

PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION: CHALLENGES IN IMPELEMENTATION

The 1st meeting of the TF on Access to Information



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Geneva 2013

Main Focus



- General challenges encountered in implementation of the Articles 4 and 5 of the Aarhus Convention
- Dimensions of the concept “environmental information”: legal developments and case law of the Compliance Committee
- Application of public interest test
- Right to appeal. Are the procedures of review effective?

** This presentation is based on information reflected in the synthesis report submitted to the Meeting of the Parties at its fourth session (Chisinau, 29 June – 1 July 2011), all reporting on obstacles encountered in the implementation of articles 4 and 5 of the Aarhus Convention provided in the national implementation reports submitted by Parties to the Convention in the 2005, 2008 and 2011 reporting cycles and the documents of the Aarhus Convention Compliance Committee with regard to access to information.*

General Regulatory Framework in Place



The basic legal framework providing the right of access to environmental information and regulating the relevant procedure is in place in all reporting Parties.

General Challenges Encountered in Implementation of Article 4



- **Parallel legal frameworks dealing with access to information issues with unclear relationship:**
 - Inconsistency between Environmental Protection Law and Access to Information Act;
 - Inconsistency between Access to Information and Construction Acts;
 - An environmental information system with a necessary overlap with other sectors (e.g. agriculture, health etc.) is not sufficiently interconnected and unified.
- **When the national legislation lacks the basic definitions of “environmental information” and “public authority” or they are different:**
 - What could be possible interpretations?
 - Difficulties with implementation.

“Onward Referral” within the Concept of “Public Authority”



- Conditions of Legitimacy:
 - Request for information is referred to another “public authority”;
 - Under national legislation private entities (e.g. developers) are delegated some functions related to maintenance and distribution of environmental information.

Case Law of the Compliance Committee

(ACCC/C/2009/37 (Belarus), ECE/MP.PP/C.1/2011/11/Add.2, paras. 67-68)

- The Committee considers that it is not conflicting with the Convention when national legislation delegates some functions related to maintenance and distribution of environmental information to private entities. Such private entities, depending on the particular arrangements adopted in the national law, should be treated for the purpose of access to information as falling under the definition of a “public authority”, in the meaning of article 2, paragraph 2 (b) or (c) of the Convention.
- In this context, the Committee notes that in Belarus the Environmental *Expertiza Law and the relevant Instructions make the developer responsible for maintaining the OVOS- and expertiza-related documentation. Therefore, for the purpose of access to information issues, which are the subject of the present communication, the developer should be treated as a public authority under the obligation to provide access to environmental information in compliance with the requirements of article 4 of the Convention.*

When It is not Explicitly Clear whether the Requested Information is Environmental Information or Not!



Case Law of the Compliance Committee

- ... 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, any or all such indications in the request would, in practice, 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 (ECE/MP.PP/C.1/2009/2/Add.1, para. 35)

Finance Agreements as Environmental Information



- *Example:* Nature of finance agreements as environmental information.

Case Law of the Compliance Committee

- Financing agreements, even though not listed explicitly in the definition of environmental information under article 2, paragraph 3 (b), may sometimes amount to “measures ... that affect or are likely to affect the elements of the environment” as set out in article 2 (b) of the Convention (ACCC/C/2005/12 (Albania) and ