supporting the adaptation and modernization of education, training and employment policies and systems.

In some countries (such as Ireland, United Kingdom) these "partnership arrangements" require public review of the draft development plans through public hearings and by the provision of written comment on the draft plans. They also enable NGOs to participate—with the same rights and duties as public authorities and other social and economic partners—in the committees that monitor the preparation of development plans. For example in Ireland since 2009, the Environmental Pillar (a representative group for some 27 environmental groups nationally) is regularly asked for their comments on plans involving structural funds, such as the EU 2020 growth strategy, along with other Social Partners, to ensure policy making takes environmental issues into account.

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

Comment [MSOffice732]: Insertion
: Ireland

Comment [MSOffice733]: Edit
(editorial team)

Formatted: Justified

Providing for implementation provisions

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

The Convention also provides that Parties may make "other provisions" to implement this provision. During the negotiations, the possibility of including "legal" provisions for public participation under this article was discussed. Some countries resisted this, but it was decided that the word "other" permitted Parties to satisfy article 7 by providing legal provisions for public participation. A similar solution was found in

article 3, paragraph 1, which talks of the obligation of Parties to take the necessary legislative, regulatory and "other" measures.

Transparent and fair framework

The reference to a transparent and fair framework emphasizes that the public must have opportunities to participate effectively. To do so the public must be able to use rules that are applied in a clear and consistent fashion, which in turn requires the implementation of a transparent and fair framework. Article 1 helps to clarify the intention behind this provision. Article 1 states that one objective of the Convention is to guarantee rights in respect of public participation in decision-making. For rights to be guaranteed, a transparent and fair framework must be in place, both for decision-making itself and to afford affected members of the public the possibility to uphold the standards of decision-making processes by challenging procedures and decisions. (See also the commentary to article 9.)

Public information

This provision requires the Parties to ensure that the necessary information is provided to the public. In this respect, the provision is linked to article 5, paragraph 3 (c), providing for the progressive availability in electronic databases of policies, plans and programmes relating to the environment, and article 5, paragraph 7 (a), which obliges Parties to publish the facts and analyses contributing to major environmental policy proposals. This naturally includes the obligation to notify the general public, and can also involve specifically notifying interested individuals and organizations, for example through a standing list.

It goes without saying that any public participation procedure must inform the public about the commencement of the process and their possibilities to participate. In order that the public participation is "effective", most of the requirements stipulated in article 6, paragraph 2, must also apply in the case of plans and programmes. This is illustrated by article 7's requirement that Parties provide "the necessary information to the public". The word "necessary" should be understood in the context of effective participation. In order that the public participation is "effective", Parties may wish to seek inspiration from the requirements stipulated in article 6, paragraph 2, in the case of plans and programmes. While not all the information under article 6, paragraph 2, may be "necessary" for the purposes of article 7, bearing in mind the obvious similarities in environmental decision-making, most of the obligations concerning provision of information which were deemed necessary in case of specific decisions subject to article 6 would seem to be also necessary in case of plans and programmes, and should might be applied *mutatis mutandis*. This would of course include the obligation to inform the public about commencement of the proceedings and possibilities to participate.

Comment [MSOffice734]: Text moved down and edited (editorial team) in light of Denmark's comments

Comment [MSOffice735]: Edit (editorial team) in light of Denmark's comments

Following the same rationale, in implementing the obligation to provide "the necessary information to the public", Parties may also wish to seek inspiration from means applying *mutatis mutandis* the two other provisions of article 6 that relate to the provision of information, namely paragraphs 6 and 9. In case of paragraph 6, it should be noted that there are some differences between decisions on specific activities and plans and programmes which should be taken into account when applying this paragraph *mutatis mutandis*.

Comment [MSOffice736]: Edit (editorial team), in light of Denmark's comments.

Comment [MSOffice737]: Edit (editorial team), in light of Denmark's comments

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

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

The different nature of proceedings under article 7 should be taken into account in the application of article 6, paragraphs 3, 2 (incorporated through article 6, paragraph 3), 4 and 8 to proceedings under article 7. Article 6, paragraph 3, and by incorporation article 6, paragraph 2, concern information to the public, early in the process, of certain elements of the process that will facilitate effective participation. Article 6, paragraph 4, requires Parties to provide for early public participation in the process. Article 6, paragraph 8, requires Parties to ensure that the decision takes "due account" of the outcome of the public participation.

Some paragraphs of article 6 are expressly omitted from this application. Its paragraphs 1, 10 and 11 are specific to decision-making and of course cannot apply to article 7.

The inapplicability of article 6, paragraph 5, indicates that the scope of the public included in participation under article 7 is not the same as that included under article 6, and for which a special category ("public concerned") has been devised.

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

Article 6, paragraph 7, which deals with the opportunity to comment, could well have been incorporated into article 7. Its omission indicates that the Parties wish to allow flexibility in defining the exact procedures for participation, without being bound as to the submission of comments in writing or at a hearing by any member of the public.

Finally, article 7 does not incorporate article 6, paragraph 9, on the notification to the public of the decision, including reasons and considerations. While taking due account of the fact that the result of public participation might require the final plan or programme to be explained with reasons, this is more a matter of logic or of good practice than an obligation under the Convention.

The close relationship between articles 6 and 7 and the direct incorporation of some of the requirements of article 6 are an indication that rights and obligations under article 7 are good candidates for the application of the access-to-justice provisions in article 9, paragraph 2. There, the Convention sets forth review procedures for persons aggrieved by decisions, acts or omissions under article 6 or "other relevant provisions" of the Convention. To make use of article 9, paragraph 2, however, a person must meet the standing requirements of that article, including being a member of the "public concerned" as defined in article 2, paragraph 5.

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

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

This sentence is the result of a compromise during the drafting which might lead to some misunderstanding. It seems to introduce the concept that the "public which may participate" in article 7-type proceedings may be a subset of the "public" as defined in article 2. Article 2 of course employs an "any person" principle to define the public. The "any person" concept is applied in the first sentence of article 7, concerning the obligation to provide necessary information to the public so that it may participate in the preparation of plans and programmes relating to the environment. Since there is no limitation with respect to the public to be informed, requiring a general notification, it may be expected that certain members of the public who learn about the process through notification will express their interest in participating. This may be in addition to the expected representatives of special interest groups that are traditionally included in these processes.

Unlike other aspects of article 7, this task is not put on the Party but directly on the relevant public authority. This clause should not be seen as a method of limiting the scope of subjects entitled to participate. Had that been the intention the term "public concerned" would likely have been used instead. Rather, it should be considered -be seen as a positive obligation requiring authorities to make an effort to actively identify those members of the public who should be actively encouraged to may participate in the preparation of plans and programmes relating to the environment. In many cases, this may very well be "all the public" — rather than as a method of limiting the scope of subjects entitled to participate. Had the latter been the intention the term "public concerned" would likely have been used instead.³³⁵ Moreover, article 7 expressly states that the public which may participate shall be identified "taking into account the objectives of this Convention". Since one of the objectives identified in the preamble is ⁽²³⁹⁾ "to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development" it is clear that the intention behind the obligation to identify the public which may participate is not to limit the participation but rather to streamline it in order to make it more effective.

Comment [M738]: Edit (editorial team in light of Denmark's comments)

Comment [MSOffice739]: Edit (editorial team)

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

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

Any obstacles that this provision might raise for an aggrieved member of the public to complain that he or she was unjustifiably excluded from a proceeding under article 7 can be overcome through a clear definition in national implementing law of the public that may participate to include any interested or concerned member of the public. Parties are obliged, at a minimum, to make an effort to identify the interested public and to make a strategy for public participation that is transparent and accessible. Among the issues that should be laid down in law are the standards to be applied to determine the scope of the public that the public authority should attempt to reach, and procedures to allow members of the public to express their interest. Standing lists of interested individuals and NGOs, in which persons express their interest in being informed of and in participating in

planning and policy-making in specific areas or on specific subjects, are useful in this regard.

E-representation platform in Bulgaria

Bulgaria's E-representation platform is an internet-based instrument for electing civil society representatives to participate in various administrative bodies taking decisions in the area of environmental protection and sustainable development in Bulgaria. It was set up by Bulgarian environmental NGOs in 2005 in accordance with the election procedure developed by the environmental NGO community at a series of national conferences. It is now regularly used by several governmental bodies, including the Ministry of Environment and Waters, the Ministry of Regional Development, the Ministry of Agriculture, the Ministry of Health and the Sofia Municipality. The on-line platform is a useful tool for government and municipal bodies seeking the input of civil society representatives in their work while at the same time enabling the environmental NGO community to nominate and elect their representatives and to receive feedback from them-. The platform has to date been used to elect approximately 50 civil society representatives in about 40 administrative bodies.³³⁶

Comment [M740]: New example provided by Milena Bokova, civil society representative of Bulgaria

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

As with "plans and programmes", ~~Nor does~~ the Convention ~~does not~~ define "policies". A policy may be defined as a "principle, plan or course of action".³³⁷ Policies are set apart from plans and programmes under the Convention, in recognition of the fact that they are typically less concrete than plans and programmes. This does not necessarily mean, however, that policies are not set forth in writing.

Policies also require a more thorough and profound understanding of the legalities and political context of a particular place. Policy incorporates history and culture and entire legal frameworks that extend beyond the finite area in which they are developed.

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

Public participation in policy-making

~~"An illuminating and informative example of the participation of the public in the preparation of environmental policies can be found in the development of an environmental policy by the Ministry of Defence of the Netherlands. It should be noted that the development of this policy was not required by any law, but was an initiative of the Ministry itself. The Ministry considered the creation of this policy to be its duty in order to carry out its activities consistently with the national environmental policy of the Netherlands. Besides the expected consultations with the armed services and relevant ministries, such as the Ministry for the Environment and the Ministry for Nature Conservation, the Ministry of Defence also contacted NGOs, including environmental action groups, to comment on the draft policy." This provision can also be considered in the light of article 3, paragraph 7, which discusses the obligation to promote the Convention's objectives in international processes and bodies.~~

Formatted: Justified

Article 8

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

The Convention recognizes that, in addition to the rights to take part in basic decisions affecting their lives, members of the public also have a role to play in the development of laws and normative acts. The applicability of the Convention to lawmaking was thoroughly discussed during the negotiations. This is reflected in the preambular provision that recognizes "the desirability of transparency in all branches of government" and invites "legislative bodies to implement the principles of this Convention in their proceedings". But governments were reluctant to negotiate specific requirements for parliaments, considering this a prerogative of the legislative branch.

Nevertheless, the Convention addresses the role of the executive branch of government in law-making, and specifically provides that the public shall be involved. Public participation in the making of law is thus an important aspect of the overall scope of the Convention. This area of activity is covered by a comparatively soft obligation to use best efforts, and uses indicative rather than mandatory wording for the steps to be taken. Nonetheless, article 8 should be interpreted as obliging the Parties to take concrete measures in order to fulfil the objectives of the Convention.

The measurement of the extent to which Parties meet their obligations under article 8 is not based on results, but on efforts. Parties are required to make efforts towards the attainment of public participation goals. Enforcement by members of the public of these obligations through the access-to-justice provisions of article 9 requires a national "opt-in" under article 9, paragraph 2. A national "opt-in" means that Parties take legislative steps to adopt guarantees for the rights contained in this article.

If Parties already have guarantees, these must be maintained under article 3, paragraphs 5 and 6. If Parties do not have guarantees and do not adopt new legislative guarantees, opportunities for the enforcement of obligations under article 8 must be based on article 9, paragraph 3, which provides for the right of citizens to bring actions in cases of violations of environmental law.

Article 8 addresses public participation in a particular area of decision-making: the preparation, by public authorities, of normative acts. A large part of a public authority's responsibilities is met by making specific decisions based on particular sets of facts and circumstances. Another significant part, however, is carried out by developing and passing rules of general application. The term "rules" is here used in its broadest sense, and may include decrees, regulations, ordinances, instructions, normative orders, norms and rules. It also includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature. Article 8 establishes public participation in the preparation of such rules as a goal of the Convention, and sets forth certain requirements that Parties should meet in reaching it.

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

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

Because different legal systems may use different terminology for various forms of normative acts, the Convention uses wording to try to avoid any unnecessary narrowing of the concept of "executive regulations". In some legal systems this term might be interpreted to cover only immediately executable rules. Therefore, to erase all doubt, article 8 refers to other generally applicable legally binding rules as well. The title also helps to explain what is meant by such rules by using the term "normative instruments" in the same manner. Such generally applicable legally binding rules include decrees, regulations, ordinances, instructions, normative orders, norms and rules. These means for the public authorities to discharge their responsibilities differ from decision-making under article 6 in that they result in directions that apply equally to all similarly-situated persons, not only to those involved in the particular matter before the authority. They differ from planning and policy-making under article 7 in that they result in definite behavioural norms.

Article 8 also includes the participation of the public authorities in the legislative process, up until the time that drafts prepared by the executive branch are passed to the legislature. Because the Convention is primarily addressed to public authorities (see definition, [article 2](#)), it seeks to implement public participation in law-making through these actors.

Role of public authorities in the preparation of legislation

In many UN/ECE countries, the public authorities play a major role in the preparation of legislation that is then submitted to the legislative branch for consideration.

Because the legislative bodies are the institutions competent for final adoption of the legal acts, with subsequent binding effect, the preparation of legislation by the public authorities cannot be considered as acting in a legislative capacity within the meaning of the Convention. Where public authorities drafting legislation will pass it on to a parliament or other legislative body, public participation while the drafts are under the auspices of public authorities does, in fact, constitute participation at an early stage.

The operative principle is similar to the one behind article 6, paragraph 5, in that the early resolution of disagreements and the taking into account of legitimate concerns at a preliminary stage can help to prevent problems later. Once the draft legislation is out of the hands of the public authorities and passes to the legislature, it is no longer in "preparation" by a public authority and article 8 would no longer apply.

Furthermore, where a public authority adopts a law that is prepared by a legislative body acting in a legislative capacity (for example, when a president signs a bill into law), article 8 would not apply because this is not "preparation" within the meaning of the Convention.

This provision of the Convention incorporates some of the basic principles found in earlier provisions. For example, the reference to the "effectiveness" of public participation requires authorities to ensure that the basic conditions for public participation are provided. Article 8 also emphasizes that the public should be involved at an early stage, while options are still open, so that the participation of the public can have a real impact on the draft laws, regulations and normative acts. The term "significant effect" is also used elsewhere in the Convention (see commentary to article 6, paragraph 1).

Many UN/ECE countries have a long-standing practice of involving at least part of the public in the preparation of executive regulations and generally applicable legally binding normative instruments. **The Hungarian Act XI of 1987 on Legislation** is a typical example. That law provides that NGOs and professional associations shall have the opportunity to give an opinion on legislative drafts prepared by the Government and drafts of ministerial and other governmental decrees.³³⁸

To this end, the following steps should be taken:

The Convention sets forth a minimum of three elements that should be implemented in order to meet the obligation to promote effective public participation in these cases. They establish a basic procedural framework for public participation, including time limits, notification and opportunity for commenting.

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

While time-frames are not specified, the Convention states that the authorities should plan for public participation by fixing their own schedule that is "sufficient" for effective participation. This will give the public the possibility to understand its opportunities for participation and maximize its input. While not establishing strict time limits, the **Hungarian law** mentioned above establishes some principles in the development of time-frames. It provides that the deadlines for giving opinions on drafts shall be established taking into account four factors:

- The person giving the opinion should have the opportunity to form a well-based opinion;
- The opinion must be able to be taken into consideration in the drafting;
- The size of the draft; and
- The type of organization giving the opinion.³³⁹

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

This provision echoes earlier provisions pertaining to effective notification of the public. It takes into account the practice of many States of publishing draft rules in an official governmental publication, ~~such as the Federal Register in the United States and other examples from Europe~~ (see box below) (see also commentary to article 6, paragraph 2). Such a mechanism will often be the appropriate vehicle for public notice and offers several advantages. First, it may already be institutionalized with an adequate staff and other resources (most UN/ECE countries already have such a publication in place). Secondly, it can serve many other governmental purposes relating to information, besides those required under this provision. Finally, standardizing the location of such information increases efficiency and reduces costs in terms of time and money, as the public becomes used to consulting the publication to monitor government activity. Where such information is routinely published, specific ad hoc requests to authorities are also reduced.

Comment [W741]: Edit (editorial team)

The mechanics of publishing draft rules

Slovenia's "Act amending the Environmental Protection Act"³⁴⁰ specifies the process for public participation in the adoption of regulations which could significantly influence the environment. Under that Act, Ministries and the competent authorities must make draft regulations available to the widest public and enable the public to express their opinions and comments on each draft regulation. As set out in the "Instructions on public participation in adopting regulations which may significantly impact the environment",³⁴¹ draft regulations are to be published on the Ministry's website, together with a notice inviting the public to provide their comments. The deadline for comments will be stated in the notice and must not be shorter than 30 days. Comments may be submitted in electronic or written form. Following the publication of the adopted regulation in the Slovenia's Official Gazette, a document summarizing the official position on the public's comments regarding the draft regulation will also be published on the Ministry's website.³⁴²

~~The government rule-making process in the United States is governed by the provisions of the Administrative Procedures Act (APA), 5 U.S.C. 500-596. Among its provisions is a requirement that government agencies must notify the general public in advance of any proposed new rule or change to the rules.¹⁵⁷³⁴³ This is accomplished by publishing the proposed new rule in the Federal Register. The Federal Register is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents. This publication is available free of charge to the general public in public libraries across the United States, and it is also available by individual subscription.~~

~~Along with notice of the proposed new rule, the agency must invite the public to comment and give information about how comments may be submitted. The public is then given time to review the proposed change and to prepare its comments. After a statutory comment period of at least 30 days, the government agency is then required to consider the comments before issuing the final rule.³⁴⁴~~

Comment [MSOffice742]: Insertion : Slovenia

Comment [MSOffice743]: Deletion (editorial team)

Formatted: Justified

The environment ministries in some countries, such as the Czech Republic, Georgia, Hungary, Latvia, Ukraine and the United Kingdom, have already developed the practice of publishing draft laws on electronic networks, sometimes using their own facilities and sometimes taking advantage of NGO initiatives. For example, in agreement with the Parliament of Georgia, draft laws in the field of environment protection are published on the Aarhus Centre Georgia's website. ~~the~~ The Hungarian Ministry of the Environment uses both its own electronic distribution list of interested NGOs as well as an existing electronic NGO network (Green Spider) linking over 200 NGOs throughout the country.³⁴⁵

Comment [M744]: NFPs and NGOs are invited to provide further examples.

Comment [FM745]: Insertion (editorial team)

Comment [o746]: Insertion : Latvia

Comment [t747]: Insertion: Aarhus Centre Georgia

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

Many UN/ECE countries already have policies for public authorities to routinely consult the public in the process of law-drafting and in the development of other normative acts. The European Commission, for example, in 1997 established a consultative committee on environmental affairs, which includes the participation of representatives from environmental NGOs.³⁴⁶

This provision acknowledges the good practice that has developed in the UN/ECE region, by not specifying how the public is to be involved, but leaving that up to each Party. It is implicit in this provision that lawmakers and legislators bear ultimate responsibility for the outcome of law-making and rule-making processes, and that therefore some accommodation must be made for them.

For this reason, authorities have the option to take public comments through a mechanism called by the Convention "representative consultative bodies." This term includes several important ideas. The first is that such bodies are not established in order to give expert assistance on their own, but only insofar as they are representative of interested or concerned segments of the public or of the public at large. Of course authorities can ask for the assistance of particular experts or expert bodies, but the participation of such experts is no substitute for the participation of the general public. Secondly, these bodies must be "consultative". That is, they must employ a process of consultation that indicates a degree of transparency and openness. Analogy may be drawn here with the "transparent and fair framework" that is often discussed under the Convention. It is further in the interests of the authorities to monitor and to assess the degree to which the representative bodies meet these requirements, in order to ensure that the process enjoys the maximum public input.

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

While the specific contours of public participation in the preparation of rules are not made obligatory by the Convention, it is mandatory for the Parties to ensure that the outcome of public participation is taken into account as far as possible. As discussed above under article 6, paragraph 8, this provision establishes a relatively high burden for public authorities to take into account public comments in processes under article 8.

While the direct rights and interests of particular members of the public might not be so implicated as in a proceeding under article 6, the propriety of public involvement in law-making must nevertheless be upheld by giving effect to public comments "as far as possible". As a practical matter, the final document adopting the legislation or rules should explain the public participation and how it was taken into account. This is also useful since very often a number of public authorities and bodies are involved in the development of legislation and rules, and the public participation may be rather diffuse. It is therefore helpful for a public authority to be responsible for coordinating the public input. In the preparation of the final documents relating to the legislation and rules, therefore, the public authority responsible for the public participation should properly and clearly inform the bodies involved in the process so as to give a full picture of public participation. Moreover, the final document should demonstrate that public participation has been used in coming to the final result.

In a particular case it might be proved that a given public authority did not meet minimum procedural requirements, if it can be shown that the public was not consulted or that the public's comments were not taken into account at all. The phrase "as far as possible" acknowledges, however, that there is an element of politics in law-making that Parties will need to take into consideration. The realities of law-making might prevent the kind of analysis of the process of decision-making that would be necessary to challenge the outcome of the process on substantive public participation grounds.

PILLAR III

ACCESS TO JUSTICE

Article 9 contains the provisions for the third "pillar" of the Convention, on access to justice. Under the Convention, "access to justice" means that members of the public have access to legal procedures to enforce the Convention's standards on legal mechanisms that they can use to gain review of potential violations of the access to information and public participation of the Convention as well as provisions of domestic environmental law.

Purpose of access-to-justice pillar

The rationale behind the access-to-justice pillar of the Convention is to give the rights enshrined in the Convention legal "teeth" by ensuring that enable members of the public to have the Convention's its standards on strengthen access to environmental information and environmental decision-making, as well as national laws relating to the environment, are enforceable by implementation and enforcement by enabling citizens to invoke the power of the law. Thus, Access access to justice creates a level playing field and helps ensure consistent and effective Parties' implementation of, and compliance with, of the Convention and as well as the effective application of national laws relating to the environment. 's access to information and public participation provisions. In addition, the public's ability to help enforce environmental law adds important resources to government efforts.

Comment [NY748]: Edit (editorial team)

Comment [MSOffice749]: Edit (editorial team)

There are, at present, numerous obstacles to access to justice in many signatory countries. For example, citizens and NGOs often lack are often denied legal standing to bring a legal challenge for violation of their rights or to enforce the law. Also, review procedures, although formally in place, may be too costly for the public to use in practice. Yet another obstacle may be that in some countries, bodies with judicial functions lack authority to provide injunctive relief or other appropriate remedies to effectively and to enforce their decisions. These and other barriers weaken the ability of members of the public to seek redress if the government public administration authorities or private sector persons does not comply with the Convention or with national environmental law. The access to justice provisions in article 9 are intended to address these issues.

Comment [MSOffice750]: Edit (editorial team)

What is access to justice under the Convention?

Access to justice under the Convention means that the public has have the ability to go to court or another independent and impartial review body to ask for the review of potential violations of the Convention and national laws relating to the environment. The Convention creates's access to information and public participation provisions create certain rights and obligations concerning access to information and public participation, and the provisions on access to justice. The access to justice provisions mean establish that not only Parties, but also individuals and NGOs, as members of the public, can enforce the Convention in these respects.

Comment [MSOffice751]: Edits (editorial team)

Comment [MSOffice752]: Edit (editorial team)

While article 9 explicitly refers to the Access to justice under the Convention's applies primarily to the access to information provisions on access to information, in of article 4, and the public participation in decisions on specific activities-making provisions of in article 6, it also requires that access to justice shall also be ensured for other decisions, acts and omissions related to the environment. The provisions on access to justice essentially apply to all matters of environmental law, but a distinction is made in the Convention between three categories of decisions, acts and omissions:

Comment [MSOffice753]: Edit (editorial team)

- However, it may also apply to "other relevant provisions." How the scope of the access to justice provisions can be interpreted beyond articles 4 and 6 is discussed below. The access to justice provisions also apply to members of the public seeking review of violations of domestic environmental law. Parties have flexibility in how they implement this requirement, but the general obligation allows the public to challenge "acts and omissions" by both private persons and public authorities. The refusal and inadequate handling by public authorities of requests for environmental information
- Decisions, acts and omissions by public authorities concerning permits, permit procedures and decision-making for specific activities
- All other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.

Depending on the kind of decision, act or omission in question, the Convention sets different criteria and allows different degrees of flexibility for the Parties when ensuring access to justice. Despite these differences, however, it is important to recall that the various references in the Convention to national law, national legislation and criteria in national law do not imply leeway for the Parties to deviate from the objective of granting wide access to justice within the scope of the Convention. As discussed with respect to article 2 of the Convention Rather, these references rather acknowledge recognise that Parties may achieve this objective in different ways in accordance with their national legal frameworks. The access to justice provisions provide a level of standing to go to court or another review body, to individuals and NGOs. The Convention provides slightly different guidance on standing depending on the type of review requested.

Comment [o754]: Edits (editorial team)

The Convention sets certain requirements for access to justice procedures. They must be fair, equitable, timely and not prohibitively expensive. They must also provide adequate and effective remedies and be carried out by independent and impartial bodies. The Convention further requires information on access to justice procedures to be disseminated and encourages the development of assistance mechanisms to remove or reduce financial and other barriers. Whereas for the first two of the three categories listed above, the Parties must provide review procedure before a court or court-like body, established by law, for the third category the Parties may ensure access to justice either by administrative or judicial procedures. The term "judicial procedures" may be seen as another way to describe courts and court-like bodies. A general characteristic of courts and court-like bodies is that they act independently and impartially outside the administration, i.e. without any instruction from the executive bodies on how to decide a specific case. Also, to maintain that independence, any appeal of a court decision should be made to a superior court instance and not the government or the public administration. While making the distinction between judicial and administrative procedures, certain general requirements are imposed on all reviewing instances and procedures within the scope of the Convention. First, they must be fair, equitable, timely and not prohibitively expensive. Second, they must provide adequate and effective remedies and be carried out by independent and impartial bodies. Third, information on administrative and judicial review procedures must be disseminated to the public, and the Parties are encouraged to establish appropriate assistance mechanisms to remove or reduce financial and other barriers.

Comment [o755]: Edits (editorial team)

Comment [MSOffice756]: Deletion : Denmark

Comment [MSOffice757]: Deletion : Denmark

As far as court or court-like bodies are concerned, the Parties have flexibility in deciding on how to structure their appeal systems. For instance, they may have systems of

for the judicial review of environmental decisions in their ordinary, civil courts or in administrative courts. An administrative court may either be a specific chamber of a court dealing with cases against the public administration or a specific court mandated to decide on appeals of administrative decisions. The Parties may also establish particular courts for dealing with cases concerning access to information or the environmental matters. Yet all court and court-like bodies must comply with the requirements of being not only independent and impartial, but also fair, equitable, timely and not prohibitively expensive. Although no explicit requirement of independence or impartiality is made for administrative procedures, where such procedures are within the scope of the Convention, they must be fair, equitable, timely and not prohibitively expensive. Moreover, the Parties must provide adequate and effective remedies for all these procedures.

Comment [o758]: Edits (editorial team)

Although the Aarhus Convention is autonomous from international human rights conventions, it is obvious that its provisions on access to justice draw on and develop established notions from international human rights law. In particular, article 9 of the Convention reinforces the right to a fair trial, as provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁴⁷ and several other international human rights instruments. Yet, the Aarhus Convention adapts the human rights notions to contexts where the protection of the environment and human health is at stake, for instance, by providing for access to justice also for environmental NGOs. In keeping with the links between its access to justice provisions and international human rights norms, the Aarhus Convention has also been considered in the jurisprudence of the European Court of Human Rights, which has decided several cases on Aarhus Convention issues, and has also quoted the Aarhus Convention in its decisions.³⁴⁸

Comment [MSOffice759]: Edits (editorial team)

Court-like bodies

Through its jurisprudence, the European Court of Human Rights has established certain criteria for court-like bodies, for example tribunals. The European Court of Human Rights considers that a tribunal must be established by law and undertake its functions of determining matters within its competence on the basis of rules of law and following proceedings that are conducted in a prescribed manner.³⁴⁹ Secondly, its members must be independent and impartial. Independence is to be determined by the manner of appointment of its members, the duration of their terms of office, and guarantees against outside pressures. It is also important whether or not the body is seen to be independent by impartial spectators.³⁵⁰ Lay assessors are generally acceptable, but in specific cases their objectivity can be questioned.³⁵¹ Furthermore, it is acceptable that the first decision in a case is taken by an authority, so long as the possibility exists of having that decision appealed to a court, without restriction on the scope of examination. Finally, the decision of the court must be binding, without the possibility for the government or other authorities to have it set aside.³⁵² The European Court of Justice has its own, closely related jurisprudence on these issues.³⁵³

Comment [MSOffice760]: Insertion of text box (editorial team, in light of Chair of Task Force on Access to Justice's insertion)

Comment [MSOffice761]: Text box inserted (Chair of Task Force on Access to Justice on Access to Justice)

Just like the other parts of the Convention, it follows from article 3, paragraph 9, that access to justice must be provided to members of the public without discrimination as to citizenship, nationality or domicile, and as regards legal persons, without discrimination as to their registered seat or effective centre of activity. This implies that not only foreign citizens in the Party where the decision, act or omission took place, state of the activity, but also outside that state country, shall have access to justice under no less favourable conditions than a person affected in the state of the activity that country. In this sense, the Convention provides for access to justice across state borders.

Comment [o762]: Deletion (Croplife)

Comment [o763]: Edits (editorial team)

Does the ombudsman fit under the Convention?

In many countries, some type of "ombudsman" functions as an independent and impartial review body for violations of administrative law against citizens. During the negotiations, the issue was raised whether ombudsman institutions would correspond with the requirements of article 9. While in practical terms, the ombudsman may facilitate the achievement of the Convention, whether it fully meets the criteria under article 9 depends e.g. on how the ombudsman office is structured and fits within the national review system. For instance, in order to fully meet the requirements of article 9, paragraph 1, final decisions by the ombudsman must be binding on the public authority holding the information. Similarly, in order to meet article 9, paragraph 4, the ombudsman must be able to provide effective remedies, including injunctive relief as appropriate.

Comment [o764]: Edits (editorial team)

If the ombudsman office established by a Party does not meet all the requirements of article 9, the public. Usually, an ombudsman does not imply a legal right to any review procedures, nor does he or she supply binding decisions or provide injunctive relief. Moreover, the ombudsman may not have strict standing rules for bringing a complaint. In such cases, while the ombudsman may add to more effective compliance with the Convention, the institution does not in itself meet the requirements of the Convention. In these situations, a person who does not achieve the intended results through the ombudsman must still have opportunities to seek review in the courts access other administrative or judicial procedures, in a manner consistent with the Convention. Moreover, it is important for the public not to delay the pursuit of legal remedies when making use of the ombudsman, so as to avoid that the time frames for court reviews expire.

Comment [o765]: Edit (editorial team in light of comments by Chair of Access to Justice Task Force)

Implementing access to justice

The following table contains the main elements of article 9 on access to justice. It serves as an overview of the obligations that will be discussed in the following sections. The Convention imposes varying degrees of obligations on access to justice for different categories of acts, omissions and decisions in different ways, with different minimum criteria and leeway for the Parties when implementing this part of the Convention. Parties and public authorities. In most cases, the Convention's structures its obligations are structured through a clear general principle combined with minimum requirements that may be more or less precise and that may allow for more or less flexibility for the Parties, flexible requirements, as well as implementation guidance with an even higher level of flexibility for the Party or public authority. The different criteria and scope of flexibility These varying degrees of obligation will be discussed in more detail below. The table covers the general obligations and provides some insight, beyond the requirements of the Convention, into how Parties may wish to implement them.

Comment [o766]: Deletion (editorial team)

Article 9	General requirements	Implementation guidance
	A system to provide review of public authority decisions based on articles 4 and 6 and other relevant provisions	<ul style="list-style-type: none"> Ensure availability of independent and impartial review bodies, including courts for all categories of decisions, acts and omissions under this article.
	A system to provide citizen access to review so as to challenge violations of	<ul style="list-style-type: none"> Develop clear rules concerning standing of individuals and NGOs to

- domestic environmental law. access judicial and other review for violations of the Convention and for violations of domestic environmental law
- Develop adequate remedies, such as injunctive relief
 - Establish mechanisms to provide public with information on review procedures and access to justice procedures
 - Ensure that principles, systems or mechanisms are in place to ensure that the costs for the review procedure are not prohibitively expensive
 - Develop assistance mechanisms for public in accessing review procedures

Comment [NY767]: Text already in previous draft but inadvertently not shown in track changes

Article 9

ACCESS TO JUSTICE

Article 9 requires ~~an appropriate mechanism to~~ adequate review procedures that safeguard the rights afforded in the other pillars of the Convention and under national environmental law. The following table provides an overview of the obligations under article 9, paragraph by paragraph. The implementation elements are taken from the requirements ~~and guidance~~ in the Convention itself.

Provision	Obligation	Implementation elements
Article 9, paragraph 1	Provides review procedures relating to information requests under article 4.	<ul style="list-style-type: none"> Judicial or other independent and impartial review Additional expeditious and inexpensive reconsideration or review procedure <u>Standing requirements Available to any person that has requested information</u> Binding final decisions Reasons for decision in writing
Article 9 paragraph 2	Provides review procedures relating to public participation under article 6 and other relevant provisions of the Convention.	<ul style="list-style-type: none"> Judicial or other independent and impartial review Possibility for preliminary administrative review procedure Standing requirements
Article 9, paragraph 3	Provides review procedures for public review of acts and omissions of private persons or public authorities concerning national law relating to the environment.	<ul style="list-style-type: none"> Administrative review procedures Judicial review procedures
Article 9, paragraph 4	<u>Sets general Minimum minimum standards applicable to access to justice that apply to all relevant review</u> procedures, decisions and remedies.	<ul style="list-style-type: none"> Adequate and effective remedies, including injunctive relief Fairness Equity Timeliness Not prohibitively expensive Record decisions in writing Publicly accessible decisions
Article 9, paragraph 5	Requires Parties to facilitate effective access to justice	<ul style="list-style-type: none"> Information on access to administrative and judicial review procedures Appropriate assistance

Comment [o768]: Edit (Chair of Task Force on Access to Justice)

mechanisms to remove or
reduce financial and other
barriers to access to justice

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

What can be reviewed?

The provisions of paragraph 1 guarantee ~~members of the public~~ the opportunity for to review of decisions made under article 4 on access to environmental information. Paragraph 1 requires Parties to ensure that any person has access to a review procedure when he or she believes that his or her information request has not been properly dealt with in accordance with article 4. ~~Parties are to carry out this obligation "within the framework of national legislation". The Parties have the flexibility to Each Party has very different review systems and has the flexibility under the Convention to implement the Convention's obligations under paragraph 1 within the framework of their national laws, e.g. in designating the competent court or establishing the route of appeal. at system.~~

Comment [o769]: Deletion (Croplife)

Comment [o770]: Edit (editorial team)

Comment [NY771]: Deleted (editorial team)

What triggers the review procedure? Triggers and scope of review

Parties must make a review procedure available when a person contends that his or her request for information has been ignored or wrongfully refused, ~~that the response was inadequate, or that the~~ ~~In addition, Parties must make a review procedure available when the applicant considers that the response is inadequate; or when he or she believes that the request was otherwise not dealt with in accordance with the provisions of article 4. It is clear that an~~ ~~For instance, a~~ ~~In this way, an~~ applicant may have received a response to his or her request and may even have received information, but may still have a basis for review. Article 4 contains many specific procedural requirements and substantive criteria, such as the time permitted to respond to an information request (art. 4, para 2), the form in which a response must be given (art. 4, para. 1 (b)), and the grounds upon which requests may be refused (art. 4, paras. 3 and 4). The review provided by article 9, paragraph 1, may address these provisions and any other aspects of an information request and response under article 4. ~~Thus, while article 9, paragraph 1, contrary in contrast to article 9, paragraph 2, does not explicitly refer to "substantial or procedural legality", it is apparent~~ ~~implicit that the review must include both kinds of arguments~~ ~~grounds when invoked by the applicant.~~

Comment [o772]: Edit (editorial team)

Comment [NY773]: Edit (editorial team)

Who can ask for review?—The issue of standing

Under article 9, paragraph 1, "any person" who has requested information is entitled to use the review procedures. ~~In other words, any person who is not satisfied with the reply~~ ~~response to or handling of a request for information must be granted and has "standing" before the reviewing body"~~ to challenge decisions made under article 4.

Comment [o774]: Edit (editorial team)

This is consistent with the wording of article 4, which allows any member of the public to request information, and of article 2, paragraph 4, which defines the "public" as ~~one or more~~ natural or legal persons, and their associations, organizations or groups. ~~Thus, as held by the Compliance Committee in its findings on Communication~~

Comment [o775]: Edit (editorial team)

~~ACCC/C/2004/1, (Kazakhstan), it would, for instance, be in violation of the Convention to deny standing for NGOs an NGO that had made an information request, standing to challenge the public authorities' response to that request in a lawsuit on access to information.~~³⁵⁴

Comment [o776]: Edit (editorial team)

~~In addition~~As mentioned previously, article 3, paragraph 9, requires public authorities to allow access to information and access to justice even to citizens or residents of other countries and requires organizations to be provided with this access even if their centre of activities is in another country.

Comment [E777]: Edit footnote : at the request of Germany

Who carries out the review?

Article 9, paragraph 1, specifies that the review procedure must be before a court of law or another "independent and impartial body established by law". ~~The concept of "independent and impartial" bodies "has been well developed under the Convention for the Protection of Human Rights and Fundamental Freedoms. "Independent and impartial" bodies do not have to be courts, but must be at least quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.~~

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

The reviewing body must also be competent to make decisions that are binding on the public authority holding the requested information. Thus, advisory findings or non-binding suggestions by the reviewing body are not sufficient. This is essential in determining whether an ombudsman institution suffices to meet the criteria in article 9, paragraph 1 of the Convention.

Comment [o778]: Edit (editorial team)

Where does the ombudsman fit under the Convention?

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

~~The office of ombudsman originated in the Nordic countries as an institution to ensure that public authorities did not commit injustices against individuals. It has since spread widely both in western and in eastern Europe. In the Nordic countries, the ombudsman acts on behalf of parliament, although it is not part of any branch of government. The ombudsman has jurisdiction to review all aspects of public administration to ensure the "proper exercise of administrative powers". Many of the complaints handled by the ombudsman deal with access to information. During the Convention's negotiations, Denmark, Finland, Norway and Sweden made an interpretative statement about the~~

institution of ombudsman in the context of article 9, contending that it corresponded with the requirements of the Convention in practical terms, although it did not imply a legal right to any review procedures, did not supply binding decisions, and did not provide injunctive relief.¹⁶² Moreover, the ombudsman does not have strict standing rules for bringing a complaint. Where a person does not achieve the intended results through the ombudsman, however, he or she may still have opportunities to seek review in the courts in some countries, in a manner consistent with the Convention.

Alternative to court review

Article 9, paragraph 1, also requires Parties to ensure that the public has access to faster and less expensive review procedures than court review. Appeal to a court can be time-consuming and expensive and access to information is often needed quickly. While review procedures in court must not be too lengthy or costly either, decisions concerning access to information can usually often be reconsidered by the public authority in question or through an administrative procedure in a yet quicker and less costly way. Many applicants will not have the financial resources to cover litigation costs, and delays and expenses in court procedures can be a barrier to effective access to information.

The Convention requires Parties whose courts have jurisdiction over access to information disputes to make an additional alternative "expeditious" and "inexpensive" alternative additional review mechanism available. "Expeditious" means "efficient and speedy". The requirement that the process should be free of charge or inexpensive is meant to ensure that any member of the public will be able to afford it. In its findings on communication ACCC/C/2004/1 (Kazakhstan), the Compliance Committee considered the lengthy review procedure to deal with a request by an NGO to get access to environmental information, and held that the requirements of providing an expeditious procedure had not been met by the Party concerned.³⁵⁵

Such aThe additional "expeditious" and "inexpensive" review process can take several forms, including reconsideration by a public authority or review by an independent and impartial body other than a court of law. While "review" means that another body, which is independent and impartial, looks at a decision looks at the decision to ensure its accuracy, "r"Reconsideration" indicates that the same body goes over the decision once again for the same purpose to ensure its accuracy. The rationale of this additional route for review is that it can be more efficient, quicker and less costly for the applicant than a court procedure. Yet providing for such a procedure is no excuse for failing to ensure a review before a court or a court-like body as well.

An example is found in the Netherlands, where the applicant, wishing to appeal against a decision denying access to information, must first file a notice of objection to the same administrative authority that made the decision. If the administrative authority then confirms its refusal to supply the requested information, appeal is directly to court. Similarly, in Georgia, an applicant who wishes to appeal a decision of a government body must first apply free of charge to the relevant higher governmental authority before going to the courts.

In its findings on Communication ACCC/C/2004/1 (Kazakhstan), the Compliance Committee considered the lengthy review procedure to deal with a request by an NGO to get access to environmental information, and held that the requirements of providing an expeditious procedure had not been met by the Party concerned.³⁵⁶

Comment [o779]: Edit (editorial team)

Comment [E780]: Edit footnote (at the request of Germany)

Comment [NY781]: Text moved up (editorial team)

Comment [FL782]: Insertion (editorial team)

Comment [o783]: Edit (editorial team)

Comment [FM784]: Deletion (editorial team)

Comment [FM785]: Insertion (Aarhus Centre Georgia)

Comment [NY786]: Text moved up (editorial team)

Alternatives to courts: quasi-judicial bodies, reconsiderations and administrative reviews

~~Some countries have chosen to create a special, independent and impartial body to review access to information cases.~~ Most UN/ECE countries have some kind of general administrative reconsideration or appeals process for governmental decisions. This administrative process often functions more rapidly than an appeal to a court and is often free of charge. Applied to review of requests for information, so long as the body is independent and impartial and established by law, such a process could satisfy the requirements of the Convention.

For example, in **Poland** a free and expeditious review can be carried out by a higher administrative body than the public authority that made the original decision.⁴⁶³ The Polish Act on Access to Public Information~~In Poland, the law~~ requires the higher administrative body to handle the appeal within one month. After the higher administrative review, the applicant still has the opportunity to take the case to an administrative court. The latter is inexpensive, but can take up to one year to reach a final decision.

~~Some countries have chosen to create special, independent and impartial bodies to review access-to-information cases. For example, the United Kingdom has an Information Commissioner's Office (<http://www.ico.gov.uk/>) and a First-tier Tribunal (Information Rights) (<http://www.informationtribunal.gov.uk/>). The Information Commissioner's Office's mission is to uphold information rights in the public interest, by promoting openness by public bodies and data privacy for individuals. It rules on eligible complaints, gives guidance to individuals and organisations, and takes appropriate action when the law is broken. The First-Tier Information Tribunal hears appeals from notices issued by the Information Commissioner under the UK's Freedom of Information Act 2000, the Environmental Information Regulations 2004 and other UK information-related legislation. A panel composed of the Tribunal Judge and two other non-legal members, appointed by the Lord Chancellor, hears appeals at venues across the UK. The oral hearings are open to the public.~~

Comment [MSOffice787]: Text moved down (editorial team)

Comment [o788]: Edit (editorial team)

Comment [MSOffice789]: Text moved down from above (editorial team)

Comment [MSOffice790]: Insertion (editorial team in light of comments by Chair of Task Force on Access to Justice)

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

Final decisions must be binding

Under the Convention, final decisions under article 9, paragraph 1, shall be binding on the public authority that holds the requested information. The Convention does not require every decision under paragraph 1 to be binding, only final ones. So, the various mechanisms and opportunities for appeal can work in combination to reach a final binding decision. Typically, if there is a possibility of further appeal, a decision is not considered to be final until such time as the period for lodging an appeal has passed. Final judicial and quasi-judicial decisions are usually binding, while in many countries, decisions of independent bodies, such as commissions and ombudsmen, are advisory. Thus, in addition to any advisory processes, Parties must ensure that a final, binding decision is still possible.

Comment [o791]: Edit (editorial team)

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

In its findings on communication ACCC/C/2008/30 (Republic of Moldova), the Compliance Committee held that, taking into account article 9, paragraph 1, which implies that the final decisions of a court of law or other independent and impartial body established by law are binding upon and must thus be complied with by public authorities, the failure of the Party concerned's public authority to fully execute the final decision of the Court of Appeal ordering the authority to provide the communicant with copies of the requested land rental contracts amounted to non-compliance with article 9, paragraph 1 of the Convention. The Committee noted that if a public agency has the possibility not to comply with a final decision of a court of law under article 9, paragraph 1, then doubts arise as to the binding nature of the decisions of the courts within a given legal system.³⁵⁷

Comment [FL792]: Insertion (editorial team)

Finally, at least where access to ~~justice~~ the requested information is refused under this paragraph, reasons for the decision shall be stated in writing. The ~~wording formulation chosen of the paragraph does appear to encourage~~ Parties to establish a general rule that all decisions should be in writing.

Comment [o793]: Edit (editorial team)

Comment [o794]: Edit (editorial team)

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What can be reviewed?

Paragraph 2 provides for access to justice ~~through formal review regarding "any decision, act or omission" relating to public participation and decision-making of matters relating to public participation~~ under article 6. It also expressly applies to "other relevant provisions" of the Convention as provided for under national law. This means that Parties ~~may be free to include provisions in their national law extending apply~~ the review procedures ~~prescribed in article 9, paragraph 2 to cover~~ other provisions in the Convention ~~by providing for review in those cases in national law~~. Parties might view the general provisions of article 3 and the provisions concerning the collection and dissemination of information in article 5 as examples of provisions that would qualify as "other relevant provisions." ~~These~~ Those provisions lay the groundwork for many of the obligations set out in article 6 and are relevant to its implementation. Similarly, the provisions of article 7 on public participation concerning plans, programmes and policies relating to the environment (especially the provisions incorporated from article 6) and the provisions of article 8 concerning public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments, describe additional processes that require public participation. Implementation of ~~these~~ those procedures ~~also could also~~ be reviewable under article 9, paragraph 2. It ~~must should~~ be noted, however, that ~~as these provisions articles 3, 5, 7 nor 8 do not generally refer to the do not use the term the~~ "public concerned". ~~In in~~ applying article 9, paragraph 2, to these ~~other~~ provisions of the Convention, ~~therefore, a~~ Parties must ~~find a way~~ decide how to determine the scope of the public concerned in those cases. Finally, ~~the reviewability of any provisions of the Convention under this paragraph of the Convention~~ the fact that a member of the public may be able to invoke article 9, paragraph 2, to challenge "any decision, act or omission" relating to public participation and decision-making ~~under this paragraph would~~ does not affect the possibility that article 9, paragraph 3, ~~might may~~ also apply.

Comment [o795]: Edit (editorial team)

Comment [o796]: Edit (editorial team)

Comment [o797]: Edit (editorial team)

What can trigger the review procedure?

~~Members of the public have the right to challenge decisions based on substantive or procedural legality. The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered.~~

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

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

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

The Convention sets out—as a minimum——that members of the "public concerned" have standing to pursue review in public participation cases. The public concerned is defined in article 2, paragraph 5, as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making." (See commentary to article 2, paragraph 5.) However, article 6 has provisions applying to the "public" as well as the "public concerned" (paragraphs 7 and 9). It is consistent with the objectives of the Convention to hold that a member of the public who actually participates in a hearing under article 6, paragraph 7, would thereby gain the status of a member of the public concerned. actual participation in a hearing under article 6, paragraph 7, would indicate that the member of the public who has participated also has the status of a member of the public concerned. This is logically supported by This approach also corresponds with the fact that the full results of public participation must be taken into account by the public authority under article 6, paragraph 8.

Comment [o798]: Edit (Sweden)

~~Under a Article 9, paragraph 2, adds a qualification to the "public concerned" to the effect that access to a review procedure must be ensured to the public concerned that either has have a "sufficient interest" in the matter under review or maintain an impairment of a right. With respect to NGOs, the Convention states clearly that NGOs meeting the requirements of article 2 paragraph 5, are deemed to have a "sufficient interest" or a right capable of being impaired. For example, in January 2011 two Ukrainian NGOs³⁵⁸ applied article 9 of the Convention, along with the Ukrainian Constitution and national law, to establish their standing to successfully appeal to the Kyiv district administrative court challenging a decision of the Minister of Education and Science of Ukraine to remove a nature reserve.~~

Comment [MSOffice799]: Example provided by Ecopravo--Kyiv

~~For other persons members of the public concerned, including individuals, the Convention allows sufficiency of interest and impairment of a right to be determined in accordance with requirements of national law. Nothing in the Convention prevents the Parties from granting standing to any person without any distinction, and the two~~

Comment [MSOffice800]: Edit (editorial team)

Comment [MSOffice801]: Edit (editorial team)

criteria should not be understood as inviting the Parties to limit the scope of persons with standing. For example, in Latvia standing is granted to every private person, as well as associations, organisations and groups of persons. Rather, the Convention allows Parties to use the two stated criteria mentioned to be used by the Parties when defining the public concerned in their national law. While the Parties thus retain some discretion in defining the scope of the public with standing in these cases, the Convention sets-imposes two qualifications that limit the leeway in determining what constitutes a sufficient interest and impairment of a right. First, this determination must be consistent "with the objective of giving the public concerned wide access to justice within the scope of the Convention." In other words, the Parties may not use the discretion bestowed on them so as to expand the interpretation of these criteria in order to narrow down the scope of persons with standing. Rather, they should interpret the application of their national law requirements within the light of the general obligations of the Convention as found in articles 1, 3 and 9. Second, as mentioned, in line with the definition of "the public concerned" in article 2, paragraph 5, non-governmental organisations meeting any requirements under national law shall be deemed to meet the criteria of having a sufficient interest or a right capable of being impaired. - These two obligations in article 9, paragraph 2(a) and (b), are two ways of trying to reach the same result, given the differing legal systems to be accommodated among the Parties. The two requirements can be considered together with later provisions that further explain "sufficient interest" and impairment of a right.

Comment [o802]: Insertion (Latvia)

Comment [MSOffice803]: Edit (editorial team)

Proper implementation and compliance with the Convention requires that the objective of wide access to justice is considered when determining the scope of persons - natural as well as legal - with standing. Several Parties to the Convention apply some kind of test for establishing standing, often in terms of a direct, sufficient, personal or legal interest, or of a legally protected individual right. While some such criteria, for instance limiting standing only to members of the public with an individual right at stake, are clearly not in line with the Convention, the permissibility of other criteria will depend on how they are construed by the reviewing body in practice. In other words, even criteria such as having a sufficient interest or a right that can be impaired may be incompatible with the Convention if understood too narrowly in the case law of the reviewing bodies.

As indicated by the Compliance Committee in its findings on communication ACCC/C/2005/11 (Belgium), meeting the Convention's objective of giving the public concerned wide access to justice, requires a significant shift of thinking in countries where NGOs have previously lacked standing in cases because they were held not to having a sufficient interest, or an impaired right.⁵⁵⁹ In ACCC/C/2005/11 the Belgian judiciary applied general criteria for standing on NGOs, meaning that they had to show a direct, personal and legitimate interest as well as a "required quality". The Compliance Committee concluded that even though the wordings of the relevant Belgian laws did not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as developed before the entry into force of the Convention for Belgium, implied a too restrictive access to justice to environmental organizations, and thus did not meet the requirements of the Convention. Yet, since there was no evidence that the jurisprudence had been maintained after the entry into force of the Convention for Belgium, the Party concerned was not found to be in non-compliance with the Convention.

Comment [E804]: Edit footnote (at the request of Germany)

An example of national criteria for standing that would not be in compliance with the Convention were the former Swedish criteria for NGOs. According to former Swedish law, to be able to appeal environmental permits, environmental associations were required to be active in Sweden for more than three years and to have had at least 2,000 members. This was found by the European Court of Justice to be in violation of the EU legislation intended to implement the Aarhus Convention, since "the number of members required cannot be fixed by national law at such a level that runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope." The Court also found that standing should be provided to the public regardless of the role - namely expressing their views, making comments, etc. - the public might have played during the prior administrative procedure. The Swedish law on access to justice for NGOs has subsequently changed as a result of the court decision.

Comment [o805]: Deletion (Sweden)

Comment [MSOffice806]: Edit (EU)

Comment [o807]: Insertion (Sweden)

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

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

Understanding "sufficient interest"

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

Examples of Treaties and Conventions where access to justice is mentioned

European Convention on Human Rights and Fundamental Freedoms

Article 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 13 - Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Treaty on the European Union (The Lisbon Treaty)

Article 19(1)

...

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

Charter of Fundamental Rights

Article 47 - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Comment [MSOffice808]: Insertion of text in text box (EU)

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Who carries out the review?

Article 9, paragraph 2, also specifies that the review procedure must be before a court of law or another "independent and impartial body established by law". Thus, the review procedure must have safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.

Under paragraph 2, a Party may provide for a preliminary review procedure before an administrative authority. The administrative appeal system is not intended to replace the opportunity of appeal to a court, but it may in many cases resolve the matter expeditiously and avoid the need to go to court.

In addition, a Party may require that plaintiffs "exhaust administrative remedies", that is, try all available administrative review procedures, before going to court. A person may then need first to request a review by the public authority in charge of the public participation process, then appeal against that decision to a higher administrative authority, before being able to appeal against the decision to a court. Such a requirement to exhaust administrative review procedures is allowed under the Convention, when it exists in national law.

Triggers and scope of review

Members of the public have the right to challenge decisions based on substantive or procedural legality. The public concerned within the meaning of this paragraph can challenge decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered.

Under this article, Parties must ensure that members of the public concerned within the meaning of this paragraph can obtain review of "decisions, acts or omissions". For instance, a governmental decision or act that limits the participants at a public hearing, or the holding of a public hearing very late in the process, may be subject to review. Review may also be available if the government administration fails to take an action or make a decision required by the Convention, for example by not holding a public hearing at all, or by failing to notify certain persons. Other issues of legality that may be challenged under this provision are permit conditions that fail to meet applicable technical standards or failures to consider nature conservation or environmental quality standards in permit procedures.

In its findings on communication ACCC/C/2005/17 (European Community), the Compliance Committee stated, without finding the Party concerned to be in non-compliance with the Convention, that it would definitely be incompatible with article 9, paragraph 2, if there were no opportunity for access to justice in relation to any permit procedures until after the construction had started. In this context, the Committee also stressed that access to justice must indeed be provided when it is effectively possible to challenge a permit decision.³⁶⁰

Comment [MSOffice809]: Edit (Chair of Task Force on Access to Justice)

Comment [E810]: Edit footnote (at the request of Germany)

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Paragraph 3 creates a further class of cases where citizens can appeal to administrative or judicial bodies. While applicable to a far broader range of acts and omissions than paragraphs 1 and 2, it also allows for greater flexibility by the Parties in the implementation. It follows on the eighteenth preambular paragraph and the Sofia Guidelines to provide standing to certain members of the public to enforce environmental law directly or indirectly. Members of the public should be able to challenge acts and omissions either directly, i.e. by bringing the case to court to have the law enforced (rather than simply to redress personal harm) or indirectly, by triggering and participating in administrative procedures so as to have the law enforced. Public enforcement of the law, besides allowing the public to achieve the results it seeks, may also be a major help to understaffed environmental enforcement agencies.

In its findings on communication ACCC/C/2006/18 (Denmark) the Compliance Committee acknowledged the rather broad range of possibilities for the Parties to ensure procedures to challenge acts and omissions contravening provisions of national law relating to the environment. The communicant had complained that he did not have any

means of challenging an act of culling bird species by a public authority in Denmark. The Committee held that access to justice under paragraph 3 requires more than a right to address an administrative authority about an illegal activity. Yet, to conclude whether the Party concerned failed to comply with the Convention, the Committee paid attention to Danish law in general, in order to consider whether any other members of the public had the right to challenge the decision in question or whether national law effectively barred members of the public in general from challenging such acts.³⁶¹

Comment [E811]: Edit footnote (at the request of Germany)

An example of a right to indirect enforcement can be found in the EU Directive 2004/35/EC on environmental liability, which sets out that natural or legal persons meeting the criteria for standing are entitled to request national authorities to take action in cases of environmental damage. The same persons shall also have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under that directive. In direct citizen enforcement, citizens are given standing to go to court or other review bodies to enforce the law rather than simply to redress personal harm. Indirect citizen enforcement means that citizens can participate in the enforcement process through, for example, citizen complaints. However, for indirect enforcement to satisfy this provision of the Convention, it must provide for clear administrative or judicial procedures in which the particular member of the public has official status. Otherwise it could not be said that the member of the public has access to such procedures. Public enforcement of the law, besides allowing the public to achieve the results it seeks, has also proven to be a major help to understaffed environmental enforcement agencies in many countries. In some countries, moreover, the citizen enforcer can even collect civil monetary penalties from the owner or operator of a facility transgressing environmental law or rules on behalf of the appropriate government agency.

What can be reviewed?

Under the Convention, members of the public have the right to challenge violations of provisions of national law relating to the environment, whether or not these are related to the information and public participation rights guaranteed by the Convention. The provision potentially covers a wide range of administrative and judicial procedures, including the “citizen enforcement” concept, in which members of the public are given standing to directly enforce environmental law in court. The obligation can also be met, for example, by providing for the opportunity to initiate an administrative procedure. Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but that the public also has a role to play. First, as regards “violation”, for this provision to apply, it does not have to be established *prima facie*, i.e. before the review, that there has been a violation. Rather, there must have been an *allegation* by the member of the public that there has been an act or omission violating national law relating to the environment (see ACCC/C/2005/18 (Denmark)). Second, national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3 regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws. This was confirmed by the Compliance Committee in its findings on communication ACCC/C/2005/11 (Belgium) where the Committee assessed Belgian planning laws under article 9, paragraph 3.³⁶²

Comment [E812]: Edit footnote (at the request of Germany)

As held by the Compliance Committee in its findings on communication ACCC/C/2006/18 (Denmark), for EU member states the reference to “national law” should be understood as including EU law applicable in the member state.³⁶³ Thus, acts and omissions that may contravene EU regulations and EU directives relating to the

Comment [E813]: Edit footnote (at the request of Germany)

environment and applicable by national courts and authorities in the member states may be challenged under paragraph 3.

What can trigger the review procedure?

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

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

Who can ask for review?—The issue of standing

The Convention requires Parties to ensure standing to enforce environmental law for members of the public meeting criteria that may exist in national law. The Convention ~~does not affect the right of~~allows the Parties to set criteria ~~by which members of the public can have~~for standing and access to environmental enforcement proceedings under paragraph 3, but only~~any~~ such criteria should be consistent with the objectives of the Convention regarding ensuring access to justice. For example, in Case C-263/08 (Sweden), the European Court of Justice held that it was conceivable that a requirement for an environmental NGO to have a minimum number of members might be relevant in order to ensure that the NGO does in fact exist and that it is active. However, the number of members required cannot be fixed at such a level that it runs counter to the objective of facilitating judicial review of projects which fall within the scope of Directive. The ECJ in particular emphasized the importance of local groups being able to challenge with legal means environmental decisions in their area.³⁶⁴ Paragraph 26 of the Sofia Guidelines similarly promotes the notion of broad standing in proceedings on environmental issues.

Comment [MSOffice814]: Insertion (Chair of Task Force on Access to Justice)

Comment [MSOffice815]: Insertion (editorial team)

Public standing to enforce national law

~~Most UNECE countries already grant some level of standing to individuals and organizations to go to court to challenge violations of national law by both private persons and public authorities. For example, in Poland NGOs may bring both civil and administrative cases, based purely on the statutory goals of the organization. Thus, an organization with the statutory goal of protecting the environment automatically has standing to bring an administrative case to enforce environmental law.~~

~~In Hungary, any citizen can file a suit in the Constitutional Court against the Government, if it has failed to fulfil legislative responsibilities.~~

The Compliance Committee has considered the criteria for standing under paragraph 3 in a few cases. In its findings on communication ACCC/C/2005/11 (Belgium), the Committee held with respect to environmental organizations that:

“the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where

they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that the effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment.”

In the same findings, the Compliance Committee held that “the phrase ‘the criteria, if any, in national law’ indicates a self-restraints on the Parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.”³⁶⁵

Comment [E816]: Edit footnote (at the request of Germany)

In the same vein, with respect to members of the public generally, the Compliance Committee held in its findings on communication ACCC/C/20086/518 (Denmark) that the criteria for standing may not be so strict that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions under paragraph 3.³⁶⁶

Comment [E817]: Edit (editorial team)

Comment [E818]: Edit (editorial team)

Comment [E819]: Edit footnote (at the request of Germany)

Who carries out the review?

Article 9, paragraph 3, gives the public access to administrative or judicial procedures. This provision ~~can~~ potentially covers a wide range of procedures for “citizen enforcement”. This may be ensured by granting members of the public standing to directly enforce environmental law in court. The obligation can also be met, for example, by ensuring a right for members of the public to initiate administrative or criminal procedures. Parties retain considerable discretion in designating which fora (court or administrative body) and forms of procedure (e.g. civil law, administrative law or criminal law) should be available to challenge the acts and omissions in question. While bearing in mind the general obligation in article 3, paragraph 1, to establish and maintain a clear, transparent and consistent framework, Parties are not prevented from providing different review procedures for different kinds of acts and omissions.

In most countries, criminal enforcement remains in the hands of the government. However, there are a few exceptions. For example, in **Poland**, the Petty Offences Code of 1971 authorizes some associations, including ~~ecological~~ ones like the Nature Protection Guard and the Animal Protection Association, to act as public prosecutors in ~~the prosecution cases~~ of petty criminal offences under the Nature Conservation Act of 1991. ~~The associations enjoy the rights of a~~ This right to act as public prosecutor, including the right to appeal to the criminal court. The United Kingdom also allows for “private prosecutions”, which is a prosecution started by a private individual who is not acting on behalf of the police or any other prosecuting authority or body which conducts prosecutions. The right to bring private prosecutions is preserved by section 6(1) of the UK’s Prosecution of Offences Act, 1985 (Archbold 1 - 332). There are, however, some controls, including that the DPP has power under section 6(2) Prosecution of Offences Act 1985 to take over private prosecutions, and in some cases, the private prosecutor must seek the consent of the Attorney General or of the DPP before the commencement of proceedings.³⁶⁷

Comment [MSOffice820]: Insertion (editorial team in light of Chair of Task Force on Access to Justice’s comments).

Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but the public also has an important role to play.

Triggers and scope of review ~~What can trigger the review procedure?~~

Under the Convention, Parties must ensure that members of the public can directly enforce the law in the case of alleged violations~~acts and omissions~~ by either private persons or public authorities. Although no explicit reference to substantive or procedural legality is made in paragraph 3, a Party cannot limit the scope of reviews under this provision to either procedural or substantive ~~matters~~legality. Rather, the review

Comment [o821]: Insertion : (UK)

Comment [o822]: Edit (UK)

procedures for acts and omissions challenged must cover violations of provisions dealing with enable both the substantive as well as the procedural matters legality of the alleged violation to be challenged. For example, ~~a local~~ individuals and environmental organizations that meets the national criteria ~~set out by a particular Party~~ may challenge a violation by a facility of waste-water discharge limitations in its permit. One means of challenging such a violation would be The environmental organization might have the right to take the owner or operator of the facility to court, claiming a violation of the law, and receive a remedy such as a court order to stop the illegal waste-water discharges. Another would be to trigger an administrative procedure against the operator, where the claimant is given a status as a party in the procedure. (See also commentary to article 9, paragraph 4, below, concerning injunctive relief.)

Comment [o823]: Edit (UK)

~~In addition, in~~ Members of the public ~~may shall also be able to~~ challenge acts or omissions of public authorities that transgress national environmental law. "Omissions" in this case includes the failure to implement or enforce environmental law with respect to other public authorities or private entities.

Standing requirements under article 9

Paragraph1—Standing to review access to information:

"Any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article."

Paragraph2—Standing to review public participation and other relevant provisions:

"Members of the public concerned, having a sufficient interest or, alternatively, maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition."

Paragraph3—Standing to review contraventions of national environmental law:

Members of the public, where they meet the criteria, if any, laid down in national law.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Paragraphs 1, 2, and 3 of article 9 each describe particular grounds for the public to pursue a review procedure. Paragraph 4 describes the minimum qualitative standards that must be met in all such procedures, as well as the type of remedies that must be provided. In other words It requires that adequate and effective remedies must be ensured not only for reviews concerning access to information or decision-making for specific activities, as set out in paragraphs 1 and 2, but also for all other acts and omissions covered by paragraph 3. As already mentioned, it is in light of these requirements of adequate and effective remedy that it should be assessed whether an ombudsman can act as a review body under article 9, paragraphs 1-3.

Comment [MSOffice824]: Edit (editorial team)

"Adequate and effective remedies"

The ~~ultimate~~ objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected, and, ultimately, to obtain a remedy for a the transgression of law. Under paragraph 4, Parties must ensure that the review bodies provide "adequate and effective" remedies. These remedies are to include injunctive relief when appropriate. ~~When irreversible damage from a violation has already occurred, a remedy often takes the form of monetary compensation.~~ When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies ~~also may~~ must be able to issue an order to stop or to undertake certain action. This order is called an "injunction" and the remedy achieved by it is called "injunctive relief". In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases may be inadequate. Compensation in such cases, is often inadequate. In other some such cases, compensatory measures, e.g. to improve the quality of the environment elsewhere, may be the most adequate remedy possible. Although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed. Monetary compensation may also be a relevant remedy when paid to public authorities by the operator, so as to compensate for the public money spent in vain to protect an area or a species that was adversely affected by an act or omission by the operator in question. Yet another related form of remedy available in some countries, is for the citizen enforcer in a proceeding similar to those contemplated under article 9, paragraph 3, to collect civil monetary penalties from the owner or operator of a facility transgressing environmental law or rules in place of the appropriate government agency.

Comment [MSOffice825]: Edit (Editorial team)

"Including injunctive relief as appropriate"

Comment [MSOffice826]: Insertion (editorial team)

What is injunctive relief?

Injunctive relief: Injunctive relief is a remedy designed to prevent or remedy injury, by requesting the addressee either to stop an activity or cease a violation, or to take certain measures. It allows a person to secure an order against another person requiring him or her to do something, for example, to provide access to information or access to a site, to hold a hearing, or to cease an unlawful activity. Injunctive relief can be either "interim" or "final".

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

Interim Preliminary injunctive relief: An interim injunction, also known as a preliminary or interlocutory injunction, is an injunction granted by the court or tribunal before the a full hearing of the matter. In cases where harm is occurring or is threatened, or where a statute designed to protect public health and welfare is being or may be violated, the court or a tribunal may have the power to grant injunctive relief to maintain the status quo or restore the situation to an earlier condition pending resolution of the case. Generally, tribunals require the party seeking preliminary injunctive relief to show that: (i) irreparable injury is immediately threatened or may occur before the case can be heard in full and (ii) the remedy sought is likely to be awarded in the final hearing on the merits. In environmental cases, it may be sufficient to show that a statute or regulation is being or may be violated. In emergency or other serious cases, the tribunal sometimes will award preliminary relief *ex parte*, without a hearing, on the basis of the pleadings and evidence.

Comment [o827]: Edits (editorial team at request of Chair of Task Force on Access to Justice)

Final injunctive relief: A final injunction is one granted by the court or tribunal once the final judgement has been delivered. It is intended to have indefinite effect. In environmental cases, injunctions, which allow the court or tribunal to cause a person to cease a violation or undertake some act, are therefore often more flexible and responsive to the underlying environmental

Comment [o828]: Edits : (editorial team at request of Chair of Task Force on Access to Justice)

provelm than other remedies, such as monetary damages or criminal sanctions.

Comment [o829]: Original text moved down from first paragraph of box (editorial team)

The Convention requires injunctive relief and other remedies to be "adequate and effective". Adequacy requires the relief to ensure the intended effect of the review procedure. It may be to fully~~This may be to~~ compensate past damage, prevent future damage, and/or ~~may require it to~~ provide for restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.

Comment [o830]: Edit (editorial team in light of Sweden's comments)

In its findings on communication ACCC/C/2005/11 (Belgium), the Compliance Committee held that if the Party concerned maintained its jurisprudence on access to review procedures with respect to town planning permits and decisions on area plans, as developed before the entry into force of the Convention for Belgium, it would fail not only to ensure access to justice, as set out in article 9, paragraph 3, but also fail to provide an effective remedy as required by paragraph 4.³⁶⁸

Comment [MSOffice831]: Insertion (Chair of Task Force on Access to Justice)

Comment [E832]: Edit footnote (at the request of Germany)

The findings of the Compliance Committee with respect to communication ACCC/C/2005/17 (European Community), referred to above with respect to article 9, paragraph 2, are also relevant regarding adequate and effective remedies.³⁶⁹ In its findings, the Committee stated that it would definitely be incompatible with paragraph 2 to grant access to a review procedure concerning a permit only after the construction had started, since access to justice must indeed be provided when it is effectively possible to challenge a permit decision. Lacking such a possibility would also imply lacking an adequate and effective remedy.

Comment [E833]: Edit footnote (at the request of Germany)

In its findings on communication ACCC/C/2008/24, (Spain), the Committee noted that when the communicant had first approached the court to request the suspension of the land allotment plan and modification, the court reversed the application on the ground that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the court held that it was too late, because this decision was subject to consideration and the subject of preceding decisions, namely the land allotment plan and modification which had not been suspended. The Committee noted that this decision was endorsed on appeal. The Committee held that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, the Committee found that the Party concerned was in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief.³⁷⁰

Comment [MSOffice834]: Insertion to update for recent Committee findings (editorial team)

Options for when to use injunctive relief

In Hungary, preliminary injunctive relief may be ordered:

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

If the court finds that any of these conditions is satisfied, it must further find that the harm caused by the injunction will not exceed the advantage gained by its issuance.³⁷¹ This legal test allows the court to decide whether an injunction is appropriate in a given case.

~~As mentioned above, i~~njunctive relief is not the only effective remedy. In some countries, for example, the citizen enforcer in ~~a~~ proceedings similar to those contemplated under article 9, paragraph 3, can even collect civil monetary penalties from, or bring a case on compensation for damage against the owner or operator of a facility transgressing environmental law or rules ~~on behalf in place~~ of the appropriate government agency. For example, in the United States, the Clean Water Act, Resource Conservation and Recovery Act, and Clean Air Act provide for citizen enforcer proceedings through which the citizen enforcer may collect monetary penalties.

Comment [MSOffice835]: Insertion (editorial team)

"Fair, equitable, timely ~~and not prohibitively expensive~~"

Comment [FL836]: Moved to separate heading below (editorial team)

In addition to specifying kinds of remedies, article 9, paragraph 4, requires Parties to ensure that review procedures under paragraphs 1, 2 and 3 are "fair, equitable, timely and not prohibitively expensive". Fair procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest. It is important to note that this applies also to any administrative review procedure intended to meet the requirements of article 9, paragraph 3. Fair procedures must also apply equally to all persons, regardless of economic or social position, ethnicity, ~~race,~~ nationality or other suspect criteria. (See also commentary to article 3, paragraph 9, although fairness ~~in justice~~ may also require non-discrimination with respect to other classifications than those laid out there, such as age, gender, religious affiliation, etc.) Moreover, fairness requires that the public be duly informed about the review procedure as well as informed about the outcome of the review. Equitable procedures are those which avoid the application of the law in an unnecessarily harsh and technical manner.

Timeliness is also very important to review procedures under article 9. This requirement reinforces the requirement of article 9, paragraph 1, that Parties ensure an "expeditious" review process. Under the Convention, Parties must adhere to this standard of timeliness in providing any review process, whether by court or other review body. Many countries have already recognized the importance of timeliness to the administration of justice. For example, in Belarus, appeals and complaints regarding environmental administrative decisions must be considered within one month, with a possible extension of an additional two months. In Ireland some countries, e.g. Ireland, courts have the discretion to pull certain cases from the docket queue and deal with them immediately when the case involves issues of an urgent and time-sensitive nature.³⁷²

Comment [MSOffice837]: Insertion (editorial team)

Comment [o838]: Insertion (editorial team)

In its findings on communication ACCC/C/2004/6, (Kazakhstan), the Compliance Committee held that allowing a court hearing to start without proper notification did not meet the requirement of a fair procedure under article 9, paragraph 94. It also held that the failure to communicate the court decision to the parties implied a lack of fairness and timeliness as required by the Convention.³⁷³

Comment [o839]: Edit (editorial team)

Comment [E840]: Edit footnote (at the request of Germany)

In its findings on communication ACCC/C/2008/23, (United Kingdom), with regard to the communicants' allegation that a court order requiring them to pay the public authorities' legal costs was unfair and inequitable under article 9, paragraph 4, the Committee held that it was the defendant operator's refusal to cooperate in naming an expert that led to the public authorities having to attend the hearing, incurring the legal costs as a result. In the circumstances, the Committee considered that the subsequent court order that the communicants pay the whole of the public authorities' legal costs (without the operator being ordered to contribute at all) was unfair and inequitable and constituted stricto sensu non-compliance with article 9, paragraph 4, of the Convention.³⁷⁴

In its findings on communication ACCC/C/2008/24, (Spain), the Committee emphasized that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a

public authority and matters covered by the Aarhus Convention. Thus the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases.³⁷⁵

Also in its findings on communication ACCC/C/2008/24, (Spain), the Committee noted that from a formal point of view, Spanish legislation did not appear to prevent decisions concerning the cost of appeal from taking fully into account the requirements of article 9, paragraph 4, that procedures be fair, equitable and not prohibitively expensive. However, the evidence presented to the Committee demonstrated clearly that in practice if a natural or legal person loses in the court of first instance against a public authority, appeals the decision and loses again, the related costs are being imposed on the appellant. The Committee stressed that if the trend referred to reflects a general practice of courts of appeal in the Party concerned in such cases this constituted non-compliance with article 9, paragraph 4, of the Convention.³⁷⁶

In its findings on communication ACCC/C/2008/27, (United Kingdom), the Committee held the communicant's judicial review proceedings were judicial procedures under article 9, paragraph 3, of the Convention, and thus also subject to the requirements of article 9, paragraph 4, of the Convention. The Committee stressed that "fairness" in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, found that in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. The Committee found that the manner in which the costs were allocated in that case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance.³⁷⁷

With respect to fairness regarding the timeframes for filing a judicial review procedure, in its findings on communication ACCC/C/2008/33, (United Kingdom), the Committee found the Party concerned could not rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. The Committee held that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.³⁷⁸

In its findings on communication ACCC/C/2009/36, (Spain), the Compliance Committee considered that, by instituting a system on legal aid which excluded small NGOs from receiving legal aid, the Party concerned had failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention, and had not taken into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, as required by article 9, paragraph 5, of the Convention.³⁷⁹

With regard to the requirement for timely remedies, in its findings on communication ACCC/C/2008/24, (Spain), the Compliance Committee held that a decision on whether to grant suspension as a preventive measure should be issued before the project is executed. In that case, it took eight months for the court to issue a decision on whether to grant the suspension sought for the project. Even if it had been granted, the suspension would have been meaningless as construction works were already in progress. The Committee noted its findings in ACCC/C/2006/17, (European Community), that "if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question" (ECE/MP.PP/2008/5/Add.10, para. 56 (European Community)). The Committee held that

in the present case, since no timely, adequate or effective remedies were available, the Party concerned was in non-compliance with article 9, paragraph 4.³⁸⁰

Comment [M841]: Insertions of relevant recent Committee findings (editorial team)

“Not prohibitively expensive”

Comment [MSOffice842]: Insertion (editorial team)

Finally, the Convention requires Parties to provide review procedures that are "not prohibitively expensive". The cost of bringing a challenge under the Convention or to enforce national environmental law ~~must~~ not be so expensive that it prevents the public, whether individuals or NGOs, from seeking review in appropriate cases. Various mechanisms, including waivers and cost-recovery mechanisms, are available to Parties to meet this obligation. In practice, alongside too strict criteria for standing, too high costs are the main barrier to access to justice in many countries.

Comment [MSOffice843]: Insertion (editorial team)

While the Convention does not define the means for keeping the costs, if any, at an acceptable level, it imposes a very clear obligation on the Parties, to ensure that the procedures are not prohibitively expensive. That is, the Convention sets an obligation of result, that allows the Parties great discretion in how to proceed, but limited discretion in what to achieve. When assessing compliance with this provision, the decisive issue is the outcome rather than how each Party ensures that the procedures remain at an acceptable cost. Although, “prohibitively expensive” is not very detailed, the obligation on the Parties to ensure procedures at acceptable costs is straightforward and unconditional.

~~The Compliance Committee held in its findings on communication ACCC/C/20089/2436 (Spain) that the failure of the Party concerned to provide appropriate assistance mechanisms to remove or reduce financial barriers for access to justice to a small NGO amounted to non-compliance with article 9, paragraph 4.~~³⁸¹

Comment [MSOffice844]: Text moved down and edited (editorial team)

As noted above in the commentary on “fair and equitable” in this paragraph, in its findings on communication ACCC/C/2008/24, (Spain), the Compliance Committee emphasized that the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent prohibitively expensive cost orders being imposed on a member of the public who seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention.³⁸²

Comment [MSOffice845]: Insertion (editorial team)

Also as noted in the commentary on “fair and equitable” in this paragraph, in its findings on communication ACCC/C/2008/27, (United Kingdom), the Compliance Committee held that the quantum of costs awarded in that case was prohibitively expensive within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance.³⁸³

In its findings on communication ACCC/C/2008/33, (United Kingdom), the Compliance Committee held that when assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee would consider the cost system as a whole and in a systemic manner.³⁸⁴ It considered that the “costs follow the event rule”, contained in the Party concerned’s Civil Procedure Rules, was not inherently objectionable under the Convention, although the compatibility of this rule with the Convention depends on the outcome in each specific case and the existence of a clear rule that prevents prohibitively expensive procedures. In the current case, the Committee considered whether the effects of “costs follow the event rule” could be softened by the Party concerned’s system of legal aid, conditional fee agreements and protective costs orders, as well as by the considerable discretionary powers that the courts have in interpreting and applying the relevant law.

The Committee found that at least four potential problems emerged with regard to the Party concerned’s legal system. First, the strict criteria applied by the Court when

considering the granting of protective cost orders. Second, the limiting effects of (i) the cost of applying for the order if it was then not granted and (ii) “reciprocal” protective cost orders that capped the costs of both parties. The Committee found that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, including that claimants should in practice not have to rely on pro bono or junior legal counsel. Third, the potential effect of cross-undertakings in damages on the costs incurred by a claimant. Fourth, the fact that in determining the allocation of costs in a given case, the public interest nature of the environmental claims under consideration is not in and of itself given sufficient consideration.

The Committee concluded that, despite the various measures available to address prohibitive costs in the Party concerned, taken together they did not ensure that the costs remain at a level which met the requirements under the Convention. The Committee considered that the considerable discretion of the Party concerned’s courts in deciding the costs - without any clear legally binding direction from the legislature or judiciary to ensure costs were not prohibitively expensive - led to considerable uncertainty regarding the costs to be faced where claimants were legitimately pursuing environmental concerns that involve the public interest. In the light of the above, the Committee concluded that the Party concerned had not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 were not prohibitively expensive.³⁸⁵

~~[Reference to Compliance Committee findings in ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 (United Kingdom) may be inserted]~~

In Case C-427/07, *Commission v Ireland*, the European Court of Justice held that mere judicial discretion to decline to order the unsuccessful party to pay the costs of the procedure cannot be regarded as valid implementation of the Convention’s requirement that the procedure must not be “prohibitively expensive” in accordance with Directive 2003/35/EC.

Comment [MSOffice846]: Insertions to update for recent Committee findings (editorial team)

Comment [MSOffice847]: Deletion (editorial team)

Comment [MSOffice848]: Insertion (EU)

Comment [MSOffice849]: Insertion (Chair of Task Force on Access to Justice)

Keeping costs down

Costs associated with going to court can include:

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

These types of costs represent a substantial financial barrier for the public. Some countries have taken steps to control them, e.g. by exempting NGOs from paying court fees, by making appeals free of charge, and by not requiring a lawyer to launch the appeal:

- In Sweden, any appeal of acts and decisions by public authorities in environmental matters to a superior administrative authority or to a court is free of charge. The person bringing the case to administrative or judicial review does not risk paying the costs for the public authority or the operator of the activity in case the appeal is lost. This applies for instance when requests for environmental information have been denied, when neighbours find a decision by a supervisory authority on precautionary measures for a hazardous activity too weak, and when permits for a hazardous activity have been appealed. Moreover, in none of these cases is there a requirement that the persons appealing acts and decisions must be accompanied by a lawyer.

Comment [MSOffice850]: Confirmed (Sweden)

Comment [MSOffice851]: Insertion (Chair of Task Force on Access to Justice)

- In Slovakia, NGOs are exempt from paying court fees and other parties or participants are exempt from paying court fees for judicial review of the lawfulness of decisions by administrative bodies.
- In Austria, an appeal of a refusal of access to information is free of charge and the plaintiff does not need a lawyer to launch an appeal.
- In Georgia, court appeals brought by disabled persons, their unions, educational unions, and foreigners are free of charge.³⁸⁶

In many countries attorneys' fees are awarded to the prevailing party in a case. In addition, in several jurisdictions of the United States, Canada and Australia in addition, members of the public bringing a case to enforce the law in the public interest may not be required to pay the defendant's costs, even if the case is unsuccessful or dismissed.

Comment [MSOffice852]: Confirmed with edits (Slovakia)

Comment [MSOffice853]: Confirmed (Austria)

Comment [FM854]: Insertion : (Aarhus Centre Georgia)

Comment [MSOffice855]: Edit (editorial team)

"In writing and publicly accessible"

The Convention requires all decisions of any of the review bodies under article 9 to be in writing. This includes interim decisions as well as binding, final decisions. Court decisions must, in addition, be publicly accessible. Decisions by other bodies must be publicly accessible whenever possible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

First, paragraph 5 requires Parties to provide information to the public on procedures for access to justice procedures. This reinforces the requirement of article 3, paragraph 3, that each Party shall promote environmental education and awareness about how to obtain access to justice. Such information can be provided in a variety of ways. One example is found in the Convention itself. According to Article article 4, paragraph 7, provides that refusals of access to information requests must include information on access to the review procedures provided for in accordance with article 9. Parties may wish to introduce similar requirements for providing information on access to review procedures. A similar mechanism could be used in the issuance when issuing of decisions under articles 6, 7 and 8. Article 5, paragraph 7 (b), also requires Parties to publicize matters within the scope of the Convention, which would include matters relating to access to justice.

Comment [o856]: Edits (editorial team)

Information on access to review procedures

In Case C-427/07 (Commission v. Ireland), the European Court of Justice noted that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Aarhus Convention. The Court held that in that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the EIA and IPPC Directives amounts to an obligation to obtain a precise result which Member States must ensure is achieved. The court held that the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a

sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.³⁸⁷

Comment [E857]: Insertion of text box (editorial team in light of Chair of Task Force on Access to Justice's comments).

Article 9, paragraph 5, also requires Parties to consider the establishment of "appropriate assistance mechanisms" to overcome barriers to access to justice. This builds on the provision in article 3, paragraph 2, that public authorities should assist and provide guidance to the public in seeking access to justice, and links to article 9, paragraph 4, according to which requires that review procedures must provide adequate and effective remedies, including not be prohibitively expensive.

Comment [o858]: Edit (editorial team)

Potential barriers to access to justice

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

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

In addition, violations of environmental laws are usually difficult to prove without clear environmental standards, clear emissions requirements in permits, and regular monitoring and reporting of emissions data.

Comment [o859]: Edit (editorial team)

The Convention already requires or encourages many of the strategies that will increase opportunities for access to justice. For example, article 9 encourages a broad interpretation of who may bring a review under national law. A broad interpretation, allowing, in general, any interested individual or organization to bring a challenge, would substantially reduce a fundamental barrier to access to justice, and practice in some countries suggests that it would not be overly burdensome on the work of the courts or other tribunals. Article 9 also requires reviews to be conducted by impartial and independent bodies. When countries ensure that judicial, administrative and other review bodies are independent and impartial, institutional barriers to access to justice are reduced.

Judicial training on access to justice issues

Judicial training may in appropriate cases also serve as an assistance mechanism towards overcoming barriers to access to justice. In December 2008, the Supreme Court of the Republic of Kazakhstan, in co-operation with the OSCE Centre in Astana, published a handbook for judges on implementing the third pillar of the Aarhus

Comment [MSOffice860]: Text box inserted for new examples received (editorial team)

Convention. As well as discussing the rights enshrined in the Convention, the Convention's Compliance Committee and environmental rights more generally, the handbook provides examples of real environmental cases initiated by Kazakh citizens and NGOs and collated from courts throughout the country by special request of the Supreme Court. The handbook has been used in several trainings on access to administrative and judicial review procedures in various regions of the country. At these training judges, NGOs, lawyers and other stakeholders had an opportunity to jointly discuss practical issues regarding public access to information, participation and environmental enforcement. A training module for further capacity building has been developed by education coordinators from Kazakhstan's regional courts and Aarhus Centres.

Comment [FM861]: Example provided by Asia American Partnership, Kazakhstan

The main objectives of the European Commission's "Cooperation with Judges Programme", launched in Paris in 2008, include to creating EU law training material for Member States' judges on the application of EU legislation - including rules regarding access to justice in environmental matters. The programme covers different areas of EU law, including waste, nature and EIA. The material produced and delivered during the seminars is available free to national judicial training centres.

Comment [MSOffice862]: Example provided by EU

~~Article 9 requires~~ It is essential for access to justice under article 9 is that the review procedures in question are to be affordable for members of the public. In this regard, there is a clear link between the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive and the obligation on Parties in article 9, paragraph 5, to consider the establishment of appropriate assistance mechanisms of remove or reduce financial barriers. In keeping with this, in her Opinion on Case C-427/07, Commission v Ireland, Advocate General Kokott took the view that article 9, paragraph 5 of the Aarhus Convention must be taken into account when interpreting article 9, paragraph 4 of the Convention and Directive 2003/35/EC's corresponding implementing provisions. She considered that the Parties to the Convention had the need for assistance mechanisms entirely in mind when they laid down that procedures are not to be prohibitively expensive.³⁸⁸

Comment [o863]: Edits (editorial team)

Comment [E864]: Insertion : (EU and editorial team)

In its findings on communication ACCC/C/2008/24-36 (Spain), the Compliance Committee noted that the Party concerned's system of legal aid appeared to be very restrictive for small NGOs. The Committee considered that by setting high financial requirements for an entity to qualify as a public utility association and thus enabling it to receive free legal aid, the current Spanish system was contradictory. It held that such a financial requirement challenged the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker. The Committee found that instituting a system on legal aid which held that the Party concerned's system of legal aid which excluded small NGOs from receiving such aid provided sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice as required by article 9, paragraph 5, and also failed to provide for adequate and effective remedies, as required by article 9, paragraph 4 (paragraph 66). the failure of the Party concerned to provide appropriate assistance mechanisms to remove or reduce financial barriers for access to justice to a small NGO amounted to non-compliance with article 9, paragraph 5, in addition to non-compliance with paragraph 4.³⁸⁹ In its findings on communication ACCC/C/2008/33 (United Kingdom), discussed in more detail in the commentary on article 9, paragraph 4 above, the Compliance Committee held that the Party concerned's system as a whole, was "not such as to "remove or reduce financial [...] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider."³⁹⁰

Comment [FL865]: Edits (editorial team)

Comment [E866]: Edit footnote (at the request of Germany)

Comment [o867]: Insertion (editorial team)

~~Article 9 requires~~ Essential for access to justice under article 9 is that the review

~~procedures in question are to be affordable for members of the public.~~ The earlier discussion under article 9, paragraph 4, gives examples of how to overcome some of the financial barriers to access to justice such as no-cost alternatives to courts, shifting fees for court expenses to the violator, reducing court costs, and finding alternatives to bond requirements. In addition, some countries establish and support legal assistance offices that provide free or low-cost legal advice to individuals and citizens' organizations. In Poland, for example, individuals and associations that cannot pay the costs associated with going to court may be entitled to a court-appointed lawyer. Other countries, such as Armenia, ~~Canada~~ the Czech Republic, Hungary, the Netherlands, the Republic of Moldova, Slovakia, ~~the Russian Federation, Ukraine, and the United Kingdom and the United States~~ have privately funded or university-based legal assistance centres. In these cases, elimination by the governments of technical obstacles to the creation, operation and funding of a not-for-profit organizations is crucial to ensuring that such privately funded legal assistance centres can also continue to exist.

Comment [MSOffice868]: Deletion (editorial team)

~~In its findings on communication ACCC/C/2008/24 (Spain), the Compliance Committee held that the failure of the Party concerned to provide appropriate assistance mechanisms to remove or reduce financial barriers for access to justice to a small NGO amounted to non-compliance with article 9, paragraph 5, in addition to non-compliance with paragraph 4.~~

Comment [MSOffice869]: Text moved up and edited (editorial team)

Article 9, paragraph 4, also requires effective remedies to be available. ~~In addition,~~ ~~if~~ courts and other review bodies have the power to enforce their decisions, one further potential barrier to access to justice – weak enforcement of judgements – will be removed. In many countries, administrative or court judgements have effectively been negated by delay in or lack of enforcement. ~~To avoid remedy~~ this, ~~many some~~ countries provide that permit decisions cannot be used by the operator if the decision is appealed, unless a specific decision is made to the contrary. ~~Another means used in some countries-~~ is to give the review body powers to enforce its own judgements. For example, in the Russian Federation, both civil and arbitration procedures are supported by special institutions of court executors to enforce court decisions through a system of fines. In the United Kingdom, ~~the United States~~ and other common-law jurisdictions, failure to comply with a court order may constitute contempt of court ultimately punishable by fine or imprisonment. Awards of compensation can be enforced through a variety of means, ranging from seizure of goods and property, and impoundment of bank accounts, to attachment of wages.

Comment [o870]: Edits (editorial team)

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

Comment [o871]: Edit (editorial team)

Elements of access to justice

Who can bring a challenge? The Convention encourages a broad interpretation of who has "standing" to bring a challenge.

What can be challenged? The Convention allows decisions, acts and omissions to be challenged. It allows both access to justice ~~in terms of~~ with respect to its own provisions and ~~to enforce in terms of enforcing~~ national environmental law.

Who can hear a challenge? An appropriate court or impartial and independent review body as established under national law may hear a challenge under the Convention.

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

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

FINAL PROVISIONS

The following sections of the Convention may be called the final provisions and cover management, implementation and institutional matters relating to it. Once a convention comes into force, the tasks of implementation still lie ahead. Conventions also evolve as the knowledge or the needs of the Parties change. To keep up with these changing needs, Parties need to have a way to communicate with each other and keep the Convention a living, working, legal regime.

The final provisions of the Aarhus Convention are very similar to those of other environmental conventions. They provide for a meeting of the Parties and a secretariat as the institutional framework for decisions relating to the Convention. They provide for the addition of new Parties to the Convention through signature, ratification, and accession. They provide for changes and additions to the Convention through amendments and annexes, and they provide implementation mechanisms, such as compliance review and methods to settle disputes. As with most conventions, the Parties to the Aarhus Convention ~~will~~ meet regularly to discuss how to more effectively meet ~~its~~ the Convention's goals and objectives. The Parties, ~~will be~~ served by the secretariat, ~~and~~ set their own rules and work plan to ~~put~~ better implement the Convention into practice.

Article 10

MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

In addition to establishing the specific obligations of Parties, most treaties also create their own administrative and policy-making bureaucracy to help Parties fulfil treaty obligations, to further the treaty's mission and to provide for international governance.

Article 10 establishes the Convention's primary policy-making body: the Meeting of the Parties. Often called "Conference" of the Parties in other international treaties, the Meeting brings together representatives of all Parties to the Convention and observers, including NGOs, non-Party States, international organizations, etc. The Meeting's basic function is to steer and supervise the process of implementing and further developing the Convention. The Meeting of the Parties typically meet every two years or so and conducts the major business of monitoring, updating, revising and assisting with implementation. The Meeting enables the contracting Parties to review the implementation of the Convention and to adopt decisions to improve the way in which the Convention works.

Article 10, paragraph 1, sets out the timing for the meetings of the Parties. Two or three years or so is the typical amount of time between sessions of Meetings of the Parties to most international treaties. In accordance with article 10, paragraph 1, Under the Aarhus Convention, the first ordinary session of the Meeting of the Parties to the Aarhus Convention is on an accelerated time frame and must be held no later than was held in Lucca, Italy on 21-23 October 2002, just under than one year after the Convention entered into force on 30 October 2001. Recently, the Meeting of the Parties has held ordinary sessions at approximately three yearly intervals. In addition, the Meeting of the Parties has held several extraordinary sessions in between its ordinary sessions.

The Executive Secretary of UN/ECE is responsible for conveying information to the Parties concerning requests for a meeting of the Parties. Under article 12, the Executive Secretary of UN/ECE carries out the secretariat functions for the Aarhus Convention. As part of its secretariat role, the Executive Secretary of UN/ECE is responsible for conveying information to the Parties concerning requests for a meeting of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

Paragraph 2 sets out certain means for supervising and facilitating the implementation of the Convention among its Parties and for further developing the Convention through protocols or additions. The Convention requires Parties to continually review its implementation. Parties must report regularly to the Meeting on their achievements. The subparagraphs of paragraph 2 provide details of the types of issues to be kept under continuous review by the Parties.

Most treaties require Parties to submit periodic reports on their compliance with the treaty. The extent of this obligation varies, but it usually covers at least the measures taken by Parties towards implementing their obligations. For example, the 1992 Convention on Biological Diversity requires its Parties to report on their implementation

measures and their effectiveness in meeting the objectives of the Convention. Information must usually be provided to enable the Parties to assess how effectively the treaty is operating. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal requires an annual report on all aspects of the transboundary trade and disposal of such substances (article- 13). Similarly, article VIII of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) requires its Parties to maintain records of their trade in listed species and to report on the number and type of permits granted. This information must be made available to the public. In some cases reporting requirements are designed to monitor how well the Parties are enforcing a treaty. Thus, the 1946 International Convention for the Regulation of Whaling and the 1991 Protocol on Environmental Protection to the Antarctic Treaty oblige their Parties to communicate reports submitted by national inspectors concerning infractions, while the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) calls for reports from national authorities on action taken to deal with reported violations and on incidents involving harmful substances.

-At its first ordinary session (21-23 October 2002), the Meeting of the Parties adopted decision I/8 on reporting requirements. Through decision I/8, the Meeting requested each Party to submit to the secretariat, in advance of the second ordinary meeting of the Parties (or in advance of the first ordinary meeting of the Parties following the entry into force of the Convention for that Party, whichever is the later) a report in the format set out in the annex to the decision. This included reporting on the legislative, regulatory or other measures that it has taken to implement the provisions of the Convention and their practical implementation.

Reports should be prepared through a transparent and consultative process involving the public. They should be submitted to the secretariat so as to arrive no later than 120 days before the meeting of the Parties for which they are submitted. Both electronic and paper versions should be submitted in one of the official languages of the Convention, as well as in the language(s) of the Party. In advance of each subsequent session of the Meeting of the Parties, each Party shall review their report and submit an updated version of it to the secretariat. The secretariat shall prepare a synthesis report for each session of the -Meeting of the Parties summarizing the progress made and identifying significant trends, challenges and solutions.

Signatories and other States not Party to the Convention, pending their ratification or accession, are invited to submit reports on measures taken to apply the Convention, in accordance with these procedures. International, regional and non-governmental organizations engaged in programmes or activities providing support to Parties and/or other States in the implementation of the Convention are also invited to provide the secretariat with reports on their programmes or activities and lessons learned.

Finally, Parties and other States preparing their reports are invited to consider adapting these to provide guidance to members of the public on the exercise of their rights under the Convention and the relevant implementing legislation.

At its second session (Almaty, 25-27 May 2005), the Meeting of the Parties adopted decision II/10 on reporting requirements. The Meeting considered that the reporting procedure as set out in decision I/8 should continue to apply for the next reporting cycle, subject only to the following changes. In complying with the reporting requirements for subsequent reporting cycles, each Party shall submit to the secretariat new information and where available a consolidated national implementation report. In order to avoid duplication and extra cost, only such new information is to be translated by the secretariat in the three official languages. In order to facilitate the preparation of the synthesis report of the secretariat and the translation process, reports are to be submitted to the secretariat so as to arrive no later than 180 days before the meeting of the Parties for which they are submitted.

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

The Convention requires Parties to supervise implementation by reviewing national approaches to implementation. This review is meant to improve domestic implementation and identify problem areas. Together with article 15 on review of compliance, this paragraph establishes a two-tier review mechanism. Article 10, paragraph 2 (a), requires a mandatory general review of implementation for all Parties, whereas article 15 establishes optional arrangements for Parties wishing to take advantage of a more intensive compliance review and assistance regime. ~~Under many other conventions, Parties include a review of their domestic policies and approaches to implementation of the convention in their regular reports to the meeting of the Parties, along with proposed strategies for improvement. These reports tend to follow standard formats. Typically, committees of meetings of Parties that review such reports make concrete and specific recommendations to particular Parties concerning implementation.~~

Reviewing policies and approaches to implementing a convention is common in international governance. For example, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer requires its Parties to submit information about the quantity of ozone-depleting substances that they manufactured or used during the year. Under the 1989 Basel Convention, Parties must submit reports on the amount of hazardous waste that they exported or imported. These reports are then available for review to ensure an exchange of information on best practices, to catch problem areas in Parties having difficulty with implementing the Convention and to monitor Parties that consistently violate the convention.

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

Bilateral and multilateral agreements increasingly contain provisions concerning access to information, public participation or access to justice. The Parties' experience in implementing these agreements is very valuable to the overall implementation of the Aarhus Convention. The Convention therefore requires Parties to share information concerning their experiences with public involvement in the context of other bilateral and multilateral agreements. Many agreements, such as those specifically mentioned in the twenty-third preambular paragraph, contain provisions covering access to information, public participation and some elements of access to justice. The experiences gained in concluding and implementing these agreements will be useful for implementing the Aarhus Convention: in particular, article 3, paragraph 7, and the Almaty Guidelines on promoting the principles of the Convention in international forums.

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

Many of the UN/ECE committees and other international bodies and committees have had experience with the substance of the three pillars of the Aarhus Convention. UN/ECE, for example, has established quite a few subsidiary bodies relevant to the Aarhus Convention, including the Committee on Environmental Policy, the Committee on Sustainable Energy, the Inland Transport Committee, the Timber Committee, the Committee for Trade, Industry and Enterprise Development and the Committee on Human Settlements. Other competent international bodies could include the United Nations Environment Programme, the United Nations Development Programme, the United Nations Commission on Sustainable Development, the World Trade Organization, the European Environment Agency, the Regional Environmental Center for Central and

Eastern Europe, and many others. A number of these bodies have taken an active part in Aarhus Convention processes to date.

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

A subsidiary body is an institution created to support the work of the Meeting of the Parties. The subsidiary body can be multidisciplinary or specific. Typically, a subsidiary body conducts research or monitoring or provides advice and recommendations on specific topics. Sometimes subsidiary bodies take forward the entire work of the Meeting of the Parties between sessions. ~~This is, for example, the function of the Working Group on Environmental Impact Assessment, which is a subsidiary body of the Meeting of the Parties to the Espoo Convention and is currently overseeing all the work mandated by the Parties at their first meeting.~~ A subsidiary body can be created in response to a specific request from the Meeting of the Parties or can be established to follow up issues mandated under the Aarhus Convention. ~~It must comply with the rules of procedure adopted by the Meeting, in accordance with article 10, paragraph 2 (h). Examples of potential subsidiary bodies under the Aarhus Convention might include committees on implementation and/or compliance under articles 10, paragraph 2 (a), and 15.~~

Current subsidiary bodies of the Aarhus Convention include:

- Working Group of the Parties
- Task Force on Access to Justice
- Task Force on Electronic Information Tools
- Task Force on Public Participation in International Forums
- Expert Group on Public Participation / Task Force on Public Participation
- Expert Group on Communication Strategy

Subsidiary bodies ~~can be~~ are composed of government representatives and observers, including NGO representatives. Rule 23(2) of the rules of procedure states that the rules shall apply mutatis mutandis in the proceedings of subsidiary bodies save as otherwise decided by the Meeting of the Parties. ~~For example, the Convention on Biological Diversity created a subsidiary body on scientific, technical and technological advice to support the Meeting of the Parties in all of its work. The 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat has set up a scientific and technical review panel consisting of individual volunteer experts who advise the Parties on scientific matters. Other examples of subsidiary bodies are committees to help with treaty administration. For example, the biennial meetings of the Conference of the Parties to CITES are supplemented by the more frequent meetings of supplemental committees formed to address specific concerns. The CITES standing committee addresses issues relating to budget, administrative concerns and internal affairs. It consists of six representatives from different regions.~~

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

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

Under the Convention, Parties may develop ~~a~~ legal documents that ~~would~~ establish additional rights and obligations to be signed and ratified as ~~a~~ separate legal agreements by those Parties that wish to bind themselves to the additional obligations. Parties negotiate, sign and ratify a protocol separately from the original convention. The purpose of a protocol could be to implement the general objectives of the Aarhus Convention by going into more detail in a specific area. Alternatively, as in the case of the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary

Watercourses and International Lakes, they may also extend into areas not covered by the parent convention.

Parties to the Aarhus Convention have to date adopted one protocol to the Convention - the Protocol on Pollutant Release and Transfer Registers, adopted at an extraordinary session of the Meeting of the Parties to the Aarhus Convention on 21 May 2003 in Kiev. The Protocol is the first legally binding international instrument on pollutant release and transfer registers. Its objective is "to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs)." The Protocol is designed to be an 'open' global protocol, and all States can participate in the Protocol, including those which have not ratified the Aarhus Convention and those which are not members of the UN/ECE. The Protocol entered into force on 8 October 2009 and, as at May 2010, had 26 Parties. Further commentary on the Protocol can be found in the commentary on article 5, paragraph 9.

~~For example, subparagraph (i) below refers to the need for Parties to consider developing an appropriate instrument that could be annexed to the Convention, such as a protocol, concerning pollution release and transfer registers in accordance with the objectives set out in article 5, paragraph 9.~~

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

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

Article 14 lays down the amendment procedures and these are discussed later. This provision establishes the Meeting of the Parties as the proper forum for putting forward amendments. To date, the Meeting of the Parties has adopted one amendment to the Convention, namely an amendment to the Convention regarding public participation in decisions in respect of the deliberate release and placing on the market of GMOs ("the Almaty amendment", decision II/1 adopted by the Meeting of the Parties at its second session (Almaty, 25-27 May 2005). The Almaty amendment is discussed in more detail in the commentary of article 6, paragraph 11 and article 6, paragraph 1 bis.

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

This provision shows that the Parties may be innovative in taking action that promotes the Convention. Parties may go beyond the protocols, amendments and subsidiary bodies specified in this article and take any additional action they believe to be in the best interests of the Convention. International law provides a basis for taking measures outside the context of the specific measures mentioned in subparagraphs (a) to (f).

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

~~_____~~ The Convention does not specify the full range of procedural rules for the Meeting of the Parties, nor for those of the subsidiary bodies. Article 10 (h) gives Parties ~~are given~~ the responsibility of adopting additional such rules at their first meeting. Rules are to be adopted by consensus and not by voting.

Through decision I/7 of its first session (Lucca, 21-23 October 2002), the Meeting of the Parties adopted rules of procedure. The rules of procedure include rules relating to place and date of meetings, notification of meetings, the participation of observers, the presence of the public, meeting agendas and documentation, Party representation and credentials, officers of the Meeting, subsidiary bodies, the secretariat, conduct of business, decision-making, official languages, amendments to the rules of procedure.

Rule 23(2) of the rules of procedure states that the rules shall apply mutatis mutandis in the proceedings of subsidiary bodies save as otherwise decided by the Meeting of the Parties.

Rule 48 of the rules of procedure stipulates that in the event of a conflict between any provision of these rules and a provision of the Convention, the provisions of the Convention shall prevail. -

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

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

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

Conventions usually deal with difficult, technical or time-sensitive issues by requiring Parties to continue to work on the details of these issues after the Convention is signed through the development of protocols, amendments or annexes.

In the negotiations for the Aarhus Convention, the development of systems for pollution inventories or registers was widely discussed. Although many UN/ECE countries have some form of pollution registers, few have fully developed pollution release and transfer registers that are publicly accessible. These systems can be highly technical, and methods and requirements can vary greatly from country to country. Thus, the Convention sets out a general obligation to move towards some type of pollution register system, while at the same time requiring the review of national systems. It also requires the Parties to consider whether or not to develop appropriate instruments, such as an annex or protocol concerning pollution release and transfer registers. In accordance with article 10, paragraph 2(i), the Protocol on Pollutant Release and Transfer Registers was adopted at an extraordinary session of the Meeting of the Parties to the Aarhus Convention on 21 May 2003 in Kiev. The Protocol is the first legally binding international instrument on pollutant release and transfer registers. Its objective is "to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs)." The Protocol is designed to be an 'open

global protocol, and all States can participate in the Protocol, including those which have not ratified the Aarhus Convention and those which are not members of the UN/ECE. The Protocol entered into force on 8 October 2009.

The Convention sets a high priority on this provision, requiring it to be carried out at the first meeting of the Parties. As discussed earlier, at their first meeting in April 1999, the Signatories already designated a task force, led by the Czech Republic, to examine issues concerning pollution release and transfer registers. (For a more detailed discussion of the Protocol on pollution Release and Transfer Registers, see the commentary to article 5, paragraph 9.)

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

Article 10 allows the Meeting of the Parties to establish financial arrangements, as necessary. However, these must be made on a consensus basis among the Parties. The requirement for consensus is fairly unusual for financial arrangements under international conventions.

Financial arrangements typically support the institutional needs of a convention and can cover costs for items such as the meetings of the Parties, subsidiary bodies, the secretariat, and non-governmental participation. Financial arrangements are often decided at the first meeting of the Parties and can be either voluntary or mandatory depending on the wishes of the Parties. For example, under the Basel Convention, mandatory financial arrangements were decided at the first meeting of the Conference of the Parties. Contributions from the Parties to the budget of the Convention and the secretariat are based on a percentage of the Parties' gross national product. In contrast, to date Parties to the Aarhus Convention have chosen to make voluntary contributions.

The first session of the Meeting of the Parties to the Aarhus Convention established an interim voluntary scheme of contributions based on a system of shares, open to contributions from Parties, Signatories and other States having opted to participate in it (decision I/13 of the first session of the Meeting of the Parties (Lucca, 21-23 October 2002)). It also established a task force to explore the possibility of establishing more stable and predictable financial arrangements for the Convention. In the intersessional period the Task Force examined various options for establishing financial arrangements, including the possible application of a scale of assessment based on the United Nations scale. The Task Force also assessed the effectiveness of the existing financial arrangements established by the first Meeting of the Parties, based on a system of shares.

At its second session (Almaty, 25-27 May 2005), the Meeting of the Parties agreed to continue the interim voluntary scheme of contributions (decision II/6 on financial arrangements). However, it asked the Working Group of the Parties to explore and develop as appropriate options for establishing stable and predictable financial arrangements based on the United Nations scale of assessments or other appropriate scales and to prepare recommendations on these matters for possible adoption at the third session of the Meeting of the Parties.

At its third session (Riga, 11-13 June 2008), the Meeting of the Parties agreed to continue the interim voluntary scheme of contributions and asked the Working Group of the Parties to continue to explore options to establish stable and predictable financial arrangements for possible adoption at the third session of the Meeting of the Parties: (III/7 on financial arrangements).

Part of the budget is used for daily operations and part for technical assistance and implementation. The budget covers items such as travel and per diem costs of representatives from developing countries so that they can attend meetings, a technical trust fund to help developing countries establish national legislation and raise public awareness, and regional and subregional information centres.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

Certain international institutions have the right to participate in the Meeting of the Parties as observers. The types of institutions listed in this provision must be admitted as observers upon meeting the requirements. No Party may object.

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

First, bodies of the United Nations and units of its Secretariat, such as the United Nations Environment Programme or the United Nations Development Programme, and its specialized agencies may participate as observers. Secondly, the International Atomic Energy Agency may participate as an observer. Any State entitled to sign the Convention but which is not a Party to it may participate as an observer. And, any regional economic integration organization entitled to sign the Convention, as defined under article 17, but which is not a Party to the Convention, may participate as an observer.

Other intergovernmental organizations also have the right to participate in meetings of the Parties, if they are qualified in the fields of access to information, public participation and access to justice in environmental matters.

Rule 27 of the Convention's rules of procedure (decision I/1) states that admitted intergovernmental organizations shall be entitled to seek to address the Meeting under each agenda item and, having made such a request, shall be included on the list of speakers. The Chair will in general call upon speakers in the order in which they signify their desire to speak, but may at his or her discretion decide to call upon representatives of Parties before observers.

Rule 6 of the Convention's rules of procedure states that intergovernmental organizations admitted as observers do not have the right to vote.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections

NGOs may also be observers under the Convention. They have to meet slightly different admission criteria than the international institutions mentioned in paragraph 4. NGOs wishing to participate at a meeting of the Parties must submit to an admission process that requires:

- Qualification in the fields of access to information, public participation in decision-making, and/or access to justice in environmental matters;
- Notification of the secretariat (see article 12) that observer status is sought.

NGOs meeting these criteria are entitled to participate as observers unless at least one third of the Parties present in the meeting raise objections. However, in accordance with rule 6 of the Convention's rules of procedure adopted through decision I/1 of the Meeting of the Parties, NGOs admitted as observers do not have the right to vote.

Rule 27 of the Convention's rules of procedure states that NGOs admitted as observers shall be entitled to seek to address the Meeting under each agenda item and,

having made such a request, shall be included on the list of speakers. The Chair will in general call upon speakers in the order in which they signify their desire to speak, but may at his or her discretion decide to call upon representatives of Parties before observers. To facilitate the proceedings, the Chair may request representatives of two or more NGOs having common goals and interests in so far as the subject matter of the Convention is concerned to constitute themselves into a single delegation for the purposes of the meeting, or to present their views through a single representative.

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

Typically, NGO observers may submit memoranda to the Parties and to any committees, receive the agenda and public documents in advance of the meeting, and are invited to plenary meetings. At times, NGO observers are permitted to participate in smaller meetings and to propose agenda items. For example, the rules of procedure of the Framework Convention on Climate Change allow accredited observers to participate in "private meetings".

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

In accordance with paragraph 6 of article 10, the rules of procedure adopted by the Meeting of the Parties through decision I/1 specify practical arrangements for the admittance of representatives of international organizations, governments and NGOs as observers. In particular, rule 5 specifies the procedure by which the organizations in paragraphs 4 and 5 are to be notified of upcoming meetings and rule 6 clarifies their rights to participate in such meetings without the right to vote. Rule 7 of the rules of procedure states that meetings of the Parties shall be open to members of the public, unless the Meeting of the Parties in exceptional circumstances decides otherwise. Rule 7 also provides for practical arrangements for the participation of the public in meetings of the Convention. The Meeting of the Parties is responsible for the rules of procedure under article 10, paragraph 2 (h). These rules must provide practical arrangements for the admittance of representatives of international organizations, governments and NGOs as observers.

Selected Agenda Items for the Meeting of the Parties

- ~~• Continually review implementation (art. 10, para; 2);~~
- ~~• Establish subsidiary bodies, if necessary (art; 10, para; 2 (d));~~
- ~~• Set procedures for the Meeting and for subsidiary bodies (art; 10, para; 2 (h));~~
- ~~• Review the experience in implementing article 5, paragraph 9, and consider next steps, including the drawing up of an instrument concerning pollution release and transfer registers or inventories (art; 10, para; 2 (i));~~

- ~~• Establish arrangements for reviewing compliance (art. 15);~~
- ~~• Further develop the application of the Convention to decisions on GMOs (Resolution of the Signatories).~~

Article 11

RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Paragraph 1 confirms the rule that each Party receives one vote. It is a traditional rule of international law derived from the principle of sovereign equality. Votes are not weighted and each Party has the same right to participate.

Both regional economic integration organizations and their member States can become Parties to the Convention. As a result, voting rights need to be clarified.

A regional economic integration organization is an organization constituted by sovereign States of a given region to which its member States have transferred competence in respect of a number of policy areas, as defined in the treaties constituting the organization (see also article 17 of the Convention and the commentary below). The European Union is the best known example of a regional economic integration organization. Typically, its ~~its~~ member States have ~~have~~ transferred competence in respect of matters governed by this Convention to ~~such a regional organization~~ European Union. In addition, the ~~regional organization has been~~ European Union is duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to international agreements like the Convention. ~~The European Community is the best known example of a regional economic integration organization. The European Community can sign or conclude binding international agreements.~~ Similar structures may emerge elsewhere in other parts of the world.

Comment [NY872]: Inserted (editorial team)

A member State of a regional economic integration organization that is also a Party to the Convention may not exercise its right to vote twice—as a Contracting Party and again as a member of the organization in question. This is why the Convention stipulates that a regional economic integration organization cannot exercise its right to vote if its member States exercise their rights to vote and vice versa. Whether it is the regional economic integration organization or the member States that exercise the right to vote depends on the respective competencies of the organization concerned and its member States as established under the applicable treaty or otherwise by international law. It may vary according to the subject being voted on. In cases where the regional economic integration organization has competence to vote, it does so with the number of votes equivalent to the number of its member States that are Parties to the Convention. For example, the European Union ~~Community~~'s treaties authorize it to take on a variety of environmental policy issues at the regional level.

Article 12 SECRETARIAT

Secretariats are responsible for the day-to-day operations of a convention. A treaty's secretariat may be part of an existing institution. The Executive Secretary of the Economic Commission for Europe is responsible for certain secretariat functions under this article. Secretariats hire staff and have a budget for their tasks contributed by the Parties. Secretariats rely heavily on the Parties' cooperation in monitoring compliance or gathering information under the treaty.

Contacting UN/ECE Aarhus Convention secretariat:

Comment [W873]: Insertion
(editorial team)

Postal address:

~~JEREMY WATES~~

Secretary to the Aarhus Convention
United Nations Economic Commission for Europe
Environment and Human Settlements Division
Palais des Nations, Office 325
CH-1211 Geneva 10, Switzerland

Phone/Email: ~~+4122 917 public.participation@unece.org~~

Fax: ~~+4122 917 063407 0107~~

E-mail: ~~Jeremy.Wates@unece.org~~

Web site: ~~www.unece.org/env/pp~~

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

The precise functions of the secretariat vary from one treaty to the next. Among the more common functions are monitoring of and reporting on treaty implementation, assisting implementation when necessary, promoting research relevant to the treaty's objectives, and contributing to the further development of law and policy. In addition, virtually all secretariats serve as channels for communication among the treaty's Parties

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

The Aarhus Convention's secretariat has the function of convening and preparing the meetings of the Parties. This is a routine but important function. The Meeting of the Parties requires staff to prepare, receive, translate and circulate its official documents, as well as manage the logistics of its meetings. Preparing or facilitating the preparation of the background papers for the Meeting of the Parties is particularly important for promoting the Convention's further development.

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

The secretariat also plays an important role in gathering, analysing and distributing information. Secretariats are the information clearing house for most conventions, whether for the formally required reports or for other types of relevant information. ~~Specifically, under The the Aarhus Convention specifically, in addition to requires the secretariat to disseminate~~ the reports required by article 10, paragraph 2 ~~and the secretariat is required~~ to transmit proposed amendments under article 14, paragraph 2. However, the secretariat's reporting function has been considerably broadened through subsequent decisions adopted by the Meeting of the Parties. For example, decision I/8 on national reporting requests the secretariat to prepare a synthesis of the national

implementation reports in advance of each session of the Meeting of the Parties. The secretariat is also often required to prepare synthesis reports and other analysis as an aid to assist the Convention's subsidiary bodies in their work. For example, to assist the Task Force on Public Participation in International Forums, the secretariat prepared a paper synthesising the responses received from international forums to the written consultation process on the Almaty Guidelines on Promoting the Application of the Principles of the Convention in International Forums.

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

The Parties may determine additional tasks for the secretariat.

Rule 25 of the rules of procedure adopted by the Meeting of the Parties through decision I/8 at its first meeting (Lucca, 21-23 October 2005) provides that for all meetings of the Parties and for all meetings of subsidiary bodies, the secretariat shall:

- (a) Prepare, in consultation with the Bureau, the documentation;
- (b) Arrange for the translation, reproduction and distribution of the documents;
- (c) Arrange for interpretation at the meeting;
- (d) Arrange for the custody and preservation of the documents in the archives of the UN/ECE.

Besides servicing the Convention's subsidiary bodies, two further areas in which the role of the secretariat has expanded is through supporting the Compliance Committee in its work and engaging in capacity-building activities. As well as assisting the Compliance Committee with the processing of submissions from Parties and communications from members of the public, decision I/7 on review of compliance envisages a role for the secretariat in making referrals of possible non-compliance to the Committee. Under paragraph 17 of decision I/7, if the secretariat becomes aware that a Party may not have complied with its obligations under the Convention, it may request the Party concerned to furnish necessary information about the matter. If the matter is not resolved within three months, or such longer period as the circumstances of the matter may require but in no case later than six months, the secretariat shall bring the matter to the attention of the Committee. With respect to capacity-building, the secretariat has organised capacity-building events at the request of the Meeting of the Parties and its subsidiary bodies (e.g. workshops on the Convention for the judiciary conducted under the auspices of the Task Force on Access to Justice) as well as taking part in regional activities initiated by one or more Parties or by other international organizations.

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

A further task often delegated to the secretariat is coordination with other treaty regimes and secretariats. This is particularly important because environmental problems are interconnected in ways not reflected by the ad hoc manner in which international environmental law develops. For example, article 3, paragraph 7, of the Aarhus Convention requires Parties to promote the application of its principles in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

Article 13
ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

In accordance with customary international law, the annexes form an integral part of the Aarhus Convention. Annexes typically provide criteria, guidelines or other more detailed specifications for obligations in the Convention. As an integral part of the Convention, the annexes are binding in terms of setting the scope and path for implementing certain articles.

Article 14
AMENDMENTS TO THE CONVENTION

A treaty may be amended by the agreement of the Parties. Every Party to a treaty is entitled to participate in the amendment's negotiations and to become a Party to the new amendment. Parties are not required to adopt amendments. In fact, in accordance with the [1969 Vienna Convention on the Law of Treaties](#) (part IV), the pre-amendment terms remain binding for any Party that does not adopt the amendment, even in dealings with a Party that is bound by the amendment.

Article 14 concerns amendments to the Convention and to annexes: who can propose them (para. 1), the process for submission (para. 2), how they are to be adopted (para. 3) and how they enter into force (paras. 4, 5 and 6).

1. Any Party may propose amendments to this Convention.

This provision is self-explanatory, and provides that any Party to the Convention has the right to propose amendment.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

Paragraph 2 provides the procedure for Parties to propose an amendment to the Convention. The Executive Secretary of ECE is responsible both for receiving the proposed amendment and for passing it on to all Parties in a timely fashion. In this way a proposed amendment can be reviewed and considered before the meeting of the Parties at which it is to be presented for adoption. Parties are obliged to submit proposed amendments in writing. This procedure is the accepted practice in international law.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

Parties are obliged to attempt to adopt amendments by consensus, i.e. without reservation or exception. Amendments alter the substance of the Convention. Although it is possible for Parties to refuse to accept obligations under amendments, attempts are made to avoid such a situation as it may lead to conflicting obligations for different Parties.

However, if consensus cannot be reached, amendments can still, as a last resort, be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. In conformity with the wish that amendments should be valid and legitimate, paragraph 7 below restricts the three-fourths majority to Parties present and voting affirmatively or negatively. This unusual requirement shows how important the Convention considers participation of the Parties in this area: in most other conventions Parties abstaining are also considered as "voting".

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

Once amendments are adopted at the meeting of the Parties, they must still go through a process of ratification, approval or acceptance that may differ according to each Party's constitutional order. The Depositary of the Aarhus Convention is the Secretary-General of the United Nations (article- 18). The Depositary is responsible for sending adopted amendments to each Party for ratification, acceptance or approval.

Amendments to the Convention other than to its annexes enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Amendments to the Convention other than to its annexes enter into force after three fourths of the Parties have ratified, approved or accepted them, on the ninetieth day after the receipt by the Depositary of the required number of instruments of ratification, approval or acceptance.

In light of the inherent ambiguity of "at least three fourths of these Parties", the Meeting of the Parties, at its third ordinary session (Riga, 11-13 June 2008), adopted decision III/1 on the interpretation of article 14 to clarify the meaning of "these Parties". Such a decision is in keeping with article 31, paragraph 3(a), of the Vienna Convention on the Law of Treaties, which provides that any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions shall be taken into account.

Decision III/1 states that, desiring to bring about an early entry into force of the amendment adopted through decision II/1, and, in principle, any future amendments to the Convention, the Meeting agrees to interpret the expression "by at least three fourths of these Parties" as meaning at least three fourths of the Parties to the Convention that were Parties at the time of the adoption of the amendment. Through the decision, the Meeting also decides that any State that becomes a Party to the Convention after the date of adoption of this decision is deemed to have agreed to the interpretation of article 14, paragraph 4, of the Convention set out above.

After the amendment enters into force, any Party wishing to ratify, accept or approve it may do so. The amendment enters into force for that Party on the ninetieth day after the receipt by the Depositary of its instrument of ratification, approval or acceptance.

Amendments to annexes must be communicated by the Depositary in the same way as other amendments. However, the procedure for entering into force differs (see paragraphs 5 and 6 below).

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

The proposal and adoption of amendments to the annexes follow the general rule described in paragraphs 1 to 4 above. However, for their entry into force, the Convention—like many other international instruments—provides a simplified procedure. Paragraph 5 states that ~~in~~to reject an amendment to an annex, a Party must take action within 12 months after the amendment's adoption at a meeting of the Parties to notify the Depositary in writing that it is unable to accept the amendment to the annex. The Depositary must then notify all Parties that a notification of non-acceptance was received.

At any time, a Party can decide to accept amendments to annexes, even if it had originally been unable to accept them. Upon substituting an acceptance for a notification of non-acceptance, the amendments become immediately effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.

Amendments to annexes enter into force under an expedited procedure in comparison to amendments to other parts of the Convention.

Parties do not need to ratify, approve or accept such amendments for them to come into effect. Only if more than one third of the Parties actually reject an amendment to annexes that was adopted at a meeting of the Parties, will it not automatically enter into force. If the required number of notifications are not submitted within 12 months from the date of communication by the Depositary, then the amendment will enter into force for all the Parties that did not reject it according to the proper procedures.

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

Paragraph 7 means that abstention or not voting on a proposed amendment will not be taken into consideration in determining whether or not the three-fourths majority has been met under paragraph 3.

Article 15

REVIEW OF COMPLIANCE

Background

The obligations in ~~this the~~ Convention are binding on Parties, ~~and its once the Convention comes into force.~~ Its purposes and objectives will be met only when each Party complies with its obligations. ~~While recognising the different legal and political structures of the Parties, the intention behind the Convention is to set rather clear,~~ common minimum standards on access to information, public participation in decision-making and access to justice in environmental matters. Various systems and mechanisms are found in international treaties to promote proper implementation and adequate compliance. ~~To ensure that their objectives are met, international treaties usually develop mechanisms to monitor progress in implementation.~~ One such mechanism is the requirement for regular reporting on implementation under article 10, paragraph 2(a). ~~But the conventions~~ Convention also provides the basis for a ~~make use of~~ more sophisticated arrangements to review and assist in compliance ~~in keeping with the Convention's spirit of involving members of the public.~~ However, rather than itself establishing a system for compliance review, the Convention obliges the Meeting of Parties to establish such an arrangement, along certain parameters. ~~Mechanisms for reviewing compliance help reach the goals of a convention and help Parties identify problems with compliance early. There are many tools used by different international agreements to monitor and review compliance.~~

Comment [M874]: Edit (editorial team)

Comment [M875]: Edit (editorial team)

In their 1998 Resolution adopting the Convention, Signatories urged Parties to give priority to the development of a compliance review mechanism. ~~After the adoption of the Convention, an expert group, later followed by a working group of the Parties, started drafting the structure and design of an appropriate compliance system, to be adopted by the Meeting of the Parties, once the Convention had entered into force.~~ An effective compliance strategy contains three elements: (i) clear primary rules; (ii) a compliance information system; and (iii) a non-compliance response procedure.³⁹¹ Considering the character of the Aarhus Convention as an environmental convention that in many respects resembles human rights conventions, examples from both areas of international law ~~may be~~ looked to. ~~To date~~At that time, four multilateral environmental agreements had ~~ve~~ compliance regimes in operation, including the ~~Montreal~~ Protocol on Substances that Deplete the Ozone Layer (Montreal, 1987), the Convention on Long-range Transboundary Air Pollution (Basel, 1979), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973), and the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979). ~~Later on,~~ compliance regimes would play an important role also in other multilateral treaty arrangements, such as the 1992 United Nations Framework Convention on Climate Change. In the area of human rights, ~~a various~~ legal instruments ~~which that~~ provides a model for the consideration of communications from members of the public ~~were considered.~~ One such instrument was ~~the is the~~ first Optional Protocol to the International Covenant on Civil and Political Rights. ~~Similar p~~Provisions of a rather similar approach ~~can be can also be~~ found in the constitution of the International Labour Organization (ILO), allowing certain members of the public to communicate directly with the Organization to ensure compliance with ILO conventions.

Comment [W876]: Edits (editorial team)

Comment [MSOffice877]: Edit (editorial team)

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

Article 15 does not establish a compliance review process in and of itself, but requires the Meeting of the Parties to do so along certain parameters. In their Resolution, the Signatories urged the Parties to give priority to the development of a compliance review. Meetings of Parties to conventions often decide to establish subsidiary bodies on implementation and compliance. Considering the establishment of such a body assists in understanding the implications and interpretation of article 15.

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Parameters for review of compliance in the Convention

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

The Convention requires that the arrangements shall be of a "non-confrontational, non-judicial and consultative nature". This phrase has several implications. The first is that the intention of compliance review is not to point the finger at Parties that are in violation of the Convention, but to recognize and assess the shortcomings of Parties and to work in a constructive atmosphere to assist them in complying. In any case, as mentioned above, Moreover, the Convention requires that the arrangements include "appropriate public involvement". For example, if the Meeting of the Parties decides to establish a compliance committee, Thus, the public will be involved in its "non-confrontational, non-judicial and consultative" activities in an appropriate manner.

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

~~the arrangements that it has just helped to develop. This is also consistent with the wish of certain countries during the negotiations to remain at least temporarily out of a compliance regime, which was one of the main factors that led to the specific wording used. In general, a Party to which particular compliance arrangements do not apply would not participate in decisions relating to any reports of a compliance committee on these particular compliance arrangements.~~

~~Compared to the compliance regimes that existed at the time the Convention was adopted, Perhaps one of the most innovative parts of article 15 is was the requirement for appropriate public involvement. The specific nature of the public involvement is left up to the Meeting of the Parties, although it would be natural to assume that the word would be as defined in the Convention (see article 2, paragraph 4). Moreover, article 15 explicitly provides that the compliance review mechanism may consider communications from members of the public as part of the system.~~ Typically, compliance monitoring under a convention is carried out by the Parties, either through their meetings or their subsidiary bodies, or by international organizations, with several notable exceptions. The International Labour Organization's conventions allow employers and trade union organizations to participate directly in the process of scrutiny.³⁹² The NAFTA Environmental Side Agreement includes a citizen complaint mechanism that allows citizens to raise issues of non-compliance by any of the three Parties with the Environmental Side Agreement, for settlement by a special body under the Agreement.³⁹³

Comment [WX878]: Footnotes inserted (editorial team)

Compliance review tools can include reporting, fact-finding and research, and complaint mechanisms. Reporting is meant to enable the Parties and the public to review and evaluate the treaty's impact and monitor progress. Fact-finding and research allow the directed collection of information when needed. Complaint mechanisms give an opportunity to Parties and, in some cases, the public, to raise issues of non-compliance with a formal body that, in turn, can develop appropriate responses, including technical assistance.

International institutions are not confined to a passive role as recipients of information. In many cases the power they enjoy to undertake fact-finding or research provides the essential scientific basis for adopting measures and formulating policies. They may also offer a measure of independent verification of the information supplied by Parties.

Decision I/7 establishing the Compliance Committee

~~The first Meeting of the Parties to the Convention ~~in~~ (Lucca, Italy, ~~on~~ 21-23 October 2002), established the Compliance Committee by its ~~d~~Decision I/7 on Review of Compliance. With the exception that the number of members in the Compliance Committee was increased from eight to nine, by ~~d~~Decision II/5, adopted at the second Meeting of the Parties in Almaty, (Kazakhstan, 25-27 May 2005), Decision I/7 is still in place.~~

Comment [M879]: Edits (editorial team)

~~This section is intended to give a brief overview about the Compliance Committee and its relevance for the implementation of the Convention. More detailed information about the Compliance Committee, its working methods and about communications and submissions to the Committee can be found in the "Guidance Document on Aarhus Convention Compliance Committee", available ~~at~~ on the Convention's website.~~

Comment [M880]: Edit (editorial team)

Composition, election and functions

~~As set out in ~~D~~Decision I/7, the members of the Compliance Committee serve in their personal capacity, which is to say that the Committee functions as an independent body when reviewing compliance by the Parties. The Committee is to report and make recommendations to the Meeting of the Parties for it to decide upon and take appropriate~~

Comment [M881]: Edit (editorial team)

action. In certain circumstances, the Committee itself may take certain actions on an interim basis, in consultation or in agreement with the Party concerned.

The Committee is composed of nine members with recognized competence in the field of the Convention. The Committee may not include more than one national from the same State.

The Compliance Committee members are elected by the Meeting of the Parties, based on nominations by the Parties, Signatories and non-governmental organizations falling within the scope of article 10, paragraph 5, of the Convention and promoting environmental protection. In order to ensure competence and experience in the Committee, the members are elected on a rotary scheme, meaning that at each ordinary session, the Meeting of the Parties elects four or five members, as appropriate.

Functions and powers of the Committee

According to Decision I/7, the Compliance Committee has the function of:

- Considering any submission, referral or communication made in accordance with paragraphs 15 to 24 of decision I/7;
- Preparing, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention; and
- Monitoring, assessing and facilitating the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention;

The Committee may examine compliance issues and make recommendations if and as appropriate.

The Committee reports on its activities at each ordinary session of the Meeting of the Parties and makes such recommendations, as it considers appropriate. Committee reports are available to the public.

The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:

- Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;
- Make recommendations to the Party concerned;
- Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
- In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;
- Issue declarations of non-compliance;
- Issue cautions;
- Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;
- Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.

Pending consideration by the Meeting of the Parties, with a view to addressing compliance issues without delay, the Compliance Committee may, in consultation with the Parties concerned, provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention.

Subject to agreement with the Party concerned, may:

- Make recommendations to the Party concerned;
- Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;
- In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

Triggers

Reviews by the Compliance Committee can be triggered in four ways:

- (1) ~~(1)~~ A Party may make a **submission about compliance by another Party**.
- (2) ~~(2)~~ A Party may make a **submission concerning its own compliance**.
- (3) ~~(3)~~ The secretariat may make a **referral** to the Committee.
- (4) ~~(4)~~ Members of the public may make **communications** concerning a Party's compliance with the Convention.

Comment [MSOffice882]: Formatting edits (editorial team)

~~The Committee may also examine compliance issues on its own initiative and make recommendations; prepare reports on compliance with or implementation of the provisions of the Convention at the request of the Meeting of the Parties; and monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention.~~

Comment [WX883]: Deletion (repetition) (editorial team)

Thus far, almost all cases have been brought to the Compliance Committee by means of communications from members of the public.

One of these cases was also subsequently the subject of a submission by one Party against another; the communication and the submission in that case were heard together.³⁹⁴

Comment [W884]: Edits (editorial team)

Compliance Committee and implementation

Although the Compliance Committee cannot make decisions on compliance that are legally binding for the Parties, its findings and recommendations are relevant for compliance with and implementation of the Convention. All adopted findings and recommendations are forwarded to the Meeting of the Parties for endorsement. To date, all findings of non-compliance by the Compliance Committee have been endorsed by the Meeting of the Parties. The findings and recommendations of the Compliance Committee are carefully drafted. Its findings can be used as an indication of what is required by the Convention, and its recommendations provide useful information to Parties on how to implement the Convention, not only for the Party concerned in the specific case.

According to ~~D~~Decision I/7 communications from members of the public may be brought to the Committee on the expiry of twelve months from the date of the entry into force of the Convention with respect to the Party concerned, unless the Party has notified

Comment [M885]: Edit (editorial team)

the Depositary in writing by the end of that time frame, that it is unable to accept, for a period of not more than four years, the consideration by the Committee of such communications. During that four year period, a Party may revoke its notification so that thereafter communications may be brought to the Committee in respect of that Party's compliance. Thus far, no Party to the Convention has made use of the possibility to notify its inability to accept communications from members of the public.

Article 16
SETTLEMENT OF DISPUTES

Article 16 provides for the means of resolving disputes between Parties to the Convention. It does not provide mechanisms for resolving disputes among members of the public or NGOs and Parties. Any dispute arising under the Convention has to be settled according to its provisions. The means provided are common in international law. They include binding and non-binding procedures. Article 16, like similar provisions in other environmental conventions, does not provide for compulsory settlement of disputes unless the Party explicitly agrees to be bound by the process.

If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

Paragraph 1 is in accordance with accepted international practice for dispute settlement. Parties must first try non-confrontational procedures, such as negotiation, mediation or conciliation. This concept is also found in article 15 concerning procedures for reviewing compliance with the provisions of the Convention.

When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

- (a) Submission of the dispute to the International Court of Justice;**
- (b) Arbitration in accordance with the procedure set out in annex II.**

If the dispute is not settled under paragraph 1, a Party can make a written declaration to the Secretary-General of the United Nations accepting a compulsory dispute settlement by arbitration or by the International Court of Justice. The results of the compulsory dispute settlement will be binding on any Parties that accept the means of dispute settlement.

A Party may seek to establish an arbitration tribunal or to submit its dispute to the International Court of Justice, or both. The procedures for arbitration are laid down in annex II to the Convention and discussed below. The procedures for cases before the International Court of Justice are laid down in the Statute of the International Court of Justice, as elaborated by its own practice.

Parties may wish to consider a range of practical aspects when deciding whether to choose the International Court of Justice or an arbitration tribunal to resolve disputes. In general, the International Court of Justice represents a highly formalized procedure and an immutable system, while parties to arbitration set their own rules of procedure (which in the case of the Aarhus Convention are the rules found in annex II) that can be modified to meet the needs of the case and the international law applicable.

The International Court of Justice has 15 judges, specialized in public international law, some with environmental expertise. An arbitration tribunal is selected specifically for a particular case: the arbitrators can be specialized in the subject matter, as well as in the cultural and legal issues of the countries involved in the case. The International Court of Justice typically has a heavy docket of cases before it, so new cases take their place in line. Cases can take four years or more to reach a conclusion. Parties to a dispute can consult the registrar of the Court to gain an impression of how long it might be before their case would be heard—but they will have a greater degree of control over the timing of arbitration. Arbitration tribunals are set up case by case. Under this Convention, the timing is determined by the limits set in annex II and the needs of the case itself. The costs of the International Court of Justice will be lower than those of arbitration, since in arbitration parties must pay the arbitrators, including travel costs and other expenses. The International Court of Justice sits in its own offices and has salaried judges.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

If both parties have accepted both options for compulsory settlement dispute, i.e. arbitration and the International Court of Justice, in writing, the International Court has priority. If the parties to the dispute nevertheless wish to submit it to arbitration, they must explicitly agree to do so.

Article 17

SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 17 establishes the procedure for prospective Parties to the Convention to sign it. Signing a convention has, *inter alia*, a role in authenticating the negotiated text. (See commentary to article 22.) Signing is by duly authorized representatives of a State or regional economic integration organization. A regional economic integration organization is an organization constituted by sovereign States of a given region. For such an organization to become a Party to the Convention, its member States must have transferred competence in respect of matters governed by this Convention to it, and the organization must have been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the Convention. Article 2, paragraph 2 (d), of the Convention explicitly includes institutions of regional economic integration organizations referred to in article 17 as being included in the definition of public authority. The European ~~Community-Union (EUC)~~ Union (EUC) is the best known example of a regional economic integration organization, but similar structures are emerging in other parts of the world as well. When it signed the Convention, the EU, then known as the Economic Community, E made a statement in the same manner as that required under article 19, paragraph 5, for ratification, acceptance, approval or accession. (See annex II.)

Signing a convention does not have a binding effect on the prospective Party concerned if the convention requires ratification. However, in accordance with the 1969 Vienna Convention on the Law of Treaties (~~article-~~ article 18), after a country signs a conven-

tion, it is obliged to refrain from acts which could defeat the object and purpose of the convention. The object and purpose of the Aarhus Convention are set out, in particular, in its preamble and in article 1.

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

Comment [W886]: Deletion
(editorial team)

Upon adoption of the Convention in Aarhus on 25 June 1998, 36 prospective Parties signed it. By the closure of the period for signature on 21 December 1998, 40 prospective Parties (39 States and one regional economic integration organization) had signed it. Since the closure of the period for signature, prospective Parties can no longer sign the Convention but must rather deposit instruments of accession (see article 19, paragraph 2).

Article 18 DEPOSITARY

The depositary of a convention has important formal functions. In particular it serves as the repository and source of information on the Convention and its status (signatures, deposit of instruments of ratification, acceptance, approval or accession, entry into force, etc.).

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

The Aarhus Convention, like many other treaties, names the Secretary-General of the United Nations as Depositary. The Convention gives the Secretary-General tasks concerning, *inter alia*:

- Adoption and acceptance of amendments (article- 14);
- Dispute settlement (article- 16);
- Entry into and withdrawal from the Convention (articles- 19 and 21); and
- Custody of the Convention (article- 22).

Today, the usual practice is to designate as depositary the competent organ either of the international organization or of the State under whose auspices the negotiations take place. In this case, negotiations took place under the United Nations Economic Commission for Europe (UN/ECE), so it was logical to name the United Nations Secretary-General as the Depositary.

The treaty itself outlines the functions of the depositary. The rules of customary international law, as codified in articles 76 to 80 of the 1969 Vienna Convention on the Law of Treaties, fill in any gaps. Typically, the functions of the depositary are international in character and the depositary is under an obligation to act impartially in performing them. In addition, the depositary takes custody of the original text of a treaty and the documents relating to it (signatures, ratifications, accessions, reservations, notifications and other communications). The tasks may include control and supervisory functions, when the depositary examines whether the documents presented are in proper form or whether the conditions required for the entry into force of an instrument have been met. The certification of copies of original texts, the preparation of any translation of the text and the correction of errors in the relevant documents are further activities codified in the Vienna Convention. If a Party and the depositary are in disagreement as to the performance of the latter's functions, the depositary must bring the issue to the attention of the other Parties.

Article 19

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

A State will be bound by the terms of a treaty only if it takes steps to demonstrate its consent to be bound. Ratification, acceptance, approval and accession are the authoritative acts whereby a prospective Party declares to the international community that it considers itself bound by a treaty. Article 19 sets out certain criteria and procedures for States and regional economic integration organizations to become Party to the Convention.

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

Prospective Parties typically show their intention to be bound by multilateral environmental agreements by depositing an instrument of ratification, acceptance or approval with the depositary. The terms "ratification", "acceptance" and "approval" represent processes that are used in various countries to reach the same result: a legal commitment by a country to abide by the requirements of ~~an a-convention~~ international treaty. ~~In many States~~ At the national level, a treaty must pass through domestic ~~political~~ processes as defined by its constitutional traditions before it can be ratified, accepted or approved, depending on ~~the individual political~~ that country's process. ~~In the majority of the signatory countries~~ With respect to the Aarhus Convention, the ratification, acceptance or approval process is typically the responsibility of the Ministry of Foreign Affairs, in consultation with the Environment Ministry. ~~Typically, T~~he Environment Ministry is usually responsible for the preparation of the assessment of any required changes to domestic law needed to implement the Convention.

Comment [W887]: Insertion : Edit (editorial team)

Comment [FM888]: Edit (editorial team)

In most countries, a treaty can be ratified, accepted or approved only after parliamentary agreement. The procedure for receiving this agreement is ~~usually~~ typically laid down in the constitution. In some cases the parliament must pass a law explicitly ratifying, accepting or approving the treaty. In others the parliament can give "tacit consent". In the case of a tacit consent, the government merely informs the parliament that an agreement has been reached on a certain issue and a special law of approval is not needed. In other cases the domestic legislation of a prospective Party must be brought into conformity with a treaty at the time it is ratified, accepted or approved by the parliament.

Comment [W889]: Edit (editorial team)

The decision to ratify, accept or approve ~~usually~~ implies that the country is prepared to implement the convention in question. Preparation can be done by assessing the changes to domestic law that the convention requires. In a few countries, such as the Czech Republic, official working groups were established to assess the impact of ratification of the Aarhus Convention on domestic law and policy. The Czech working group included ministry officials, representatives of environmental agencies, municipalities, NGOs and academics. In Slovenia and Estonia, ~~specific a number of~~ officials were designated within the Environment Ministry and the Ministry of Foreign Affairs to lead the ratification process. In several countries, representatives from municipalities, the office of the ombudsman, members of parliament and members of the business community have added their voice to the ratification process.

Comment [W890]: Deletion (editorial team)

Comment [W891]: Edit (editorial team)

Under the Vienna Convention on the Law of Treaties (1969), a State which has signed a treaty but has not yet ratified it or the treaty has not yet entered force, is obliged to refrain from acts which would defeat the object and purpose of a treaty, unless it makes clear its intention not to become a party to the treaty.³⁹⁵

Comment [MSOffice892]: Edit (editorial team)

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

When the Convention was closed for signature (22 December 1998), it became open for accession by the States and regional economic integration organizations that

could otherwise have signed - specifically, those that are member States or have consultative status with UN/ECE, or regional economic integration organizations made up of member States, as described in article 17. Accession is a process similar to ratification where prospective Parties that did not meet the deadline for signature may become bound by the Convention. As with ratification, the exact process depends on their constitutional order.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

The Aarhus Convention is not limited to the UN/ECE region. Paragraph 3 makes it clear that any other State from any other region of the world may accede to the Convention, as long as it is a Member of the United Nations and as long as the Meeting of the Parties approves. ~~This obviously means that the earliest a State that is not a member of UN/ECE and does not have consultative status with it can become a Party is after the Convention enters into force, and following the first meeting of the Parties.~~

At its second ordinary session (25-27 May 2005), the Meeting of the Parties adopted decision II/89 on the accession of non-UNECE member States to the Convention and advancement of the principles of the convention in other regions and at the global level. The decision reiterates the Meeting's invitation in the Lucca Declaration to States outside the UNECE region to accede to the Convention if it suits their particular circumstances. It also makes clear that the approval by Meeting of the Parties referred to in article 19, paragraph 3, should not be interpreted as implying a substantive review of the national legal system and administrative practices of any State wishing to accede to the Convention.

Comment [W893]: Edit (editorial team)

At its third ordinary session (Riga, 11-13 June 2008), the Meeting of the Parties adopted a strategic plan for 2009-2014 (decision III/8). Objective II.4 of the strategic plan is: "States in other regions of the world effectively exercise their right to accede to the Convention. Parties actively encourage accession to the Convention by States of other regions of the world with the aim of, by 2011, having Parties which are not member States of the UNECE."

At its twelfth meeting (Geneva, 30 June – 2 July 2010), the Working Group of the Parties agreed that (a) an amendment to the Convention should not be considered as a possible option; (b) a procedure for accession by non-UNECE countries should be simple, clear and with minimal criteria and should follow the formal steps described in the note; and (c) candidate countries could be invited to be represented by high-level officials at the respective sessions of the MOP where the approval for accession would take place. It requested the Bureau, with the assistance of the secretariat, to prepare a draft decision on accession by non-UNECE countries for consideration at the thirteenth meeting of the Working Group. At its thirteenth meeting (Geneva, 19-21 February 2011) the Working Group revised the draft decision (AC/WGP-13/CRP.5) and forwarded it for consideration by the Meeting of the Parties at its fourth session.

Comment [W894]: Comment by editorial team: This will be updated after MOP4.

Comment [M895]: Edits (editorial team)

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

The rights and obligations of regional economic integration organizations, such as the European Community Union, which become a Party to the Convention, is determined by paragraph 4. Most importantly, the organization and its member States that are also

Parties must decide on their respective responsibilities regarding the Convention's obligations. The provision preserves the notion of sovereign equality by preventing concurrent rights and obligations between the respective organizations and their member States. (See also article 11 on how the right to vote is divided among regional economic integration organizations and their members.)

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

In addition, the respective competencies of the regional economic integration organization and its member States must be declared in the instrument of ratification, acceptance, approval or accession submitted to the Depositary by the organization. If there is a substantial change in the respective competencies, for example due to a change in the constitutional treaty forming the organization, the organization must inform the Secretary General of the United Nations ~~Depositary~~.

Article 20

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

The Aarhus Convention entered into force on 30 October 2001, 90 days after the sixteenth instrument of ratification, acceptance, approval or accession was deposited with the Secretary General of the United Nations.

~~Except to the limited extent established by signing a treaty (see commentary to art. 17), the Parties to a treaty are not bound by its terms until the treaty enters into force. No treaty enters into force for a specific Party. The Convention does not enter into force for any specific country/State until that Party/country/State has ratified, accepted, approved or acceded to it and deposited its instrument with the depositary/Secretary General (see article 19), and any other preconditions for the treaty's entry into force have been satisfied. It is important to should be emphasized that the mere ratification, acceptance, approval or accession alone of a prospective Party to a treaty are-is not enough—the instruments must also be deposited with the Depositary. The Aarhus Convention requires 16 such instruments to have been deposited with the Secretary General of the United Nations for it to enter into force 90 days after the sixteenth instrument has been deposited. Thus, Whereas ratification is a domestic process that legally commits a country/State to abide by the requirements of the Convention, it is only through actually depositing the instrument of ratification, acceptance, approval or accession with the Depositary designated by the Convention, that these actions will have effect in international law and the State will become party to the Convention only through actually depositing the instrument of ratification, acceptance, approval or accession with the proper authority, will the a country become a new Party to the Convention. Once the treaty enters into force, it is only effective between those Parties that have deposited their instruments with the Depositary.~~

Comment [W896]: Edits (editorial team)

2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

Paragraph 2 ensures that the process for determining when the Convention entered into force ~~does~~ did not count a regional economic integration organization, unless its member States do not become Parties. However, where the member States of a regional economic integration organization have not transferred full competence over all matters relating to the Convention, the effect of the deposit of such an instrument is not clear. (See also commentary to article 19, paragraph 4.)

3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

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

Activities pending entry into force

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

~~Until a convention comes into force, countries that have signed it can meet as signatories. The Meeting of the Signatories to the Aarhus Convention was convened by the UN/ECE Committee on Environmental Policy following the request contained in the Resolution of the Signatories. The Resolution called for the establishment of the Meeting of the Signatories to the Convention, "open to all members of ECE and to observers, to identify activities that need to be undertaken pending the entry into force of the Convention, to report to the Committee on progress made in respect of the ratification of the Convention and to prepare for the first meeting of the Parties". The Signatories also called for a sufficient secretariat with an adequate budget.~~

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

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

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

Article 21

WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by

giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

~~Conventions are only binding for a Party as long as it agrees to be bound. Under international law, a Party may withdraw from a treaty either (i) in conformity with the provisions of the treaty or (ii) at any time by consent of all the Parties after consultation with the other contracting States.³⁹⁶ This means that a Party wishing to withdraw from the Aarhus Convention either has to obtain the consent of all the other Parties to its withdrawal (after which the Party can withdraw at any time) or otherwise it must wait until three years after the Convention entered into force for that Party and withdraw in accordance with article 21. After the expiry of the three years, it may withdraw at any time by giving written notice to the Depositary and its withdrawal will take effect 90 days later. This means that, unless the Party obtains the consent of all the other Parties to its withdrawal, it In the case of the Aarhus Convention, a Party will be bound for a minimum of three years and 90 days. However, if a Party decides after three years from the date the Convention takes effect for that Party to withdraw from it, it may do so according to the procedures established under article 21. A Party wishing to withdraw must notify the Depositary of its intention in writing.~~

Comment [FM897]: Edits (editorial team)

The constitutional order of a Party determines its internal procedure for arriving at a decision to withdraw. The effect of withdrawal is to release the former Party from any future international obligations arising from the Convention, and to exclude it from any future international benefits arising from the Convention.

Article 22

AUTHENTIC TEXTS

When the final draft of a treaty has been adopted, it must be "authenticated" by a representative of each prospective Party, generally by signing the treaty. Authentication identifies the treaty's text as the actual text the negotiators agreed to, and establishes that each prospective Party signing agrees in principle to its terms.

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Article 22 provides that the Aarhus Convention has three equally authentic texts, in English, French and Russian. All authentic texts of a convention are equally authoritative, and the terms of the treaty are presumed to have the same meaning in each. Cases of discrepancies between authentic language versions, however, may happen. They can be resolved by only negotiation and the amendment of one or more versions. The addition of an authentic version (for example, a version in a fourth language, under this Convention) necessitates the amendment of the relevant article (here article 22) of the Convention.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

THE ANNEXES

The Aarhus Convention has two annexes. Annex I contains the list of activities referred to in article 6, paragraph 1 (a), to which the Convention requires Parties to apply public participation in decision-making. Annex II contains mandatory arbitration procedures that will govern Parties if they submit a dispute over the interpretation or application of the Convention to arbitration pursuant to article 16, paragraph 2

Annex I

List of activities referred to in article 6, paragraph 1(a)

1. Energy sector:

- Mineral oil and gas refineries;
- Installations for gasification and liquefaction;
- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
- Coke ovens;
- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors¹ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
- Installations for the reprocessing of irradiated nuclear fuel;
- Installations designed:
 - For the production or enrichment of nuclear fuel;
 - For the processing of irradiated nuclear fuel or high-level radioactive waste;
 - For the final disposal of irradiated nuclear fuel;
 - Solely for the final disposal of radioactive waste;
 - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:

- Metal ore (including sulphide ore) roasting or sintering installations;
- Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
- Installations for the processing of ferrous metals:
 - (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
 - (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
 - (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
- Ferrous metal foundries with a production capacity exceeding 20 tons per day;
- Installations:
 - (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
 - (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting

capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;

- Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m³.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m³ and with a setting density per kiln exceeding 300 kg/m³.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):

(a) Chemical installations for the production of basic organic chemicals, such as:

- (i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
- (ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
- (iii) Sulphurous hydrocarbons;
- (iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
- (v) Phosphorus-containing hydrocarbons;
- (vi) Halogenic hydrocarbons;
- (vii) Organometallic compounds;
- (viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
- (ix) Synthetic rubbers;
- (x) Dyes and pigments;
- (xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:

- (i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;

- (ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
 - (iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
 - (iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;
 - (v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;
- (c) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);
 - (d) Chemical installations for the production of basic plant health products and of biocides;
 - (e) Installations using a chemical or biological process for the production of basic pharmaceutical products;
 - (f) Chemical installations for the production of explosives;
 - (g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances
5. Waste management:
- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
 - Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
 - Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
 - Landfills receiving more than 10 tons per day or with a total capacity exceeding 25,000 tons, excluding landfills of inert waste.
6. Waste-water treatment plants with a capacity exceeding 150,000 population equivalent.
7. Industrial plants for the:
- (a) Production of pulp from timber or similar fibrous materials;
 - (b) Production of paper and board with a production capacity exceeding 20 tons per day
8. (a) Construction of lines for long-distance railway traffic and of airports² with a basic runway length of 2,100 m or more;
- (b) Construction of motorways and express roads;³
 - (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.
9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tons;
- (b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.
11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2,000 million cubic metres/year and where the amount of water transferred exceeds 5 per cent of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas.
13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.
14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.
15. Installations for the intensive rearing of poultry or pigs with more than:
 - (a) 40,000 places for poultry;
 - (b) 2,000 places for production pigs (over 30 kg); or
 - (c) 750 places for sows.
16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.
17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.
18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more.
19. Other activities:
 - Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;
 - Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;
 - (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;
 - (b) Treatment and processing intended for the production of food products from:
 - (i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;
 - (ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

- (c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);
- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;
 - Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
 - Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.
20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.
21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.
22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1(a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

Notes

¹ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

² For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

³ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

[Annex I lists activities subject to public participation provisions of article 6. These provisions, by virtue of article 6, paragraph 1 \(a\) apply "with respect to decisions on whether to permit proposed activities listed in annex I".](#)

Annex I is based on the annexes relating to similar provisions in Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,³⁹⁷ as amended by Directive 97/11/EEC (the "EIA Directive"), the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC).³⁹⁸ [\(The last of these has since been superseded by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control \(codified version\).](#)

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

Annex I to the Aarhus Convention has 20 sections: 1. Energy sector; 2. Production and processing of metals; 3. Mineral industry; 4. Chemical industry; 5. Waste management; 6. Waste-water treatment plants; 7. Specific industrial plants; 8. Railway and airports; 9. Inland waterways and ports; 10. Groundwater abstraction or recharge schemes; 11. Works for the transfer of water resources; 12. Extraction of petroleum and natural gas; 13. Dams; 14. Pipelines; 15. Installations for the intensive rearing of poultry or pigs; 16. Quarries and opencast mining; 17. Construction of overhead electrical power lines; 18. Installations for the storage of petroleum; 19. Other activities; 20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

It also includes two further qualifying paragraphs and three notes that define the terms "nuclear power stations and other nuclear reactors", "airport" and "express road".

The main reference sources for annex I of the Convention are the annexes to the EIA Directive listing categories of projects. The EIA Directive ~~on EIA~~ contains ~~two~~ ~~three~~ such annexes; Annexes I and II together can be compared with the content of annex I to the Aarhus Convention. Projects within the scope of annex I to the EIA Directive ~~on EIA~~ "shall be made subject to an assessment in accordance with articles 5 to 10".³⁹⁹ Annex I does not group the projects into systematic sections but mentions crude-oil refineries, power stations, disposal of radioactive waste, melting of cast-iron and steel, extraction of asbestos, integrated chemical installations, motorways and express roads, ports and waste-disposal installations. Annex II to the EIA Directive ~~on EIA~~ lists projects that "shall be made subject to an assessment, in accordance with articles 5 to 10", where Member States consider that their characteristics so require."⁴⁰⁰ Annex II groups 1. Agriculture; 2. Extractive industry; 3. Energy industry; 4. Processing of metals; 5. Manufacturing of glass; 6. Chemical industry; 7. Food industry; 8. Textile, leather, wood and paper industries; 9. Rubber industry; 10. Infrastructure projects; and 11. Other projects. Here we can already observe groupings similar to annex I to the Aarhus Convention, such as "energy industry" and "energy sector". Other sectors are missing in annex I to the Aarhus Convention, such as the special food industry group. Otherwise, the characteristics of the projects are very similar in annexes I and II to the EIA Directive ~~on EIA~~ and in annex I to the Aarhus Convention.

Appendix I to the Espoo Convention (List of activities) can be compared with annex I to the Aarhus Convention. For instance, article 2 (General provisions), paragraph 3, of the Espoo Convention refers to appendix I. The appendix lists: 1. Crude oil refineries; 2. Thermal power stations; 3. Installations for the production of nuclear fuels; 4. Smelting of cast-iron and steel; 5. Extraction of asbestos; 6. Integrated chemical installations; 7. construction of motorways, express roads, railways and airports; 8. Oil and gas pipelines; 9. Ports and inland waterways; 10. Waste-disposal installations; 11. Dams and reservoirs; 12. Groundwater abstraction; 13. Pulp and paper manufacturing; 14. Mining, on-site extraction and processing of metal ores and coal; 15. Offshore hydrocarbon production; 16. Storage of petroleum and chemicals; and 17. Deforestation.

The IPPC Directive's annex I (Categories of industrial activities referred to in article 1) can be compared with annex I to the Aarhus Convention. Article 1 of the Directive refers to its annex I by stating that "The purpose of this Directive is to achieve integrated prevention and control of pollution arising from the activities listed in annex I". The IPPC Directive's annex I consists of six groups of activities. The first five groups, 1. Energy industries, 2. Production and processing of metals, 3. Mineral industry, 4. Chemical industry and 5. Waste management, are the same as in annex I to the Aarhus Convention. Paragraphs 2 [Production and processing of metals] and 3 [Mineral industry]

are even identical in both annexes. Paragraph 4 [Chemical industry] is almost identical but the Aarhus Convention has, in addition to the text of the IPPC Directive, subparagraph (g), which regulates "Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances". Paragraph 6 of annex I to the IPPC Directive lists under "Other activities" various industrial plants dealing with the production of pulp from timber or other fibrous materials, the pretreatment or dyeing of fibres or textiles, the tanning of hides and skins, slaughterhouses, the disposal or recycling of animal carcasses and animal waste, extensive rearing of poultry or pigs, organic solvents and the production of carbon or electrographite. Paragraph 6 is almost identical to paragraph 19 [Other activities] of annex I to the Aarhus Convention but with minor differences, the main one being that industrial plants dealing with the production of pulp from timber or other fibrous materials and the specific production of paper and board are regulated in paragraph 7 of annex I to the Aarhus Convention. Installations for the extensive rearing of poultry or pigs are addressed in paragraph 15 of annex I to the Aarhus Convention and not in paragraph 19 [Other activities].

Three paragraphs of annex I to the Aarhus Convention bear special mention - paragraphs 20-22.

Paragraph 20 of Annex I includes any activity not otherwise listed which requires public participation under an environmental impact assessment procedure in accordance with national legislation ~~(para. 20).~~ In its findings on communication ACCC/C/2009/35 (Georgia), the Compliance Committee observed that the determination of whether an activity falls within the ambit of paragraph 20 of annex I to the Convention depends on three elements, namely: (i) public participation; (ii) EIA procedure in the context of which public participation takes place; and (iii) domestic legislation providing for EIA procedure.⁴⁰¹ It further noted that even if paragraph 20 of annex I to the Convention refers to the taking place of an EIA, the domestic legislator may provide for a process that includes all basic elements for an EIA, without naming the process by the term "EIA". Such a de facto EIA process should also fall within the ambit of annex I, paragraph 20. It is critical, however, to define the extent to which the de facto EIA process qualifies as an EIA process, even if it is not termed as such.⁴⁰² Thus, according to the Committee it is not the name but particular features of the given procedure which decides whether such procedure should be considered as EIA procedure. One such characteristic feature is public participation. Furthermore, the national legislator must intend to subject the activity to such a procedure, including public participation.⁴⁰³ In this regard, it should be noted that in its findings on communication ACCC/C/2009/37 (Belarus), the Compliance Committee found that the OVOS and the expertiza shall be considered jointly as a decision-making process constituting a form of EIA procedure.⁴⁰⁴

Comment [E898]: Edit footnote : as requested by Germany

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

Comment [E899]: Edit footnote : as requested by Germany

With respect to paragraph 21 of annex I, under very special circumstances the authorities may avoid public participation ~~only under very special circumstances~~ if their decision concerns activities listed in annex I that are performed within various kinds of research. Research must be the primary goal of the activity and the period of the project may not exceed two years. If the research project may cause a significant adverse effect on the environment or health, article 6 automatically applies. In this context it seems that such a provision shall be implemented inline with the general obligation set out in article 6, paragraph 1 (b), except that this provision specifically mentions health in addition to the environment. That is, the significant effect need not be an effect on the environment, as in article 6, paragraph 1 (b), but may be solely an effect on health. The scheme is similar to that applied by the EIA Directive regarding research projects.

Under paragraph 22 of annex I, where a change or extension of an activity listed in annex I itself meets the criteria or threshold set out in the annex for that activity, article 6, paragraph 1 (a) will apply, applies article 6 to certain changes or extensions of activities. If the change or extension does not meet the threshold criteria set in the annex, they are subject to article 6, paragraph 1 (b) of the Convention. This approach is modeled on the EIA Directive and effectively means that the changes or extensions will be subject to screening.

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

Annex II

Arbitration

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information;

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

There are alternative mechanisms available, such as negotiation or mediation, that parties sometimes look into before, or instead of, arbitration. Arbitration is, thus, a process that is used when parties cannot reach an agreement independently and require an impartial decision-making body to intervene.

Comment [FM900]: Text moved up (editorial team)

Arbitration is a process of dispute settlement, based on the determination of facts and law by an independent third person or persons, that results in a binding decision. As discussed above, article 16 names arbitration as one of several dispute settlement methods available under this Convention. Specifically, article 16, paragraph 2, gives parties the ability to choose between arbitration and adjudication by the International Court of Justice when non-binding methods such as negotiation and mediation are not sufficient to resolve the dispute. To date, there have been no disputes taken to arbitration under the Convention.

Arbitration is a form of dispute resolution used to resolve many different types of disputes at both the national and international level, including commercial disputes. While arbitration is not unique to the international context, it has been used extensively throughout the twentieth century to resolve disputes between States, international organizations, and non-State parties of different nationalities because of its ability to consider and reconcile multiple systems of law. This capacity is achieved primarily through the use of a panel structure whereby multiple arbitrators are selected, in part because of their familiarity with one or more of the legal systems of parties to the dispute. The arbitrators, functioning much like a traditional judicial body, then work together to decide the facts of the case, determine the applicability of various applicable laws, and reach a decision. Parties entering into arbitration agree to abide by the procedures selected and the awards granted, and in practice most tend to honour this commitment.

Comment [W901]: Edited for clarity (editorial team)

Comment [W902]: Edit (editorial team)

Annex II establishes the framework under which parties can use arbitration to resolve disputes arising under the Convention. The terms of the annex are almost identical

to those of several other UN/ECE conventions, including the Convention on the Transboundary Effects of Industrial Accidents and the Convention on Environmental Impact Assessment in a Transboundary Context. In practice, the point at which parties enter into arbitration is comparable to when they would seek judicial remedies. ~~There are alternative mechanisms available, such as negotiation or mediation, that parties sometimes look into before, or instead of, arbitration. Arbitration is, thus, a process that is used when parties cannot reach an agreement independently and require an impartial decision-making body to intervene.~~

Comment [FM903]: Text moved up (editorial team)

The scope of annex II is limited to disputes between Parties to the Convention, so arbitration with third parties, such as NGOs, is not covered. This does not mean, however, that Parties are prevented from engaging in arbitration with third parties to resolve disputes arising under the Convention. Agreement by a Party to arbitrate with a third party would not violate the terms of the Convention—in this case, the terms of annex II simply would not apply. The Permanent Court of Arbitration, an independent international organization established in 1899 by the Convention for the Pacific Settlement of International Disputes, regularly settles disputes between States and private parties and therefore has a special set of procedural rules that govern such cases. There are also a number of other sets of arbitration rules that might be used in such an arbitration, albeit not specifically designed for disputes between States and private parties, e.g. the arbitration rules of the United Nations Commission on International Trade Law. Alternatively, Parties participating in other international treaties that do not recognize third parties in the context of arbitration have extended diplomatic protection to NGOs and citizens by espousing their claims and arbitrating on their behalf.

Pursuant to paragraph 1 of annex II, once parties have decided to use arbitration, the first step in constituting a tribunal is notifying the secretariat to the Convention. Parties must indicate the subject matter of the desired arbitration and the articles of the Convention that form the basis of the dispute. In keeping with the Convention's emphasis on the active dissemination of information, the secretariat will then forward the information received to all Parties to the Convention.

Paragraphs 2, 3 and 4 stipulate the manner in which the arbitral tribunal will be formed. Pursuant to paragraph 2, a total of three arbitrators will constitute the tribunal. If there are only two parties to the dispute, each has authority to appoint one arbitrator. The third, who will serve as president of the tribunal, is to be agreed upon by the two arbitrators selected. If there are more than two parties to the dispute, parties sharing a common position appoint one arbitrator. Arbitrators selected by the parties are expected to be impartial and independent. They are not supposed to represent the interests of those parties; rather, are they usually chosen on the basis of their familiarity with the legal and cultural systems of those parties and their expertise in the subject of the dispute. The president of the tribunal is also expected to be impartial and independent. To avoid any appearance of partiality he or she may not be a national of one of the parties to the dispute, reside in any of their territories, or have prior affiliations with the parties or the case.

To ensure that arbitration is not prevented by failure to appoint the requisite arbitrators, paragraphs 3 and 4 establish several specific time-frames by which arbitrators must be chosen. Those paragraphs also outline procedures to be followed when one or more of the arbitrators is not promptly selected. If the two arbitrators selected by the parties fail to appoint a president, the Executive Secretary of the Economic Commission for Europe is authorized to designate one. If one of the parties does not appoint an arbitrator, the Executive Secretary is authorized to designate the president, who will then encourage the party to select an arbitrator or appoint one unilaterally if the party does not comply. In practice, many arbitral tribunals are established more promptly than required by law in order to expedite dispute settlement, making such intervention unnecessary.

The annex outlines some guiding principles that govern the conduct of the tribunal, although considerable discretion is left to the arbitrators to determine both the procedural and the substantive elements of the arbitral process. For example, paragraph 5 instructs tribunals to render their decisions in accordance with international law and the provisions of this Convention. But the arbitrators determine what will constitute the applicable body of international law in this context. Ostensibly, this means that the body of international

law to be applied in any arbitration brought under the Convention will be determined by arbitrators on a case by case basis, however, arbitrators of international disputes generally adhere to the approach of the Permanent Court of Arbitration and International Court of Justice. The Permanent Court of Arbitration's rules for disputes between States provide that international law consists of: international conventions, international custom, general principles of law "recognized by civilized nations", and judicial and arbitral decisions, which shall be used as a subsidiary means to aid in determining the rule of law. This is based on a similar provision ~~followed by in the Statute of the International Court of Justice. Ostensibly, the body of international law to be recognized under this Convention will be determined case by case in the drafting of procedural rules.~~

Pursuant to paragraph 6, the arbitral tribunal will draw up its own rules of procedure. In practice, many tribunals choose to adopt or copy by reference existing rules of procedure, such as those available through the Permanent Court of Arbitration, to the extent that those rules are consistent with the terms of the convention in question. Where necessary, tribunals then modify existing rules to comply with the terms of the particular convention. As Should arbitrations begins to take place under this Convention, potential models for procedural rules will likely emerge. Such models may be of considerable use to future arbitrators, as they will have determined mechanisms for accommodating the terms of annex II and, more specifically, the requirement that decisions should be rendered in accordance with the entire Convention. The Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment adopted by the Permanent Court of Arbitration in June 2001 may provide additional guidance. Additional guidance may emerge from the "procedural rules in the field of environmental protection" that the Permanent Court of Arbitration is developing.

Paragraph 7 of the annex specifies that the decisions of the tribunal will be made by majority vote of the arbitrators. The president's role is, thus, limited to presiding over the arbitral hearing and casting a vote equal in weight to those of the other two members. This type of voting structure is similar to that used in other conventions, such as the Convention on Biological Diversity, but differs from some ~~procedural arbitration~~ rules that make the president sole arbitrator when the other two arbitrators cannot agree on a decision.

Paragraph 8 instructs the tribunal to take all appropriate measures to establish the facts of the case. In practice, this usually includes gathering evidence and calling witnesses. Pursuant to paragraph 9, parties to the dispute are required to facilitate this work of the tribunal using all means at their disposal, including provision of relevant documents and assistance in obtaining witnesses and expert testimony. In the past, tribunals have found it useful to allow for presentation of views or evidence by third parties such as NGOs. The Iran-United States Claims Tribunal, for example, permitted submission of oral or written statements by any person who was not a party to a particular case if that information was likely to assist the Tribunal in carrying out its task.

Paragraph 10 requires the arbitrators to protect the confidentiality of any information received in confidence during the proceedings of the tribunal. This provision does not cover all information received; rather, it is limited to information expressly agreed upon as confidential in nature by the parties and the arbitrators. Unless such an agreement is made in advance of submission, the right to access information used in an arbitral proceeding is protected by the terms of this Convention. In keeping with the spirit of the Convention, disputing parties should make all pleadings and documents and all orders and awards by the tribunal publicly available during and after the proceeding, subject to that information expressly agreed between the parties and the arbitrators to be confidential.

Under paragraph 11, the arbitral tribunal may recommend interim protection measures at the request of one of the parties. Interim protection measures include mechanisms, such as injunctions, that require or restrict a certain behaviour on the part of one or more parties to the dispute until a final remedy is selected. Since the Convention provides that arbitrators can only recommend such mechanisms at the request of one of the parties, responsibility for conceiving of and advancing interim measures falls on that party. The tribunal is also limited in its capacity to guarantee adherence to interim

measures selected. Since it has no enforcement mechanism, it may only recommend parties to implement interim measures. But, in practice, parties tend to comply, possibly out of consideration for how their cooperation could influence the final award.

Pursuant to paragraph 12, failure on the part of a party to appear before the tribunal or to defend its case does not prevent the tribunal from conducting the proceedings. A party may request that the tribunal proceed with arbitration and render its final decision without the input of the other party. As such, it would be possible for the appointment of arbitrators and the adjudication of the dispute to proceed from beginning to end without a party ever responding to another party's initial notification of the secretariat or otherwise participating.

If a responding party wishes to file a counter-claim against one or more parties initiating arbitration, such action is governed by paragraph 13. The only restriction is that counter-claims must be directly relevant to the subject matter of the original dispute being arbitrated. When parties do have a claim that meets this requirement, filing a counter-claim would presumably expedite resolution of the matter, whereas initiating a separate claim would necessitate the formation of a new tribunal and the development of new procedural rules.

The costs of arbitration are discussed in paragraph 14, which stipulates that all the expenses of the tribunal should be divided equally among parties to the dispute unless the arbitrators determine that some other payment scheme is appropriate given the specific circumstances of the case. Aside from compensation for the arbitrators, the annex does not specify what types of costs may be included. In practice, costs often include the fees of the arbitrators, including travel and other expenses; the cost of expert advice required by the tribunal; the travel and other expenses of witnesses; rental of a space in which to conduct the arbitral hearing; fees for secretarial assistance; and any fees or expenses of the secretariat or the appointing authority, who under this Convention is the Executive Secretary of the Economic Commission for Europe. The tribunal is required to keep a record of all its expenses and provide a final list of charges to the parties. It is quite common in international arbitration for tribunals to apportion costs disproportionately among parties, with losing parties covering some or all of the costs of the prevailing parties.

Paragraph 15 provides a mechanism for additional parties with a compelling interest in a dispute to become involved in the arbitral process. Specifically, it allows any Party to the Convention to intervene in the proceedings, thereby becoming a party to the case, provided that it has a legal interest in the subject matter of the dispute and may be affected by the decision rendered. While the Convention does not specify what constitutes a legal interest, it is typically interpreted as one that could form the basis of judicial proceedings. When parties intervene after a hearing has already begun, the business of the tribunal proceeds as normal. Intervening parties are not permitted to appoint additional arbitrators.

According to paragraph 16, once a tribunal has been established, it has five months to render its decision. If the tribunal finds it necessary, however, it may extend the time limit by another five months. Grounds for granting such an extension are not specified in the annex, and the tribunal has sole authority to determine when a delay is appropriate. In practice, extensions may be granted for a variety of reasons ranging from the personal circumstances of one or more arbitrators to the inability to obtain a majority vote. But whenever possible, tribunals are expected to render their decisions within the first five-month period and reserve the use of the extension for unusual or uncontrollable circumstances.

Pursuant to paragraph 17, the award granted by the tribunal is final and binding on all parties to the dispute. The decision must be accompanied by a statement of reasons, which typically addresses both factual and legal explanations for the outcome of the case. Once the decision is rendered, it must be transmitted by the tribunal to all of the parties to the dispute and the secretariat of the Convention. The secretariat then forwards the information received to all the Parties to the Convention. Although the award is only binding on the parties to the dispute, this dissemination structure allows the Parties to

keep abreast of issues involving implementation of the Convention, to track the role of arbitration in resolving disputes, to see how arbitrators interpret specific provisions of the Convention, and to develop a sense of how arbitrators might react to similar issues in the future.

Paragraph 18 addresses the possibility that a further dispute may arise over the interpretation or implementation of the award granted. In such cases, the parties to the original dispute may call upon the tribunal that made the award for further assistance. If, for whatever reason, the original tribunal cannot be reconstituted at that time, parties can seek the establishment of a new tribunal.

APPENDICESANNEXESAPPENDIX I ANNEX HDECLARATIONS AND RESERVATIONSAUSTRIADeclaration upon ratification:

The Republic of Austria declares in accordance with article 16 (2) of the Convention that it accepts both of the means of dispute settlement mentioned in paragraph 2 as compulsory in relation to any party accepting an obligation concerning one or both of these means of dispute settlement.

Comment [FL904]: Insertion (editorial team)

DENMARK

Declaration upon signature:

Both the Faroe Islands and Greenland are self-governing under Home Rule Acts, which implies *inter alia* that environmental affairs in general and the areas covered by the Convention are governed by the right of self-determination. In both the Faroe and the Greenland Home Rule Governments there is great political interest in promoting the fundamental ideas and principles embodied in the Convention to the extent possible. However, as the Convention is prepared with a view to European countries with relatively large populations and corresponding administrative and social structures, it is not a matter of course that the Convention is in all respects suitable for the scarcely populated and far less diverse societies of the Faroe Islands and of Greenland. Thus, full implementation of the Convention in these areas may imply needless and inadequate bureaucratization. The authorities of the Faroe Islands and of Greenland will analyse this question thoroughly.

Signing by Denmark of the Convention, therefore, not necessarily means that Danish ratification will in due course include the Faroe Islands and Greenland.

EUROPEAN UNIONDeclaration upon signature:

The European Community wishes to express its great satisfaction with the present Convention as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN/ECE region, in accordance with the principle of sustainable development.

Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply the Convention

within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The Community will consider whether any further declarations will be necessary when ratifying the Convention for the purpose of its application to Community institutions."

Declarations upon approval:

"Declaration by the European Community in accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters

The European Community declares that, in accordance with the Treaty establishing the European Community, and in particular Article 175 (1) thereof, it is competent for entering into international agreements, and for implementing the obligations resulting there from, which contribute to the pursuit of the following objectives:

preserving, protecting and improving the quality of the environment;

protecting human health;

prudent and rational utilisation of natural resources;

promoting measures at international level to deal with regional or world-wide environmental problems.

Moreover, the European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10 (2) and Article 19 (5) of the Convention. In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2 (2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.

Finally, the Community reiterates its declaration made upon signing the Convention that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.

The exercise of Community competence is, by its nature, subject to continuous development.

Declaration by the European Community concerning certain specific provisions under directive 2003/4/EC

In relation to Article 9 of the Aarhus Convention, the European Community invites Parties to the Convention to take note of Article 2 (2) and Article 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2 (2) and Article 6 of Directive 2003/4/EC.

FINLAND

Declarations upon acceptance:

1. Finland considers that provisions of Article 9, paragraph 2 on access to a review procedure do not require those provisions to be applied at a stage of the decision-making of an activity in which a decision in principle is made by the Government and which then is endorsed or rejected by the national Parliament, provided that provisions of Article 9, paragraph 2 are applicable at a subsequent decision-making stage of the activity.

2. Some activities in Annex I to the Convention may require consecutive decisions by a public authority or public authorities on whether to permit the activity in question. Finland considers that each party shall, within the framework of its national legislation, determine at what stage the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 may be challenged pursuant to Article 9, paragraph 2.

Comment [FL905]: Insertion (editorial team)

FRANCE

Declaration upon approval:

Interpretative declaration concerning articles 4, 5 and 6 of the Convention:

The French Government will see to the dissemination of relevant information for the protection of the environment while, at the same time, ensuring protection of industrial and commercial secrets, with reference to established legal practice applicable in France.

Comment [FL906]: Insertion (editorial team)

GERMANY

Declaration upon signature:

The text of the Convention raises a number of difficult questions regarding its practical implementation in the German legal system which it was not possible to finally resolve during the period provided for the signing of the Convention. These questions require careful consideration, including a consideration of the legislative consequences, before the Convention becomes binding under international law.

The Federal Republic of Germany assumes that implementing the Convention through German administrative enforcement will not lead to developments which counteract efforts towards deregulation and speeding up procedures.

NETHERLANDS

Declaration, 17 February 2010:

The Kingdom of the Netherlands declares, in accordance with paragraph 2 of Article 16 of the United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, that it accepts both means of dispute settlement referred to in that paragraph as compulsory in relation to any Party accepting one or both means of dispute settlement.

NORWAY

Declaration upon ratification:

In accordance with article 16, paragraph 2 (a) of the Convention, Norway hereby declares that it will submit the dispute to the International Court of Justice.

Comment [FL907]: Insertion (editorial team)

SWEDEN

Reservations upon ratification:

Sweden lodges a reservation in relation to Article 9.1 with regard to access to a review procedure before a court of law of decisions taken by the Parliament, the Government and Ministers on issues ~ involving the release of official documents.

Comment [FL908]: Insertion (editorial team)

A reservation is also lodged in relation to Article 9.2 with regard to access by environmental organisations to a review procedure before a court of law concerning such decisions on local plans that require environmental impact assessments. This also applies to decisions regarding issuing permits that are taken by the Government as the first instance, under, for example the Natural Gas Act (2000:599) and after appeal under Chapter 18 of the Swedish Environmental Code. It is the Government's ambition that Sweden will shortly comply with Article 9.2 in its entirety.

**UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND**

Declaration made upon signature and confirmed upon ratification:

The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person "to live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

APPENDIX II ANNEX I

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

Adopted at the fourth Ministerial Conference "Environment for Europe"
Held in Aarhus, Denmark, on 23-25 June 1998

We, the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,

Resolve to strive for the entry into force of the Convention as soon as possible and to seek to apply the Convention to the maximum extent possible pending its entry into force, and to continue to cooperate in gradually developing policies and strategies related to matters within the scope of this Convention;

Recommend that the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995, should be taken into account in the application of the Convention pending its entry into force;

Emphasize that, besides Governments, parliaments, regional and local authorities and non-governmental organizations also have a key role to play at the national, regional and local level in the implementation of the Convention;

Acknowledge that the Convention is an important element in the regional implementation of Agenda 21 and that its ratification will further the convergence of environmental legislation and strengthen the process of democratization in the region of the United Nations Economic Commission for Europe (ECE);

Emphasize the importance of capacity building to maximize the effectiveness of officials, authorities and non-governmental organizations in implementing the provisions of this Convention;

Call upon each Government to promote environmental education and environmental awareness among the public, particularly in relation to the opportunities that this Convention provides;

Call upon public, private and international fund providers to give high priority to projects that aim to further the objectives of this Convention;

Call for close cooperation between ECE, other bodies involved in the "Environment for Europe" process and other relevant international governmental and non-governmental organizations on the issues of this Convention, for example in the implementation of national environmental action plans and national environmental health action plans;

Recognize that the successful application of the Convention is linked to adequate administrative and additional financial resources being made available to support and maintain the initiatives necessary to achieve this goal and call upon Governments to make voluntary financial contributions to this process so that sufficient financial means are available to carry out the programme of activities of the ECE Committee on Environmental Policy related to the Convention;

Request the ECE Committee on Environmental Policy actively to promote and keep under review the process of ratification of the Convention pending its entry into force by, *inter alia*:

(a) Establishing the Meeting of the Signatories to the Convention, open to all members of ECE and to observers, to identify activities that need to be undertaken pending the entry into force of the Convention, to report to the Committee on progress

made in respect of the ratification of the Convention; and to prepare for the first meeting of the Parties;

(b) Giving full recognition to the activities identified by the Meeting of the Signatories within the Committee's work programme and when the Committee considers the allocation of ECE resources provided for the environment;

(c) Encouraging Governments to make voluntary contributions to ensure that sufficient resources are available to support these activities;

Consider that, pending the entry into force of the Convention, the necessary authority should be given to ECE and its Executive Secretary to provide for a sufficient secretariat and, in the framework of the existing budgetary structure, for appropriate financial means;

Urge the Parties at their first meeting or as soon as possible thereafter to establish effective compliance arrangements in accordance with article 15 of the Convention, and call upon the Parties to comply with such arrangements;

Commend the international organizations and non-governmental organizations, in particular environmental organizations, for their active and constructive participation in the development of the Convention and recommend that they should be allowed to participate in the same spirit in the Meeting of the Signatories and its activities to the extent possible, based on a provisional application of the provisions of article 10, paragraphs 2(c), 4 and 5, of the Convention;

Recommend that non-governmental organizations should be allowed to participate effectively in the preparation of instruments on environmental protection by other intergovernmental organizations;

Recognize the importance of the application of the provisions of the Convention to deliberate releases of genetically modified organisms into the environment, and request the Parties, at their first meeting, to further develop the application of the Convention by means of *inter alia* more precise provisions, taking into account the work done under the Convention on Biological Diversity which is developing a protocol on biosafety;

Invite the other member States of ECE and any other State that is a Member of the United Nations and/or of other regional commissions to accede to this Convention;

Encourage other international organizations, including other United Nations regional commissions and bodies, to develop appropriate arrangements relating to access to information, public participation in decision-making and access to justice in environmental matters, drawing, as appropriate, on the Convention and to take such other action as may be appropriate to further its objectives.

LUCCA DECLARATION

adopted at the first meeting of the Parties
held in Lucca, Italy, on 21-23 October 2002

We, Ministers and heads of delegation of Parties, Signatories and other States, parliamentarians, representatives of civil society, and in particular non-governmental organizations promoting environmental protection from throughout the ECE region and beyond, gathered at the first meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), affirm the following:

I. CREATING PARTNERSHIPS FOR SUSTAINABLE DEVELOPMENT

1. The engagement of the public is vital for creating an environmentally sustainable future. Governments alone cannot solve the major ecological problems of our time. Only through building partnerships with and within a well-informed and empowered civil society, within the framework of good governance and respect for human rights, can this challenge be met.

2. Access to information, public participation and access to justice are fundamental elements of **good governance** at all levels and essential for sustainability. They are necessary for the functioning of modern democracies that are responsive to the needs of the public and respectful of human rights and the rule of law. These elements underpin and support representative democracy.

3. We note that the World Summit on Sustainable Development recognized the importance of principle 10 of the Rio Declaration on Environment and Development, but we also note the need to further promote concrete actions. We will continue to contribute to development of initiatives around the world. Such assistance could be political, financial or technical, and could include sharing experiences of the Aarhus Convention process and of best practices developed in the UNECE region.

II. THE AARHUS CONVENTION

A BREAKTHROUGH IN PARTICIPATORY DEMOCRACY

4. The Aarhus Convention is, as stated by the United Nations Secretary-General Kofi Annan, the most ambitious venture in **environmental democracy** undertaken under the auspices of the United Nations. It represents a major step forward in international law. We express our satisfaction that the Convention has entered into force within a relatively short period of time, and at the same time acknowledge the considerable challenges that lie ahead in achieving its full and widespread implementation. We note that, among others, non-governmental organizations promoting environmental protection have expressed their wish to further improve and develop the Convention.

5. The Aarhus Convention is **a new kind of environmental agreement**. It acknowledges our obligation to present and future generations. It confers rights on individual members of the public, without regard to their nationality, citizenship or domicile. It recognizes the key role of an active and well-informed public in ensuring sustainable and environmentally sound development. Through seeking to guarantee public rights to information, to participation and to access to justice in the environmental sphere, it addresses, in a tangible and concrete way, the relationship between governments and individuals. It is thus more than an environmental agreement; it is an agreement that addresses fundamental aspects of human rights and democracy, including government transparency, responsiveness and accountability to society.

6. We recognize the close relationship between **human rights** and environmental

protection. Through its goal of contributing to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, the Convention reflects this link.

III. STRENGTHENING THE IMPLEMENTATION OF THE CONVENTION

7. We welcome the rapid progress in ratification of the Convention, which has brought about its early entry into force, and express our determination that this momentum should be maintained in its implementation and further development.

8. We recognize that implementation and compliance by the Parties with their obligations under the Convention is the very heart of the matter in relation to the success of the Convention.

9. We urge all **Signatories** to the Convention which have not yet ratified it to do so as soon as possible, to put in place the full set of implementing legislation as well as procedures and mechanisms for implementing the specific provisions of the Convention and, in the interim, to seek to apply the provisions of the Convention to the maximum extent possible.

10. We call on other countries to further the principles of the Convention with a view to establishing equivalent participation rights for the public and to the extent possible to participate in its processes.

11. We encourage all member States of UNECE that are neither Signatories nor Parties who wish to accede to the Convention to do so as soon as possible.

12. We believe that the Convention should be implemented in such a way that the public is able to effectively **exercise the rights** that the Convention seeks to guarantee, including by removing practical obstacles, such as cost barriers and lengthy procedures.

13. We encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than required under the Convention, noting that the Convention provides for **minimum requirements**.

14. We underline the importance of developing effective means of providing public access to information and actively disseminating it to the public, and call upon Parties to make information progressively available in electronic form.

15. **Civil society** and its actors, including non-governmental organizations, the private sector and the media all have a crucial role to play in the implementation, promotion and further development of the Aarhus Convention. Their expertise is needed to 'make Aarhus work'.

16. We warmly welcome the active involvement of non-governmental organizations, in particular **environmental organizations**, in supporting the implementation of the Convention at both the national and international levels and urge donors to support the continuation of this engagement with adequate finance.

17. We also welcome the active involvement of intergovernmental organizations as well as those of international character facilitating the implementation of the Convention.

18. There is a need to raise wider **public awareness** of the Convention, to encourage the public to exercise the rights that the Convention confers and to reach out to individual members of the public, including those who are not members of any organization.

19. Public authorities and decision makers at all levels and in all sectors, as well as the

judiciary and legislators, need to be fully aware of the obligations arising under the Convention.

20. Effective implementation of the provisions of the Convention is a significant challenge for many Parties. We encourage Parties to draw as necessary upon available assistance mechanisms, such as the **capacity-building service and clearing-house mechanism**, to overcome obstacles to the full application of the Convention.

21. The successful implementation of the Convention can be facilitated by the availability of adequate financial resources in all countries. While the primary responsibility for implementation lies with national governments themselves, it is important to provide **financial and technical assistance to countries with economies in transition**, in particular in the early stages, to help them fulfil their obligations under the Convention. We therefore call upon public, private and international donors to give high priority to financing activities to implement the Convention.

22. We believe that the financial base for the Convention should be broadened and that **stable and predictable funding** for the activities under the Convention should be secured. We welcome the establishment of the financial arrangements based on shares as a first step to meet this need and urge Parties and others in a position to do so to contribute financially to the Convention in accordance with the arrangements.

23. In order to secure effective and timely implementation, we agree on the need to establish an adequate **reporting system** and an effective **compliance mechanism**, including the involvement of the public.

IV. FURTHER WORK ON KEY TOPICS

24. We believe that **pollutant release and transfer registers** provide an important mechanism to increase corporate accountability, reduce pollution and promote sustainable development. We will therefore work towards the adoption of an effective protocol at the Kiev Ministerial Conference and its implementation and, as appropriate, its further development with a view to promoting effective PRTR systems.

25. We recognize that the Signatories have identified the need for, inter alia, more precise provisions with respect to **genetically modified organisms**. As a first step towards addressing this need, the Parties intend to adopt and implement guidelines. They also intend to undertake further work, including on options for a legally binding approach, to develop the Convention in this area, with a result to be considered for adoption, if appropriate, at the second meeting of the Parties.

26. **Access to justice** as provided for under the Convention is indispensable both to underpin the rights of access to information and public participation set out in the Convention, and, more generally, to protect the legitimate interests of the public and to enable it to play a fuller role in supporting the enforcement of environmental law. Further work is required to support Parties in overcoming practical barriers to effective access to justice, including through the examination of good practices, the sharing of experience and the development of information and guidance materials for relevant target groups.

27. In the light of the ongoing revolution in **electronic information technology**, the area of electronic information tools and publishing should be kept under active review, to ensure that activities under the Convention remain abreast of the latest developments and to contribute to bridging the 'digital divide'. We will provide input, as appropriate, to the World Summit on the Information Society.

28. 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**.

V. STRENGTHENING INTERNATIONAL COOPERATION

29. The Aarhus Convention emerged out of the “**Environment for Europe**” process. We recognize the need to maintain strong links with that process and look forward to making an appropriate contribution to the fifth Ministerial Conference “Environment for Europe” (Kiev, May 2003).

30. Cooperation between the bodies of the Aarhus Convention and those of other **multilateral environmental agreements**, including ECE environmental instruments, should be strengthened on an ongoing basis in order to promote the principles of the Convention in all areas of environmental policy.

31. We recognize the need for guidance to the Parties on promoting 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** and we therefore recommend that consideration be given to the possibility of developing guidelines on this topic for adoption, as appropriate, at a future meeting of the Parties.

32. We encourage **other regions and international organizations** to develop appropriate arrangements and action relating to access to information, public participation in decision-making and access to justice in environmental matters. Where requested, we will endeavour to support initiatives aimed at applying the principles contained in the Aarhus Convention, including the development of global and/or regional guidelines or other instruments promoting access to information, public participation and access to justice.

33. We note that, where it suits their particular circumstances, **States outside the ECE region** may wish to accede to the Convention. We believe that the involvement of such States could be of mutual benefit and could enrich the processes under the Convention, and would, therefore, be broadly supportive of their accession. We also note that the Plan of Implementation agreed upon at the World Summit for Sustainable Development contains a commitment to ensure access to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making.

VI. CONCLUSION

34. We celebrate the **constructive spirit** and close cooperation among stakeholders which have characterized the processes associated with the Aarhus Convention, and express our firm hope that this will continue.

ALMATY DECLARATION

adopted at the second meeting of the Parties
held in Almaty, Kazakhstan, on 25-27 May 2005

We, Ministers and heads of delegation of Parties, Signatories and other States, parliamentarians and representatives of civil society, in particular non-governmental organizations promoting environmental protection from throughout the UNECE region and beyond, gathered at the second meeting of the Parties to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, affirm the following:

1. Since our first meeting in Lucca, Italy, the Aarhus Convention has taken firmer hold in the UNECE region. The number of Parties, which now include the European Community, has more than doubled since it entered into force in 2001. More States are preparing to ratify or accede to it and a growing number of States, whether or not Signatories, are making efforts to give effect to its principles and provisions in their internal law, thereby strengthening the protection of citizens' environmental rights and environmental democracy throughout the region.

I. ADVANCING ENVIRONMENTAL PROTECTION AND DEMOCRATIC GOVERNANCE

2. The Convention is an unprecedented instrument of international environmental law, representing a significant step forward both for the environment and for the consolidation of democracy. Today, gathered in Almaty, we reiterate our pledge to continue to advance both environmental protection and democratic governance by adhering to, implementing and possibly, where appropriate, further developing the Aarhus Convention as an instrument to enable public authorities and citizens to assume their individual and collective responsibility to protect and improve the environment for the welfare and well-being of present and future generations.

3. The Convention reflects the important link between human rights and environmental protection. This link has been recognized not only in the UNECE region but also in other regions of the world, in the work of certain international organizations and the practice of human rights bodies. We welcome these developments and encourage the Council of Europe and the United Nations Commission on Human Rights to pursue their ongoing work on the relationship between environmental protection and human rights. Consolidating democracy, the rule of law and the protection of human rights is paramount, as was recently reiterated by the Heads of State and Government of the member States of the Council of Europe in their Warsaw Declaration and Action Plan (16-17 May 2005). We welcome in particular their encouragement of cooperation between the Council of Europe and the United Nations in order to achieve everyone's entitlement to live in a healthy environment.

4. Our long-term strategic vision is to secure the enjoyment of the rights of environmental democracy in order to improve the state of the environment and promote sustainable development throughout the pan-European region and beyond. We see it as our mission to strengthen the rights of the public to have access to information, participate in decision-making and obtain access to justice in environmental matters, throughout the UNECE region, by promoting more effective implementation of the Convention by a larger number of Parties, by encouraging States which are not yet in a position to become Parties to take steps to participate in the Aarhus process and give effect to the principles of the Convention, and by further developing the Convention to the extent necessary, where doing so may usefully contribute to the achievement of its objective.

5. We encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than the minimum required

under the Convention. We also urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision-making and access to justice in environmental matters even where such measures would not necessarily involve any breach of the Convention.

II. FROM LUCCA TO ALMATY: PROGRESS IN DEVELOPING THE CONVENTION

6. In Lucca, we mandated the Convention's bodies to undertake further work on a number of topics. We welcome the results achieved on most of those topics, which reflect important progress.

7. The adoption of the Kiev Protocol on Pollutant Release and Transfer Registers two years ago was a particularly important step forward. Once the Protocol enters into force, it is likely to contribute to increasing corporate accountability, reducing pollution and promoting sustainable development. We urge all Signatories to speed up their internal processes with a view to ratification of the Protocol by the end of 2007 and to put in place implementing legislation as well as administrative procedures and mechanisms for establishing operational pollutant release and transfer registers in accordance with the provisions of the Protocol.

8. With respect to genetically modified organisms, the adoption of the Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms was a first step towards addressing the need to develop more precise provisions identified by the Signatories when the Convention was adopted in Aarhus, Denmark. The adoption of the Almaty amendment represents another significant step forward. We consider this amendment, which further develops the Convention, to be a crucially important result of this meeting. We call upon the Parties to ratify the amendment without delay and to start implementing it as soon as possible without awaiting its formal entry into force.

9. The Almaty Guidelines are another milestone resulting from this meeting. They will guide us in implementing the Aarhus principles in international decision-making. We recognize the importance of further consultation on the Guidelines and hope that they will inspire other environmental governance processes within forums at the regional and global levels.

10. We welcome the successful launch of the Aarhus Clearing House for Environmental Democracy and the adoption of a set of practical recommendations to further promote the wider use of electronic information tools as an effective instrument for the implementation of the Convention's provisions on the dissemination of environmental information. We encourage all Parties, Signatories and other States, as well as international, regional and non-governmental organizations, academic and other research institutions and other members of the public, to submit relevant information for inclusion in the Clearing House, to make use of this important information resource and to contribute to the implementation of our recommendations on electronic information tools.

11. In Lucca, we agreed that further work was required to support Parties in ensuring effective access to justice. We have identified the main obstacles and taken the first steps to overcome them. We welcome the establishment of a task force with the involvement of legal professions and other stakeholders.

III. IMPLEMENTATION AND COMPLIANCE AS A PRIORITY

12. Promoting the Aarhus Convention and the Kiev Protocol, their implementation and compliance with them, are our immediate priority.

13. We urge all Signatories to the Convention which have not yet ratified it to do so as soon as possible and all UNECE member States which have not signed the Convention to cooperate with us and consider acceding to it. We call upon those States to put in place the necessary legislation, procedures and mechanisms for implementing the various provisions of the Convention and, in the interim, to seek to apply them to the maximum extent possible.

14. Implementation and compliance by the Parties with their obligations under the Convention continue to be crucial to its success. In this regard, we welcome the fact that the unique system for compliance review, which was established by the Meeting of the Parties in its decision I/7, has now become fully operational. We commend the work of the Compliance Committee, undertake to give full consideration to its recommendations and encourage the Parties involved to give full effect to the measures decided on the basis of these recommendations.

15. Implementation needs to be continuously and effectively monitored. To this end, we aim to review and, if necessary, further develop the reporting regime under the Convention, based on the experience gained; to develop an adequate reporting system for the Protocol; to use the clearing house to make available other sources of information on implementation; and to review methodologies for assessing the state of implementation, including where appropriate relevant indicators.

16. Problems of non-compliance need to be further addressed through information, support and guidance; through applying the existing mechanism for compliance review, while promoting wider awareness of its existence; and through developing a suitable compliance mechanism for the Protocol, drawing on the experience with the compliance mechanism gained under the Convention and other compliance mechanisms.

17. Promoting implementation will require further capacity-building efforts aimed at addressing the identified needs of specific countries or groups of countries or addressing specific topics or professional target groups and providing guidance and support for implementation. We expect the reporting regime and compliance mechanism to provide a rich source of information, which should be used as a basis for identifying specific priorities for capacity-building, having regard to the respective needs and possibilities of public authorities, legal professionals and civil society in the countries or groups of countries in question.

18. We recognize the important tasks to be performed by public authorities in implementing the Convention and the need to provide them with a proportionate level of resources to enable them to effectively fulfil their obligations. We welcome the initiatives of those countries that have prepared and adopted national profiles, strategies and action plans to assess and strengthen their capacities related to the Convention. We also welcome the activities carried out by international and regional organizations to strengthen the capacities of national authorities and other stakeholders to implement the Convention, and invite donors to further support these activities. We recognize the importance of democratic processes with regard to decision-making relating to the Convention, in particular for countries with economies in transition, and sub-regional cooperation, including on transboundary issues. We welcome and support initiatives and proposals for strengthening sub-regional cooperation for implementation of the Convention, for example in Central Asia.

19. We encourage the public to make full use of its rights under the Convention and recognize the role that all partners in civil society have to play in its effective implementation. In particular, we welcome the important contribution non-governmental organizations can make to the successful pursuit of the Convention's objectives, and call upon Governments and others in a position to do so to give appropriate support, including financial support, to such organizations.

20. Promoting environmental education and strengthening civil society mechanisms will be crucial for the effective implementation of the Convention and its Protocol. Measures taken to implement the UNECE Strategy for Education for Sustainable Development and the United Nations Decade on Education for Sustainable Development (2005-2014), as well as efforts of public authorities and civil society organizations aimed at raising environmental awareness generally, will help the public to exercise its rights under the Convention more effectively.

IV. OUR VISION FOR THE FUTURE

21. As regards future activities under the Convention, we underline the importance of the declaration of Environment Ministers at their fifth “Environment for Europe” Conference in Kiev in May 2003 that greater emphasis should be placed on compliance and national implementation of legally binding instruments for environmental protection within the UNECE region, and that a larger concentration of effort on the East European, Caucasian and Central Asian countries is needed. While we recognize that further work remains to be done on specific topics regarding the application of the principles of the Convention, we reiterate that promoting the implementation of and compliance with the Aarhus Convention and the Kiev Protocol is our immediate priority. In this respect, we stress the paramount importance of sharing and transferring knowledge and experience on the matters covered by the Convention, and of finding synergies and areas of cooperation in relation to the practical application of the Convention, both within the UNECE region and in the wider global context.

22. It gives us great encouragement that the Convention has attracted considerable interest and support from a variety of organizations and institutions in the UNECE region and beyond. The promotion of networking and capacity-building among all interested partners, to which the regional environmental centres are making a key contribution, can produce significant synergies and provide important resources for implementation. Sharing experiences and finding synergies and areas of cooperation with the other UNECE conventions, as well as with other regional, subregional and global multilateral environmental agreements, such as the Cartagena Protocol on Biosafety, in order to maximize their combined effectiveness in our region, will also be one of our priorities during the next few years.

23. With the adoption of the Protocol on Strategic Environmental Assessment to the Espoo Convention, a contribution has been made to the implementation of article 7 of the Aarhus Convention. However, we recognize the need for further work to clarify how public participation in decision-making on plans, programmes and, to the extent appropriate, policies is to be organized in other contexts relating to the environment.

24. We reiterate our invitation to interested States, including those outside the UNECE region, to accede to the Convention and/or the Protocol. We believe that the involvement of such States could be of mutual benefit, by enriching the processes under the Convention and its Protocol and affirming the global relevance of their standards, while at the same time strengthening support for the implementation of principle 10 of the Rio Declaration on Environment and Development worldwide. In this regard, we also encourage the United Nations Environment Programme to continue its work on access to information, public participation in decision-making and access to justice in environmental matters. Where requested and within available resources, we are prepared to support initiatives in other regions and forums aimed at applying the principles contained in the Aarhus Convention and at making clear the links between various initiatives focused on strengthening environmental democracy throughout the world.

25. Securing adequate funding of activities under the Convention remains paramount. We therefore call upon Parties, Signatories and other interested States, as well as other

potential donors, to make voluntary financial contributions to support the implementation of the work programme under the Convention and related activities. At the same time, we will continue to explore and develop as appropriate one or several options for establishing stable and predictable financial arrangements based on appropriate scales.

26. At our third meeting, we intend to adopt a long-term strategic plan covering the following five-year period and translating our collective aspirations and priorities into operational terms.

27. We express our appreciation and gratitude to the Government of Kazakhstan for having undertaken to host the second meeting of the Parties.

RIGA DECLARATION

adopted at the third meeting of the Parties
held from 11 to 13 June 2008 in Riga

We, the Ministers and heads of delegation from Parties and Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), together with representatives of other States, international, regional and non-governmental organizations, parliamentarians and other representatives of civil society from throughout the UNECE region and beyond, gathered here in Riga at the third session of the Meeting of the Parties,
Have resolved as follows:

1. We affirm our belief in the importance of the Aarhus Convention as a uniquely effective international legal instrument promoting environmental democracy; strengthening the link between the protection, preservation and improvement of the environment and human rights; and thereby contributing to sustainable and environmentally sound development.

2. We welcome the increase in the number of States that have ratified, approved, accepted or acceded to the Convention since our last meeting and encourage other States, both within and outside the UNECE region, to ratify, approve, accept or accede to it at the earliest opportunity.

3. We welcome furthermore the real and tangible progress made by many Parties to implement the Convention, as reflected in particular in the national implementation reports. In many countries throughout Europe and Central Asia, Governments have adapted their laws and are improving practices to bring them into line with the requirements of the Convention. We consider this as a major achievement.

4. We note, however, that in a significant number of countries, major challenges remain with regard to the task of fully implementing the Convention. The national implementation reports, the findings of the Compliance Committee and the outcomes of various workshops, seminars and surveys indicate that these challenges include but are not limited to the following:

(a) The need to establish adequate legislative, regulatory or administrative frameworks and develop detailed procedures;

(b) The need to reduce gaps between the legal, regulatory and administrative requirements and the actual practice;

(c) The need to implement the provisions of the Convention effectively in transboundary contexts;

(d) The need for public authorities to take responsibility for the quality and level of public participation, including where developers are mandated to organize the public participation process;

(e) The need to provide for appropriate levels of discussion and feedback in the course of public participation, including where consultation is organized through electronic means;

(f) The need to ensure that members of the public, including non-governmental organizations, are afforded appropriate opportunities to participate effectively in decision-making processes, inter alia by providing for a sufficiently broad interpretation of the public concerned and establishing sufficiently broad standing criteria in the context of appeals procedures;

(g) The need to remove or reduce practical barriers to access to justice, such as financial barriers, access to legal services and lack of awareness among the judiciary.

5. We therefore commit ourselves, within our own jurisdictions or spheres of activity, to facing those challenges. In doing so, we recognize that the Convention, as an international treaty, establishes a set of standards that are designed to be achievable across a large and politically diverse region, and that achieving basic compliance with those standards, while essential, should not set a limit on our efforts. In this regard, we encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than the minimum required under the Convention.

6. We also urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision making and access to justice in environmental matters even where such measures would not necessarily involve any breach of the Convention.

7. We note that a small number of Parties have problems of compliance. Taking into account the non-confrontational and consultative nature of the compliance mechanism, we express the hope that the facilitation and support provided through the compliance mechanism will help those Parties to achieve full compliance. At the same time, we recognize the need to take firm action with respect to Parties that persistently fail to comply with the Convention and do not make efforts to achieve compliance.

8. The adoption of a strategic plan marks an important milestone for the Convention. Through this plan, we commit ourselves to prioritizing more effective implementation of the Convention, including through capacity-building activities, while recognizing the need to encourage more countries to become Parties to the Convention as well as the need for further work on particular themes under the Convention. Furthermore, we are convinced that the experience gained in implementing the Convention serves as a basis for further strengthening environmental democracy in sustainable development policy formulation and implementation.

9. Public access to information, as well as being a right in itself, is essential for meaningful public participation and access to justice. When properly implemented, the right to information leads on the one hand to more transparent, accountable government and on the other to a more informed, environmentally aware public. We resolve to strengthen our efforts to streamline the flow of environmental information to the public and to ensure that any use of exemptions to the release of information is kept to a minimum and is always strictly justified.

10. Electronic tools have dramatically increased the possibilities for putting environmental information in the public domain, but their potential has yet to be fully realized. Whereas increasing volumes of environmental information may be obtained through the Internet, greater use of electronic tools to facilitate public participation processes could and should be made.

11. Pollutant release and transfer registers are effective tools contributing to the prevention and reduction of pollution of the environment, promoting corporate accountability and enabling the public to know about immediate sources of pollution in their neighbourhood. We welcome the increasing number of States that have established such registers. We note the progress towards entry into force of the Kiev Protocol on Pollutant Release and Transfer Registers and call upon all Signatories to the Protocol and other interested States to ratify, approve, accept or accede to it at the earliest opportunity with a view to bringing about its entry into force by the end of 2008. We also encourage prospective Parties to the Protocol to apply its provisions to the maximum extent possible pending its entry into force.

12. The Aarhus Clearinghouse for Environmental Democracy has proven itself as a leading portal to a wide range of information relevant to the themes of the Convention. We welcome the growth in both its content and usage, and encourage the secretariat and the focal points for the national nodes to continue to work with this valuable resource.

13. We recognize that procedures enabling the public to participate effectively in decision-making, whether on specific activities or on more strategic levels, lie at the heart of the Convention. Despite this, significant challenges in creating the conditions for effective participation remain, such as failure to adequately notify the public concerned, lack of early opportunities for participation, unwillingness among public authorities to take due account of comments received, insufficient expertise among the public or public authorities, and difficulties in applying public participation procedures in transboundary contexts. We recognize that there is a need to increase our activities in this area in such a way as to address these challenges. We also consider it important to engage more fully with the experts responsible for designing and facilitating public participation procedures.

14. With respect to public participation in strategic decision-making, we note the mutually reinforcing character of parts of the Aarhus Convention and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), and call upon Parties and other interested States to ratify and implement the Protocol on Strategic Environmental Assessment at the earliest opportunity.

15. We acknowledge the important role that the public, and in particular environmental organizations and public interest lawyers, can play in supporting the enforcement of laws related to the environment when adequate opportunities to challenge decisions, acts and omissions through administrative or judicial review processes are provided. We encourage all Parties to create the conditions which can enhance that role, including through the establishment of sufficiently broad standing criteria, the implementation of measures aimed at overcoming financial or other obstacles, and support for public interest environmental law non-governmental organizations.

16. The emergence of genetic engineering is one of the major technological developments of the modern era, with significant implications for the environment. Given the high level of public interest in the topic and the need for rational and informed debate, establishing balanced procedures to facilitate effective public participation in decision-making in this field is of paramount importance. In this regard, we note the progress towards entry into force of the amendment on genetically modified organisms (GMOs) that was adopted by consensus at our second session in Almaty, Kazakhstan, and encourage all Parties that have not done so to ratify, approve or accept the amendment with a view to bringing about its entry into force by early 2009. We also encourage Parties to apply the provisions of the amendment to the maximum extent possible pending its entry into force. We recognize the value of further collaboration with the bodies of the Cartagena Protocol on Biosafety in activities aimed at supporting the application of the Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to GMOs and the implementation of the Almaty amendment on GMOs.

17. We welcome the work done to consult widely with international forums on the subject of the Almaty Guidelines on promoting the application of the principles of the Aarhus Convention in international forums, which has led to greater awareness of both the Convention and the Almaty Guidelines. We affirm our commitment to promoting and applying the Guidelines and recognize that more emphasis needs to be given to consultations within governments so as to ensure that the Guidelines are applied consistently by all branches of government. We also affirm that the processes under the Convention itself, as well as those under the Meeting of the Parties to the Kiev Protocol on Pollutant Release and Transfer Registers, once it is established, should be a model for the application of the Almaty Guidelines.

18. We recognize the importance of measures to raise awareness and build capacity both within public authorities and the judiciary and among those seeking to exercise their rights under the Convention, notably non-governmental organizations. We call on the donor community to increase its support for capacity-building programmes and projects aimed at strengthening the implementation of the Convention. We welcome the emergence of "Aarhus Centres" in several countries and encourage their development in more countries.

19. We welcome the constructive role that representatives of civil society and in particular environmental organizations continue to play in supporting the implementation of the Convention, including through awareness-raising and capacity-building, through providing input to the compliance and reporting mechanisms and through participation in the Bureau.

20. The support provided by international and regional organizations, including the regional environmental centres, has also been crucial to the successes achieved in promoting more effective implementation of the Convention and will remain crucial in facing the challenges ahead. We welcome the efforts of the secretariat to coordinate relevant capacity-building activities of international and regional organizations through the capacity-building coordination framework, and invite all those involved to continue to collaborate within this framework so as to achieve synergies and optimize the use of resources.

21. The Convention's compliance and reporting mechanisms have provided essential information on the extent to which the objective and principles of the Convention have become a reality on the ground and on the problems that remain. We note that the public involvement in those mechanisms has enriched them, increased the sense of broad ownership of the Convention and helped to expose problems with regard to implementation and compliance which would otherwise not necessarily have come to light.

22. The *Implementation Guide* to the Convention has provided a valuable source of guidance on the text of the Convention. Since it was published in 2000, experience with the implementation of the Convention has accumulated, both within the Parties and through the compliance and reporting mechanisms. In addition, the amendment on genetically modified organisms and various sets of recommendations and guidance have been adopted by the Meeting of the Parties. These combined factors point to the possible need for an updated version of the *Implementation Guide* to be produced during the coming intersessional period.

23. Recalling decision II/9, we reiterate the invitation to States outside the UNECE region to accede to the Convention where it suits their particular circumstances, and reaffirm our willingness to support the promotion of principle 10 of the Rio Declaration on Environment and Development at the global level and in countries outside the UNECE region.

24. While the Convention has promoted more democratic values and practices in the environmental field, it can and should serve as an inspiration for promoting greater transparency and accountability in all spheres of government. In this regard, we express our willingness to share the experiences gained with promoting access to information, public participation and access to justice in the environmental fields with those promoting these values in other fields as an essential contribution to sustainable development.

25. We commit ourselves to maintaining the open and participatory character of the processes under the Convention, working in partnership with a wide range of actors as we move forward to achieve our common goals.

26. We express our appreciation and gratitude to the Government of Latvia for having undertaken to host the third meeting of the Parties. We welcome and accept the offer of the Government of the Republic of Moldova to host the fourth meeting of the Parties in 2011.

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

² Article 19 (1.) Everyone shall have the right to hold opinions without interference. (2.)

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3.) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

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

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

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

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

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

⁸ *Ibid.*

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

¹⁰ [Tatar v Romania, 67021/01, 29 January 2009, and also mentioned in ECtHR, Branduse v Romania, 6586/03, 7 April 2009.](#)

¹¹ [Tatar v Romania, 67021/01, 29 January 2009, and also mentioned in ECtHR, Branduse v Romania, 6586/03, 7 April 2009.](#)

¹² Hans-Dietrich Treviranus, Preamble, in: R. Bernhardt ed., *Encyclopedia of Public International Law* (Amsterdam, Elsevier, 1997), vol. III, p. 1097.

¹³ The Vienna Convention can be found at: <http://www.tufts.edu/fletcher/multi/texts/BH538.txt>, 1999.07.14.

¹⁴ Treviranus, op. cit., p. 1098.

¹⁵ L. Glowka and others, *A Guide to the Convention on Biological Diversity*, 2nd printing (1996) (Gland and Cambridge, IUCN, 1994), p. 9, Preamble.

¹⁶ United Nations General Assembly resolution 2398 (XXIII) (1968).

¹⁷ United Nations General Assembly resolution 44/228.

¹⁸ Sands, op. cit., p. 99.

¹⁹ The resolution can be found in: 23 ILM (1983). It was adopted by a vote of 111 in favour, 18 abstentions and one vote against.

²⁰ Sands, op. cit., p. 42.

²¹ E/CN.4/Sub.2/1994/9.

²² [In 2005, the Secretary-General prepared a follow-up report on human rights and the environment as part of sustainable development. This noted that the Aarhus Convention continued to represent the most advanced example of the link between the environment and human rights at the regional level \(E/CN.4/2005/96, paragraph 54\). In resolution 16/11 of March 2011, the Human Rights Council recalled the earlier reports and requested the Office of the UN High Commissioner for Human Rights in consultation with UN Member States, relevant international organizations and other stakeholders, and to conduct a further detailed analytical study on the relationship between human rights and the environment, to be submitted to the Human Rights Council prior to its nineteenth session in March 2012 \(A/HRC/RES/16/11\).](#)

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

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

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

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

²⁷ WHO Regional Office for Europe, *Overview of the Environment and Health in Europe in the 1990s*, EUR/ICP/EHCO 02 02 05/6, 04229-29 March 1999, p. 3.

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

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

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

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

³² The preamble to the Rio Declaration refers to “the integrity of the global environmental and developmental system”. Principle 2 repeats the formulation of principle 21 of the Stockholm Declaration, while adding the words “and developmental” between “environmental” and “policies”. Principle 4 states: “[I]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Principle 25 provides “[P]eace, development and environmental protection are interdependent and indivisible”.

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

³⁴ For a discussion of its origins back to 1975, see M. Pallemarts, “International law in the age of sustainable development: a critical assessment of the UNCED process”, *Journal of Law and Commerce*, vol.15, No. 36 (1996), p. 623.

³⁵ The consolidated versions of the relevant treaties may be found as Treaty on European Union, Official Journal C 340, 10.11.1997, pp. 145-172. Treaty establishing the European Community, Official Journal, C 340, 10.11.1997, pp. 173-308.

³⁶ [United Nations General Assembly resolution A/RES/44/228 of 22 December 1989 on a United Nations Conference on Environment and Development, preamble and paragraphs I.3, I.12, I.14 and I.15.](#)

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

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

³⁹ [Article 11\(1\) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights \(1988\) states “Everyone shall have the right to live in a healthy environment”](#) [Article 24 of the African Charter on Human and Peoples' Rights \(1981\) declares that “All peoples shall have the right to a general satisfactory environment favourable to their development”.](#)

⁴⁰ See, for instance, the World Charter for Nature, the Stockholm Declaration, principle 1; the draft principles on human rights and the environment (E/CN.4/Sub.2/1994/9, annex I), principle 21.

⁴¹ [Paragraph 1, UN General Assembly Resolution \(A/RES/64/292\), 28 July 2010](#)

⁴² [UN General Assembly Resolution 61/295, 13 September 2007.](#)

⁴³ See E/CN.4/Sub.2/1994/9, annex I.

⁴⁴ [E.g. Subhash Kumar v. State of Bihar \(AIR 1991 SC 420/ 1991 \(1\) SCC 598; M.C. Mehta v. Union of India, \(1998\) 9 SCC 589.](#)

⁴⁵ [E.g. Case General Secretary, West Pakistan Salt Miners Labour Union \(CBA\) Khewara, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore 1994 SCMR 2061.](#)

⁴⁶ [Minors OPOSA v. Sec'y of the Department of Environment and Natural Resources, 33 ILM 168 \(1994\).](#)

⁴⁷ “Protected Forests Case”, Decision of the Hungarian Constitutional Court, MK. 28/

1994 (20 May 1994). See S. Stec, "Ecological rights advancing the rule of law in eastern Europe," *Journal of Environmental Law and Litigation*, vol. 13 (1998), pp. 275, 320-21. The case is described in S. Stec, "New phase in the legislative struggle for environmental protection in central and eastern Europe", *Ecodecision*, vol. 15 (winter 1995), pp. 22-23.

⁴⁸ *Minors OPOSA v. Sec'y of the Department of Environment and Natural Resources*, 33 *ILM* 168 (1994). This case is described in A.G. M. La Vina, "The right to a sound environment in the Philippines: the significance of the Minors Oposa case". *RECIEL*, vol. 3, No. 4 (1994), p. 246.

⁴⁹ See Pres. Trib. First Inst. Antwerp, Dec. of 20 April 1999 (on file with author); *Inter-Environment Wallonie v Walloon Region*, Constitutional Court, 14 Sep 2006, considering article 23 of the Belgian Constitution on the right of everyone to enjoy the protection of a healthy environment. ⁵⁰ "Spriedums Latvijas Republikas vārdā Rīgā 2008. gada 24. septembrī lietā Nr. 2008-03-03" Constitutional Court, 24 September 2008 and "Spriedums Latvijas Republikas Rīgā 2009. gada 6. jūlijā lietā Nr. 2008-38-03" Constitutional Court, 6 July 2009. In both cases, which concerned different facts, the Court considered article 115 of the Constitution of the Republic of Latvia, which requires the State to protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.

⁵¹ The Constitutional Court of Slovenia (Dec. No. U-I-30/95-26, 1/15-1996) recognized that the constitutional right to a healthy living environment in article 72 of Slovenia's constitution gave a legal interest of individuals a legal interest before the court on the basis of the constitutional right to healthy living environment "to prevent actions damaging the environment". See Milada Mirkovic, Legal and Institutional Practices of Public Participation: Slovenia, in *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998).

⁵² "The *GECEN-Castellón case*", STS 4460/2008, Supreme Court, 25 June 2008, considered article 45 of the Spain's constitution which provides that everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.

⁵³ Nov. 4, 1950, 213 U.N.T.S. 222, as amended. Article 8, titled "Right to Respect for Private and Family Life", states:

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

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

⁵⁴ Paragraph 76.

⁵⁵ Paragraph 78.

⁵⁶ Paragraph 77.

⁵⁷ Paragraph 82.

⁵⁸ Paragraph 83.

⁵⁹ S. Stec, *Do Two Wrongs Make a Right? Idem* at 230.

⁶⁰ *Guerra & Others v. Italy*, XX Eur. Ct. H.R. (ser. X) (116/1996/735/932).

⁶¹ *López Ostra v. Spain*, XX Eur. Ct. H.R. (ser. A), Judgment of 9 Dec. 1994, series A No. 303-C, p. 55, § 55 (1994). Other environmental cases under Article 8 include *Kyrtatos v Greece* (ECHR 2003-05-22), *Hatton and others v United Kingdom* (ECHR 2001-10-02 and 2003-07-08 (Grand Chamber)), *Taşkın and others v Turkey* (ECHR 2004-10-10), *Moreno Gomez vt Spain* (ECHR 2004-11-16), *Fadeyeva v Russia* (ECHR 2005-06-09), *Öçkan and others v Turkey* (ECHR 2006-03-28), *Ledyayeva and others v Russia* (ECHR 2006-10-26) and *Giacomelli v Italy* (ECHR 2006-11-12).

⁶² E. Brown Weiss, "Our rights and obligations to future generations for the environment", *AJIL*, vol. 84 (1990), pp. 198-199.

⁶³ Sands, op. cit., pp. 199-200.

⁶⁴ Glowka, op. cit., p. 14, Preamble.

⁶⁵ Legality of the Threat or Use of Nuclear Weapons, . . .

⁶⁶ *Minors OPOSA v. Secretary of the Department of Environment and Natural Resources*,

⁶⁷ For an examination of intergenerational standing in the context of the United States Endangered Species Act, see "Comment: intergenerational standing under the Endangered Species Act: giving back the right to biodiversity after *Lujan v. Defenders of Wildlife*", *Tulane Law Review*, vol. 71 (1996), pp. 529, 597-633.

⁶⁸ Quoted in La Vina, op cit., p. 247.

⁶⁹ See PELA, *Co-operation amongst environmental authorities and environmental NGOs* in six Central and Eastern European Countries, Wroclaw, 1998.

⁷⁰ See Stockholm Statement on the draft convention on access to environmental information and public participation in environmental decision-making, *GLOBE Europe News*: Issue 1 –January 1998.

⁷¹ See, for instance, [Agenda 21, 29: Strengthening the role of workers and their trade unions, paras. 29.4-29.5](#).

⁷² [Agenda 21, 37: National mechanisms and international cooperation for capacity building in developing countries](#).

⁷³ United Nations document UNESCO-EPD-97/CONF.401/CLD.

⁷⁴ For more about particular problems in the implementation of EU environmental law in non-environmental fields, see Ludwig Kramer, “Right of Complaint and Access to Information at the Commission of the EC”. In Deimann, Sven and Bernard Dyssli eds., *Environmental Rights: Law, Litigation and Access to Justice* (London, Cameron May, 1995), pp. 53-69.

⁷⁵ For example, [Guerra et al. v. Italy, Application no. 14967/89, 19 February 1998, Reports 1998-I](#)

⁷⁶ [Case concerning pulp mills on the river Uruguay \(Argentina v. Uruguay\), Judgment of 20 April 2010, ICJ Report 2010](#)

⁷⁷ See *Official Journal* L 099, 11/04/1992, p. 1-7.

⁷⁸ Guidelines on access to information, public participation in decision-making and access to justice with respect to genetically modified organisms (ECE/MP.PP/2003/3)

⁷⁹ ECE/MP.PP/2005/2/Add.2

⁸⁰ EP.DEJ./92/99, 28 May 1999. See also NATO Committee on the Challenges of Modern Society, *Environment and Security in an International Context*.

⁸¹ CSCE Meeting on the Protection of the Environment, Sofia, 3 November 1989. This meeting produced the mandate for the UN/ECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992) and the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992).

⁸² Proposal submitted by the delegations of Austria, Finland, Sweden, Switzerland and those of Bulgaria, Canada, Cyprus, Czechoslovakia, France in the name of the twelve participating States, members of the European Community, the German Democratic Republic, the Holy See, Hungary, Iceland, Liechtenstein, Malta, Monaco, Norway, Poland, San Marino, Turkey, the Union of Soviet Socialist Republics, the United States of America and Yugoslavia, Report on Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, CSCE/SEM.36/Rev (3 Nov. 1989). The document is called a proposal because it was not agreed to by all the countries present. (The one hold-out was Romania, [even the host country, Bulgaria, agreed to the proposal](#).)

⁸³ Available at <http://www.osce.org/mc/17502>

⁸⁴ Wates, op. cit.

⁸⁵ “Environment for Europe” Process: From Dobris to Sofia, www.unece.org/env/europe/dobrisof.htm, 29 June 1999.

⁸⁶ Aarhus Conference, 23-25 June 1998, www.ens.dk/mem/faktuelt/Aarhuscon.htm, 7 June 1998.

⁸⁷ Convention on Environmental Impact Assessment in a Transboundary Context, <http://www.unece.org/env/eia.htm>.

⁸⁸ [As of 1 December 2009, the European Union succeeded the European Community in its obligations arising from the Convention in accordance with the provisions of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community](#).

⁸⁹ See ECE/CEP/41, p. 49.

⁹⁰ For earlier formulations of the right to a healthy environment in international legal instruments, see the African Charter on Human and Peoples’ Rights, adopted at Algiers on 27 June 1981, and the Additional Protocol to the American Convention on Human Rights, adopted in San Salvador on 17 November 1988. According to a 1994 article, at that time more than 60 countries and several federal states of the United States had provisions in their constitutions concerning the right to a healthy environment. See A. Fabra Aguilar and N. Popovic, “Lawmaking in the United Nations: the UN Study on Human Rights and the Environment”, *RECIEL*, vol. 3, No. 17 (1994), pp.197, 199.

⁹¹ The United Nations Special Rapporteur, in her preliminary report on human rights and the environment to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1991/8, paras. 13-14, pointed out such a connection between article 3 of the Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights and article 25 of the International Covenant on Economic, Social and Cultural Rights. See A. Fabra Aguilar and N. Popovic, op. cit.

⁹² Thus, it addresses one of the shortcomings in the establishment of the right to a healthy environment—that is, the lack of effective implementation. See E/CN.4/Sub.2/1994/9.

⁹³ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 4 on compliance with regard to Denmark (ECE/MP.PP/2008/5/Add.4), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

⁹⁴ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

⁹⁵ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 4 on compliance with regard to Denmark (ECE/MP.PP/2008/5/Add.4), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

⁹⁶ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

⁹⁷ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

⁹⁸ R. Hallo, "Chapter 10: the Netherlands", in *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (Kluwer Law International, 1996), p. 200.

⁹⁹ See *Griffin v. South West Water Service Limited*, [1995] IRLR 15, described in P. Roderick, *United Kingdom*, in R. Hallo ed., *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (1996), p. 267.

¹⁰⁰ <http://www.informationtribunal.gov.uk/DBFiles/Appeal/4460/GI%202458%202010.pdf><http://www.informationtribunal.gov.uk/DBFiles/Appeal/4460/GI%202458%202010.pdf>

¹⁰¹ *Network Rail Ltd v Information Commissioner & Network Rail Infrastructure, United Kingdom* Information Tribunal, including the National Security Appeals Panel 17 July 2007, 2007 UKIT EA 2006 0061

¹⁰² See Stockholm Statement . . .

¹⁰³ *Társaság a Szabadságjogokért v. Hungary*, 37374/05, 14 April 2009.

¹⁰⁴ Paragraph 130.

¹⁰⁵ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹⁰⁶ For an analysis of *WWF-EPO v. Council of the European Union* Ferreira, Sofia de Abreu, see *The Fundamental Right of Access to Environmental Information in the EC: A Critical Analysis of the WW-EPO v. Council*. Journal of Environmental Law, Oxford University Press, (2007).

Available electronically at:
<http://jel.oxfordjournals.org/cgi/content/full/19/3/399?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=Sofia+de+Abreu+Ferreira&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT>

¹⁰⁷ See *Official Journal*, L 296 p. 55, 1996/11/21, Article 2(1).

¹⁰⁸ Convention on Biological Diversity, article 2.

¹⁰⁹ A Guide to the Convention on Biological Diversity (IUCN, 1994), p. 16.

¹¹⁰ Article 3, Cartagena Protocol on Biosafety.

¹¹¹ Directive of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L106, pp.1-39

¹¹² 2008/1/EC96/61/EC.

¹¹³ Article 33(1), Vienna Convention on the Law of Treaties 1969.

¹¹⁴ Article 33(1), Vienna Convention on the Law of Treaties 1969.

¹¹⁵ See, for instance, S. Rose-Ackerman, "American administrative law under siege: is Germany a model?", *Harvard Law Review*, vol. 107 (1994), pp. 1279, 1292-1293, 1300.

¹¹⁶ The Compliance Committee's findings are expected to be endorsed by the Meeting of the Parties at its fourth session (Chisinau, June 2011).

¹¹⁷ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6b (ECE/MP.PP/2008/2/Add.10).

¹¹⁸ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 10 on compliance with regard to the European Community (ECE/MP.PP/2008/5/Add.10), see Report of

the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹¹⁹ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

¹²⁰ ECE/MP.PP/C.1/2005/2/Add.3 para 26. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5b (ECE/MP.PP/2005/2/Add.8).

¹²¹ For an example of a narrow reading of legal interest, a United Kingdom court found that local residents and active environmentalists who regularly visited a certain park had no legally "sufficient interest" in a local planning agency's permission for a quarry to expand its operations into the park. See *R v. North Somerset District Council ex parte Garnett* (Queen's Bench Division, Popplewell J, 24 March 1997), reported in "Access to the courts: a conflict of ideologies", *Journal of Environmental Law*, vol. 10, No. 1 (Oxford University Press, 1998), pp. 161-174. The court looked to ownership of land or being a neighbour to the planned project as factors which may convey standing. Lacking these, the application for judicial review was denied. See p. 170.

¹²² ECE/MP.PP/C.1/2005/2/Add.5, para. 16. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9).

¹²³ Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, C-263/08 (Celex 62008J0263), European Court reports 2009 Page I-09967, Judgment 15 October 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0263:EN:HTML>.

¹²⁴ The Advocate General observed in paragraph 52 of her opinion that "participation under Article 6 of Directive 85/337, as amended, does not of itself guarantee unrestricted access to justice by 'the public concerned' under Article 10a. However, a non-governmental organisation promoting environmental protection which meets the definition of 'the public concerned' in Article 1(2) of Directive 85/337, as amended, does have an automatic right of access to justice under Article 10a."

¹²⁵ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6a (ECE/MP.PP/2008/2/Add.9).

¹²⁶ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5b (ECE/MP.PP/2005/2/Add.8).

¹²⁷ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9).

¹²⁸ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹²⁹ ECE/MP.PP/2008/4/e, para. 27.

¹³⁰ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹³¹ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹³² The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6a (ECE/MP.PP/2008/2/Add.9).

¹³³ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5b (ECE/MP.PP/2005/2/Add.8).

¹³⁴ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9).

¹³⁵ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹³⁶ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

¹³⁷ See <http://www.ekoszkola.pl>.

¹³⁸ This overview of the work of the Aarhus Centres is drawn from two publications produced by the OSCE: Focus South Caucasus and Focus Central Asia, both December 2009.

¹³⁹ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9).

¹⁴⁰ See Section 5, Administrative Procedure Code, 21.06.1993; RT I 1993, 50, 694; 15.09.1993 as amended, described in D. Galligan and D. Smilov, *Administrative Law in Central and Eastern Europe*, 1996-1998, p. 85 (1999).

¹⁴¹ [The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c \(ECE/MP.PP/2005/2/Add.9\).](#)

¹⁴² [Synthesis Report on the Status of Implementation of the Convention, \(ECE/MP/PP/2008/4\), paragraph 39.](#)

¹⁴³ [The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c \(ECE/MP.PP/2005/2/Add.9\).](#)

¹⁴⁴ Article 2, paragraph 8, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at Helsinki, on 17 March 1992.

¹⁴⁵ S. Stec, "Access to information and public participation in environmental decisionmaking in the Commonwealth of Independent States", *Review of Central and East European Law*, vol. 23 (1997), pp. 355-529.

¹⁴⁶ [See for example, paragraph 3 of decision II/6 on general issues of compliance \(ECE/MP.PP/2005/2/Add.6\).](#)

¹⁴⁷ [Almaty Guidelines, paragraph 1.](#)

¹⁴⁸ [Almaty Guidelines, paragraphs 5 and 6.](#)

¹⁴⁹ [Almaty Guidelines, paragraph 4.](#)

¹⁵⁰ [Almaty Guidelines, paragraph 9.](#)

¹⁵¹ This may be contrasted with the Protocol to the Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, which has good active information provisions but did not follow Aarhus principles on passive information.

¹⁵² Law on Public Complaints of Hungary [quotation].

¹⁵³ Criminal Code of Hungary, section 257.

¹⁵⁴ [The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session \(Chisinau, June 2011\).](#)

¹⁵⁵ Available at http://www.unece.org/env/pp/compliance/CC_GuidanceDocument.pdf

¹⁵⁶ [The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5c \(ECE/MP.PP/2005/2/Add.9\).](#)

¹⁵⁷ [By letters of 16 March 2010, the Implementation Committee informed Belgium, the Netherlands and the Dutch NGO that it had decided not to begin a Committee initiative further to the information provided, as there was insufficient evidence of non-compliance. Nonetheless, the Committee noted that some aspects of the practical application of the Convention to the activity did not necessarily constitute good practice and so decided to make some observations as set out in that letter.](#)

¹⁵⁸ [Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of 19 September 2006, Series C No. 151.](#)

¹⁵⁹ For the status of ratifications see:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=1&DF=&CL=ENG>

¹⁶⁰ [Társaság a Szabadságjogokért v. Hungary. Application no. 37374/05, Judgment of 14 April 2009; Kenedi v. Hungary. Application 31475/05, Judgment of 26 May 2009.](#)

¹⁶¹ [Application no. 14967/89, 19 February 1998, Reports 1998-I.](#)

¹⁶² [At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee \(ECE/MP.PP/2008/5\), including its accompanying addendum 10 on compliance with regard to the European Community \(ECE/MP.PP/2008/5/Add.10\), see Report of the third meeting of the Parties \(ECE/MP.PP/2008/2\), paragraph 47.](#)

¹⁶³ [The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a \(ECE/MP.PP/2005/2/Add.7\).](#)

¹⁶⁴ [The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session \(Chisinau, June 2011\).](#)

¹⁶⁵ Belgium, Ordinance of the Brussels Region, Article 5.3.

¹⁶⁶ Norway, Freedom of Information Act, Section 29 (19702006).

<http://www.ub.uio.no/ujur/ulovdata/lov-20060519-016-eng.pdf>

¹⁶⁷ [The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session \(Chisinau, June 2011\).](#)

¹⁶⁸ [The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5b \(ECE/MP.PP/2005/2/Add.8\).](#)

¹⁶⁹ [The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session \(Chisinau, June 2011\).](#)

¹⁷⁰ Russian Federation Law on State Secrets 1993, *Rossiiskaia gazeta*, 21 September 1993, full amended text at Sobranie zakonodatel'stva RF 1997 No. 41 item 4673. See Stec, *Access to*

Information . . . , pp. 355, 472-473.

¹⁷¹ Hungary, Act LXV of 1995 on State and Official Secrets, art. 3.

¹⁷² For example, United States case law has defined “legitimate economic interest” under the trade secrets exemption to the United States Freedom of Information Act.

¹⁷³ The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

¹⁷⁴ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, article 2 (5). Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, Article 2. Official Journal L 257, 10/10/1996 pp. 0026-0040.

¹⁷⁵ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 7 on compliance with regard to Romania (ECE/MP.PP/2008/5/Add.7), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹⁷⁶ Ireland, *Hallo, op. cit.*, p. 140.

¹⁷⁷ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 10 on compliance with regard to the European Community (ECE/MP.PP/2008/5/Add.10), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its second session through decision II/5c (ECE/MP.PP/2005/2/Add.9).

¹⁷⁸ Paragraph 39.

¹⁷⁹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006, Article 6 (1).

¹⁸⁰ Armenia, Law on Procedures for Consideration of Suggestions, Applications and Grievances of Citizens.

¹⁸¹ Hungary, Act IV (1954) General Rules of Administrative Procedure, Article 7.1, Article 15.1

¹⁸² France, *Hallo, op. cit.*, p. 76.

¹⁸³ Norway, Freedom of Information Act (2006), section 32, para 2.

¹⁸⁴ Norway, Freedom of Information Act (2006), section 31, para 1.

¹⁸⁵ Norway, Freedom of Information Act (2006), section 31, para 2.

¹⁸⁶ Freedom of Information Act, section 9; see also section 2, para. 2.

¹⁸⁷ Norway, Freedom of Information Act (2006), section 11.

¹⁸⁸ The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

¹⁸⁹ The Netherlands, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Western Europe* (Szentendre, REC, June 1998), p. 115.

¹⁹⁰ The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

¹⁹¹ Paragraph 47.

¹⁹² See, Information Tribunal, Appeal Number: EA/2005/0014, David Markinson v. Information Commissioner (14 March 2006), published on the Internet at:

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i161/Markinson.pdf>

¹⁹³ A/CONF.151/26 (Vol.1)

¹⁹⁴ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 7 on compliance with regard to Romania (ECE/MP.PP/2008/5/Add.7), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹⁹⁵ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 7 on compliance with regard to Romania (ECE/MP.PP/2008/5/Add.7), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

¹⁹⁶ Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances. Official Journal L 345, 31/12/2003 P. 0097 – 0105.

¹⁹⁷ Case of Guerra and Others v. Italy (116/1996/735/932), European Court of Human Rights, Strasbourg, 19 February 1998.

¹⁹⁸ Paragraph 60.

¹⁹⁹ COM (2008) 794, 27.11.2008.

²⁰⁰ Aarhus Information Centers in Albania, see www.aic.org.al

²⁰¹ PIECs in Armenia, see www.aarhus.am

- ²⁰² [Aarhus Center Georgia](http://www.aarhus.ge), see www.aarhus.ge
- ²⁰³ [Aarhus Center of the Republic of Kazakhstan](http://www.aarhus.kz), see www.aarhus.kz
- ²⁰⁴ [Resource Aarhus Center at the Committee of the Environment at the Government of the Republic of Tajikistan](http://www.aarhus.tj), see www.aarhus.tj
- ²⁰⁵ *Major Trends in Ratification of the Aarhus Convention in the CEE countries.*
- ²⁰⁶ Maastricht Treaty, article 129a Since the entry into force of the Maastricht Treaty, consumer protection has been a full Community policy. While the Treaty's general principles state that the Community must contribute to the "strengthening of consumer protection", Article 129a is the legal framework for consumer policy.
- ²⁰⁷ Available at <http://www.unece.org/env/pp/prtr.guidancedev.htm> / [prtr.guidancedev.htm](http://www.unece.org/env/pp/prtr.guidancedev.htm)
- ²⁰⁸ *Pollutant Release and Transfer Registers (PRTRs): A Tool for Environmental Policy and Sustainable Development—Guidance Manual for Governments* (Paris, OECD, 1996), OECD/GD(96)32.
- ²⁰⁹ *Major Trends . . .*
- ²¹⁰ B.Sadler, *Environmental Assessment in a Changing World. The International Study of the Effectiveness of Environmental Assessment*, 1996
- ²¹¹ [ACCC/C/2004/8/ \(Armenia\) - ECE/MP.PP/C.1/2006/2/Add.1, para. 28.](#)
- ²¹² [ACCC/C/2006/16 \(#Lithuania\) - ECE/MP.PP/2008/5/Add.6 para 577.](#)
- ²¹³ [ACCC/C/2005/11 \(#Belgium\) -ECE/MP.PP/C.1/2006/4/Add.2, para. 29.](#)
- ²¹⁴ [ACCC/C/2006/16 \(Lithuania\) - ECE/MP.PP/2008/5/Add.6 para 58ACCC/C/11/Albania – ECE/MP.PP/C.1/2007/4/Add.1,para 58. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its third session through decision III/6d \(ECE/MP.PP/2008/2/Add.12\).](#)
- ²¹⁵ [ACCC/C/2005/12 \(Albania\) - ECE/MP.PP/C.1/2007/4/Add.1, para 68. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its third session through decision III/6a \(ECE/MP.PP/2008/2/Add.9\).](#)
- ²¹⁶ [ACCC/C/2005/12 \(Albania\) - ECE /MP.PP/C. 1/2007/4/Add.1, para 67.](#)
- ²¹⁷ Jerzy Jendroška *Public participation in the preparation of plans and programs: some reflections on the scope of obligations under Article 7 of the Aarhus Convention*, *Journal for European Environmental & Planning Law*, 6.4/2009, s. 495-516
- ²¹⁸ [The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session \(Chisinau, June 2011\).](#)
- ²¹⁹ [The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session \(Chisinau, June 2011\).](#)
- ²²⁰ [The Compliance Committee’s findings with regard to compliance by Lithuania were endorsed by the Meeting of the Parties at its third session through decision III/6d \(ECE/MP.PP/2008/2/Add.12\). The Meeting of the Parties is expected to endorse the Compliance Committee’s findings with regard to compliance by Belarus at its fourth session \(Chisinau, June 2011\).](#)
- ²²¹ [The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session \(Chisinau, June 2011\).](#)
- ²²² [ECE/MP.PP/2008/5](#)
- ²²³ [ECE/MP.PP/2008/5 para 57](#)
- ²²⁴ [ECE/MP.PP/2008/5 para 58](#)
- ²²⁵ [ACCC/C/2007/22 \(#France\), paragraph 33. The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session \(Chisinau, June 2011\).](#)
- ²²⁶ [The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session \(Chisinau, June 2011\).](#)
- ²²⁷ [Judgment of the Court of 4 May 2006 in Case C-290/03, Barker, ECR 2006, p.1-3949.](#)
- ²²⁸ [ACCC/C/2005/11\(#-Belgium\) -ECE/MP.PP/C.1/2006/4/Add.2, para. 29. At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee \(ECE/MP.PP/2008/5\), including its accompanying addendum 3 on compliance with regard to Belgium \(ECE/MP.PP/2008/5/Add.3\), see Report of the third meeting of the Parties \(ECE/MP.PP/2008/2\), paragraph 47.](#)
- ²²⁹ See Par. 3 of Section 33-2, of the Plan and Building Act, which provides for an ordered EIA "where the [environmental, natural resource or social] consequences are regarded as particularly uncertain or controversial".
- ²³⁰ [Anastasia, op. cit., p. 9.](#)
- ²³¹ [See Environment Law, Article 11\(b\). Source of reference: Anastasia, op. cit., p. 81.](#)
- ²³² [Guidance for EIA screening, European Commission, June 2001, available at http://ec.europa.eu/environment/eia/eia-guidelines/g-screening-full-text.pdf](#)
- ²³³ [ECE/MP.PP/C.1/2005/2/Add.3 para 28. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its second session through decision II/5c](#)

(ECE/MP.PP/2005/2/Add.9).

²³⁴ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, article 6.3, http://europa.eu.int/eur-lex/en/lif/dat/1985/en_385L0337.html, p. 4.

²³⁵ ECE/MP.PP/2008/5 para 56

²³⁶ Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, article 6.3, http://europa.eu.int/eur-lex/en/lif/dat/1985/en_385L0337.html, p. 4.

²³⁷ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²³⁸ Paragraph 66. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²³⁹ Paragraph 67. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁴⁰ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁴¹ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁴² Paragraph 67. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁴³ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁴⁴ Paragraphs 67 and 78. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁴⁵ Paragraph 79. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁴⁶ Paragraph 78. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁴⁷ See Review of Transboundary EIA provisions and initiatives in selected Regional and Multilateral Environmental Agreements - available at <http://www.unece.org/env/eia/resources/agreements.html>.

²⁴⁸ General report paragraph 60.

²⁴⁹ Paragraphs 69-70. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁵⁰ Paragraph 44. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁵¹ Without entering into discussion about the other features of the French legal framework of public participation which is criticized by French NGOs and academics - see Amicus Brief in the above quoted French case - http://www.unece.org/env/pp/compliance/C2008-22/FrAmisdeLaTerreC22Remarks_2009.07.02.pdf

²⁵² Paragraph 92. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁵³ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁵⁴ Paragraph 117 (a) (iii). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).

²⁵⁵ ACC/C/2006/16 (Lithuania) ECE/MP.PP/5/Add.6, paragraph 71. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁵⁶ ECE/MP.PP/2008/5/Add.6, paragraph 71. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁵⁷ Ibidem.

²⁵⁸ ACC/C/12/Albania ECE/MP.PP/C.1/2007/4/Add.1, paragraph 79. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6a (ECE/MP.PP/2008/2/Add.9).

²⁵⁹ ACC/C/2006/16 (Lithuania) ECE/MP.PP/5/Add.6, paragraph 71. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁶⁰ 'H' Scoping' is the procedural stage within the EIA procedure whereby the scope of studies and information to be assessed (in particular to be covered in the EIA report) is being decided - sometimes it is called as "designing the EIA programme."

²⁶¹ ‘Screening’ is a procedural stage preceding the actual EIA procedure whereby it is being decided whether an activity is likely to have significant impact on the environment and therefore requires an EIA to be carried out.

²⁶² According to Report on EIA Directive 2009, sixteen Member States provide for mandatory public participation in the scoping phase and two next – for facultative public participation at that stage. Nine Member States provide for mandatory public participation in screening. European Commission, Directorate General for Environment, Study concerning the report on the application and effectiveness of the EIA Directive, Final report, June 2009, available at http://ec.europa.eu/environment/eia/pdf/eia_study_june_09.pdf

²⁶³ ACCC/C/2004/ Hungary - ECE/MP.PP/C.1/2005/2/Add.4, para. 11. The Compliance Committee’s findings were noted by the Meeting of the Parties at its second session through decision II/6 on general issues of compliance (ECE/MP.PP/2005/2/Add.6).

²⁶⁴ ACCC/C-/2006/16/ Lithuania - ECE/MP.PP/5/Add.6, para. 73. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁶⁵ Based on the definition of “proposed activity”, Convention on Environmental Impact Assessment in a Transboundary Context (art. 1 (v)).

²⁶⁶ Paragraph 78. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁶⁷ Paragraph 78. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁶⁸ Paragraph 95. The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

²⁶⁹ Paragraph 96. The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

²⁷⁰ ECE/MP.PP/2008/5 para 55. The Compliance Committee’s report was noted with appreciation by the Meeting of the Parties at its third session through decision III/6 on general issues of compliance (ECE/MP.PP/2008/2/Add.6).

²⁷¹ Paragraph 29. At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 7 on compliance with regard to Romania (ECE/MP.PP/2008/5/Add.7), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

²⁷² ECE/MP.PP/2008/5/Add.7, paragraph 30. At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 7 on compliance with regard Romania (ECE/MP.PP/2008/5/Add.7), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

²⁷³ Decree No. 152 of 1995 of the Government of Hungary (12 December 1995). See annex 3.

²⁷⁴ Law on Environmental Protection, Vidmosti Verkhovnoi Rady Ukrainy, 1995, N 8, p. 54; Regulation on the form and content of materials of the assessment of the impact of a proposed activity on the environment and natural resources (OVNS) in various stages of completing the tasks of constructing new, extension, reconstruction, technical re-equipment of existing industrial and other sites. Approved by the Order of the Minekobebezpeky Ukrainy N59 from 08.07.92.

²⁷⁵ Hungary—Act on Environmental Protection.

²⁷⁶ ECE/MP.PP/2008/5/Add.6, para 80. The Compliance Committee’s findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).

²⁷⁷ Paragraph 95. The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

²⁷⁸ Access to information, public participation and access to justice in environmental matters at Community level – A Practical Guide, available at

<http://ec.europa.eu/environment/aarhus/pdf/guide/AR%20Practical%20Guide%20EN.pdf>

²⁷⁹ Standards of Public Participation (2008; adopted by the Austrian Council of Ministers on 2 July 2008), page 13, available at http://www.unece.org/env/pp/pppeg/Austria_pp_standards.pdf

²⁸⁰ Report of the 24th meeting of the Compliance Committee (ECE/MP.PP/C.1/2009/4), para 29. The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

²⁸¹ Paragraphs 99-100. The Meeting of the Parties is expected to endorse the Compliance Committee’s findings at its fourth session (Chisinau, June 2011).

²⁸² Draft list of recommendations on public participation prepared for the first meeting of the Task Force on Public Participation in Decision-making, Geneva, 25-26 October 2010, see http://www.unece.org/env/pp/ppdm/PPDM_recommendations.pdf

²⁸³ See J. M. Evans and others, Administrative Law: Cases, Text, and Materials (1989).

²⁸⁴ Report of the 24th meeting of the Compliance Committee (ECE/MP.PP/C.1/2009/4), para 29.

- The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).
- ²⁸⁵ Paragraphs 99-100. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).
- ²⁸⁶ Paragraph 38. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).
- ²⁸⁷ See Law on Proposals, Signals, Complaints and Requests, *Official Gazette* No. 54, 1988, with amendments as of 1999, described in Galligan and Smilov, op. cit., p. 7.
- ²⁸⁸ Ibid.
- ²⁸⁹ See Constitutional Court Decision of 13 November, 1996. *NN (Narodne novine, i.e., National gazette)*, No. 103/96 of 6 December, 1996, described in Galligan and Smilov, op. cit., p. 43.
- ²⁹⁰ Paragraph 81. The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6d (ECE/MP.PP/2008/2/Add.12).
- ²⁹¹ Paragraph 82.
- ²⁹² Paragraph 84.
- ²⁹³ Based on Evans, op. cit. pp. 309-344.
- ²⁹⁴ Paragraph 99. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, June 2011).
- ²⁹⁵ See Black's Law Dictionary (1979), p. 919.
- ²⁹⁶ Guidelines on access to information, public participation in decision-making and access to justice with respect to genetically modified organisms (ECE/MP.PP/2003/3)
- ²⁹⁷ ECE/MP.PP/2/Add.5
- ²⁹⁸ ECE/MP.PP/2005/5
- ²⁹⁹ ECE/MP.PP/2005/2/Add.2
- ³⁰⁰ Para 16, ECE/MP.PP/2008/2/Add.1.
- ³⁰¹ See Convention on Biological Diversity, articles 8 (g) and 19, paragraph 3 and Cartagena Protocol on Biosafety, article 3.
- ³⁰² The text of the Protocol is available at http://bch.cbd.int/protocol/NKL_text.shtml.
The name of the Supplementary Protocol reflects the important contribution of two countries to the negotiation process: Kuala Lumpur, Malaysia where the mandate of the first negotiating group of the Supplementary Protocol was adopted during the first session of the Meeting of the Parties to the Cartagena Protocol, and where two negotiating meetings were subsequently held, and Nagoya, Japan, where the negotiations of the Supplementary Protocol were completed and the Supplementary Protocol adopted on 16 October 2011. The Supplementary Protocol opened for signature on 7 March 2011 and will enter into force 90 days after being ratified by at least 40 Parties to the Cartagena Protocol on Biosafety.
- ³⁰³ Decision II/1 on genetically modified organisms adopted at the second session of the Meeting of the Parties (Almaty, 25-27 May 2005) (ECE/MP.PP/2005/2/Add.2)
- ³⁰⁴ ECE/MP.PP/WG.1/2009/3
- ³⁰⁵ ECE/MP.PP/2011/3
- ³⁰⁶ ECE/MP.PP/WG.1/2009/3
- ³⁰⁷ [Insert document reference number when finalised]
- ³⁰⁸ See 2008 Implementation Report submitted by Bulgaria (ECE/MP.PP/IR/2008/BGR)
- ³⁰⁹ Environment Code, article L. 533-3.
- ³¹⁰ Environment Code, article L. 533-5.
- ³¹¹ http://www.ogm.gouv.fr/experimentations/evaluation_scientifique/evaluation_scientifique.htm and http://www.ogm.gouv.fr/mise_marche/avis_scientifiques/avis_scientifique.htm
- ³¹² http://www.ogm.gouv.fr/experimentations/consultation_public/consultation_public.htm
- ³¹³ <http://gmoinfo.jrc.it>. See 2008 Implementation Report submitted by France (ECE/MP.PP/IR/2008/FRA)
- ³¹⁴ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13-b&chapter=27&lang=en
- ³¹⁵ Guidelines on access to information, public participation in decision-making and access to justice with respect to genetically modified organisms (ECE/MP.PP/2003/3)
- ³¹⁶ Directive of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L106, pp.1-39.
- ³¹⁷ [Reference to be added]
- ³¹⁸ Article 7, paragraph 2 (b)
- ³¹⁹ Directive of the European Council of 23 April 1990 on the contained use of genetically modified micro-organisms. Journal of the European Communities L 117, pp.1-14
- ³²⁰ Directive of the European Council of 26 October 1998 amending Directive 90/219/EEC on the

contained use of genetically modified micro-organisms. Official Journal of the European Communities L 330, pp.13-31

³²¹ Commission Decision 2002/623/EC of 24 July 2002 establishing guidance notes supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L 200, pp. 22-33.

³²² Council Decision 2002/811/EC of 3 October 2002 establishing guidance notes supplementing Annex VII to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L 280, pp. 27-36.

³²³ Council Decision 2002/812/EC of 3 October 2002 establishing pursuant to Directive 2001/18/EC of the European Parliament and of the Council the summary information format relating to the placing on the market of genetically modified organisms as or in products. Official Journal of the European Communities L 280, pp. 37-61.

³²⁴ Council Decision 2002/813/EC of 3 October 2002 establishing, pursuant to Directive 2001/18/EC of the European Parliament and of the Council, the summary notification information format for notifications concerning the deliberate release into the environment of genetically modified organisms for purposes other than for placing on the market. Official Journal of the European Communities L 280, pp.62-83.

³²⁵ REGULATION (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed. Official Journal of the European Union L 268, pp.1-23.

³²⁶ Judgment of the European Court of Justice, Case C-552/07, *Commune de Sausheim v. Pierre Azelvandré*, February 2009.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0552:EN:HTML>

³²⁷ Part A, Annex VII, Directive 2001/18/EC.

³²⁸ Commission Decision 2002/623/EC of 24 July 2002 establishing guidance notes supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L 200, pp. 22-33.

³²⁹ EFSA Panel on Genetically Modified Organisms (GMO): Guidance on the environmental risk assessment of genetically modified plants. *EFSA Journal* 2010;8(11):1879. [111 pp.]. doi:10.2903/j.efsa.2010.1879. Available online: www.efsa.europa.eu/efsajournal.htm.

³³⁰ [References to be added.]

³³¹ [Reference to be added.]

³³² For a more detailed account see for example J. Jendroška, S. Stec, *The Kyiv Protocol...op.cit. passim*

³³³ Agriculture, forestry, fisheries, energy, industry including mining, transport, regional development, waste management, water management, telecommunications, tourism, town and country planning or land use.

³³⁴ See discussion in SEA Directive Implementation Guide - Implementation of Directive 2001/42...op.cit. p 48-49

³³⁵ For more about the concept of “public concerned” under the Aarhus Convention, see J.Jendroška, *Public participation ...op.cit. (forthcoming)*

³³⁶ The e-representation platform is available online at www.bluelink.net/vote.

³³⁷ Webster’s New World Dictionary, Third College Edition (1988), p. 1045.

³³⁸ Act XI of 1987, arts. 27, 29.

³³⁹ *Ibid.*, article 31.

³⁴⁰ “Act amending the Environmental Protection Act” (Official Gazette RS, No.70/08; EPA-1B), article 34.

³⁴¹ http://www.mop.gov.si/fileadmin/mop.gov.si/pageuploads/zakonodaja/okolje/navodilo_okoljski_predpisi.pdf.

³⁴² http://www.mop.gov.si/si/zakonodaja_in_dokumenti/veljavni_predpisi/arhiv_zaključenih_postopkov_v_sodelovanju_javnosti/.

³⁴³ 5 U.S.C. 553.

³⁴⁴ 5 U.S.C. 553(e).

³⁴⁵ S. Fulop, 1998. Current Trends and Practices in Public Participation in Environmental Decisionmaking in Hungary in *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 214.

³⁴⁶ Commission Decision 97/150/EC of 24 February 1997, Official Journal, L 058 of 27 February 1997, p. 48.

³⁴⁷ Article 6.

³⁴⁸ The Aarhus Convention was quoted e.g. in ECtHR, *Tatar v Romania*, 67021/01, 29 January 2009, and also mentioned in ECtHR, *Branduse v Romania*, 6586/03, 7 April 2009. For other cases before the European Convention on Human Rights that concern issues covered by the Aarhus Convention, see e.g.: ECtHR, *Zander v Sweden*, 45/1992/390/468 of 25 October 1993; ECtHR, *Guerra et al v Italy*, 14967/89 of 19 February 1998.; ECtHR, *Taskin et al v Turkey*, 46117/99 of 10 November 2004; ECtHR, *Giacomelli v Italy*, 59909/00, 2 November 2006; ECtHR, *Okyay et al v Turkey*, 36220/97 of 12 July 2005; ECtHR, *Társaság a Szabadságjogokért v Hungary*, 37374/05, 14 April 2009; ECtHR, *Kenedi v Hungary*, Application 31475/05, 26 May 2009.

³⁴⁹ *Sramek v Austria*, para. 36, see also *Coëme and others v Belgium*, ECHR 2000-06-22.

³⁵⁰ *Campbell and Fell* para. 78

³⁵¹ *Langborger v Sweden*, ECHR 1989-06-22

³⁵² *Zander v Sweden*, ECHR 1993-11-25.

³⁵³ See for example C-205/08, where ECJ considered that the Austrian Umweltsenat is a court according to union law.

³⁵⁴ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

³⁵⁵ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

³⁵⁶ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its second session through decision II/5a (ECE/MP.PP/2005/2/Add.7).

³⁵⁷ Paragraph 35, ECE/MP.PP/C.1/2009/6/Add.3. The Meeting of the Parties is expected to endorse these findings at its fourth session (Chisinau, 29 June-2 July 2011)

³⁵⁸ *Ecopravo--Kyiv and KEKTz*, both based in Kyiv, Ukraine.

³⁵⁹ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶⁰ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 10 on compliance with regard to the European Community (ECE/MP.PP/2008/5/Add.10), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶¹ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 4 on compliance with regard to Denmark (ECE/MP.PP/2008/5/Add.4), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶² At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶³ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 4 on compliance with regard to Denmark (ECE/MP.PP/2008/5/Add.4), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶⁴ Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsörening v Stockholms kommun genom dess marknämnd*, C-263/08 (Celex 62008J0263), European Court reports 2009 Page I-09967, Judgment 15 October 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0263:EN:HTML>

³⁶⁵ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶⁶ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶⁷ http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/index.html. An example of a successful private prosecution in the UK regarding the environment is *Ron Hart v. Anglian Water* (Court of Appeal 21 July 2003), [2004] Env. L.R. 10, see also ENDS (326) March 2002, p. 54)

³⁶⁸ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the

Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 3 on compliance with regard to Belgium (ECE/MP.PP/2008/5/Add.3), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁶⁹ At its third meeting, the Meeting of the Parties noted with appreciation the Report of the Compliance Committee (ECE/MP.PP/2008/5), including its accompanying addendum 10 on compliance with regard to the European Community (ECE/MP.PP/2008/5/Add.10), see Report of the third meeting of the Parties (ECE/MP.PP/2008/2), paragraph 47.

³⁷⁰ Paragraphs 104 and 105, (ECE/MP.PP/C.1/2009/8/Add.1) The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁷¹ Hungary, Act. III [1952] on Civil Procedure, article 156.

³⁷² E.g. Ireland, DTD, p. 106.

³⁷³ The Compliance Committee's findings were endorsed by the Meeting of the Parties at its third session through decision III/6c (ECE/MP.PP/2008/2/Add.11).

³⁷⁴ Paragraph 52, (ECE/MP.PP/C.1/2010/6/Add.1) Taking into consideration that no evidence was presented to substantiate that the non-compliance in this case was due to a systemic error, the Committee refrained from presenting any recommendations. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁷⁵ Paragraph 108, (ECE/MP.PP/C.1/2009/8/Add.1). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁷⁶ Paragraph 110, (ECE/MP.PP/C.1/2009/8/Add.1). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁷⁷ Paragraphs 44 and 45, (ECE/MP.PP/C.1/2010/6/Add.2) The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁷⁸ Paragraph 138 and 139, (ECE/MP.PP/C.1/2010/6/Add.3) The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁷⁹ Paragraph 66, (ECE/MP.PP/C.1/2010/4/Add.2). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸⁰ Paragraph 112, (ECE/MP.PP/C.1/2009/8/Add.1). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸¹ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸² Paragraph 108, (ECE/MP.PP/C.1/2009/8/Add.1). The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸³ Paragraph 44, (ECE/MP.PP/C.1/2010/6/Add.2) The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸⁴ Paragraph 128, (ECE/MP.PP/C.1/2010/6/Add.3) The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸⁵ Paragraph 128-136, (ECE/MP.PP/C.1/2010/6/Add.3) The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session (Chisinau, 29 June – 1 July 2011).

³⁸⁶ Georgia, Law on State Custom's Fees.

³⁸⁷ Case C-427/07 Commission v. Ireland, Judgment 16 July 2009, [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$docrequire=alldocs&numaff=C-427/07](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-427/07)

³⁸⁸ C-427/07, Commission v. Ireland, Opinion of Advocate General Kokott, 15 January 2009, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=427/07&nosuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher>

³⁸⁹ The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its

fourth session (Chisinau, June 2011).

³⁹⁰ [Paragraph 136.](#)

³⁹¹ Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and the Conclusions, UNEP/GC.20/INF/16, p. 29, citing P.H. Sand.

³⁹² [ILO Constitution, Article 24.](#)

³⁹³ [North American Agreement on Environmental Cooperation, Articles 14 and 15.](#)

³⁹⁴ [Communication ACCC/C/2004/03 \(Ukraine\) and submission ACCC/S/2004/01 \(Ukraine\).](#)

³⁹⁵ [Article 18, Vienna Convention on the Law of Treaties \(1969\)](#)

³⁹⁶ [Convention on the Law of Treaties \(Vienna, 1969\) , Article 54.](#)

³⁹⁷ *Official Journal*, L 175, 05/07/1985, pp. 0040-0048: amended by 397L0011 (OJ L 073 14.03.97, p. 5).

³⁹⁸ *Official Journal*, L 257, 10/10/1996, pp. 0026-0040.

³⁹⁹ EC Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, article 4 (1).

⁴⁰⁰ *Ibid.*, Article 4 (2).

⁴⁰¹ [Paragraph 43. The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session \(Chisinau, June 2011\).](#)

⁴⁰² [Paragraph 46.](#)

⁴⁰³ [Paragraph 47.](#)

⁴⁰⁴ [The Meeting of the Parties is expected to endorse the Compliance Committee's findings at its fourth session \(Chisinau, June 2011\).](#)

References [to be expanded]

~~DIRECTIVE 90/219/EEC: Directive of the European Council of 23 April 1990 on the contained use of genetically modified micro-organisms. Journal of the European Communities L 117, pp.1-14~~

~~DIRECTIVE 98/81/EC: Directive of the European Council of 26 October 1998 amending Directive 90/219/EEC on the contained use of genetically modified micro-organisms. Official Journal of the European Communities L 330, pp.13-31~~

~~DIRECTIVE 2001/18/EC: Directive of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L106, pp.1-39~~

~~EC 2002a: Commission Decision 2002/623/EC of 24 July 2002 establishing guidance notes supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L 200, pp. 22-33~~

~~EC 2002b: Council Decision 2002/811/EC of 3 October 2002 establishing guidance notes supplementing Annex VII to Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Official Journal of the European Communities L 280, pp. 27-36~~

~~EC 2002c: Council Decision 2002/812/EC of 3 October 2002 establishing pursuant to Directive 2001/18/EC of the European Parliament and of the Council the summary information format relating to the placing on the market of genetically modified organisms as or in products. Official Journal of the European Communities L 280, pp. 37-61~~

~~EC 2002d: Council Decision 2002/813/EC of 3 October 2002 establishing, pursuant to Directive 2001/18/EC of the European Parliament and of the Council, the summary notification information format for notifications concerning the deliberate release into the environment of genetically modified organisms for purposes other than for placing on the market. Official Journal of the European Communities L 280, pp.62-83~~

[EFSA Panel on Genetically Modified Organisms \(GMO\): Guidance on the environmental risk assessment of genetically modified plants. EFSA Journal 2010;8\(11\):1879. \[111 pp.\]. doi:10.2903/j.efsa.2010.1879. Available online: \[www.efsa.europa.eu/efsajournal.htm\]\(http://www.efsa.europa.eu/efsajournal.htm\)](#)

Judgment of the European Court of Justice, Case C-552/07, *Commune de Sausheim v. Pierre Azelvandre*, February 2009

REGULATION (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed. Official Journal of the European Union L 268, pp.1-23

Secretariat of the Convention on Biological Diversity (2000): *Cartagena Protocol on Biosafety to the Convention on Biological Diversity: text and annexes*. Montreal: Secretariat of the Convention on Biological Diversity.

UN-ECE (1999): *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. United Nations 1999

UN-ECE (2003): *Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms*. MP.PP/2003/3; KIEV.CONF/2003/INF/7

UN-ECE (2004): *Decision I/4 on Genetically Modified Organisms adopted at the first meeting of the Parties held in Lucca, Italy, on 21-23 October 2002*. ECE/MP.PP/2/Add.5

UN-ECE (2005): *Report on the Implementation of the Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms*. ECE/MP.PP/2005/5

UN-ECE (2005): *Decision II/1 on Genetically Modified Organisms adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005*. ECE/MP.PP/2005/2/Add.2

UN-ECE (2009): *International Expert Meeting on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms*. ECE/MP.PP/WG.1/2009/3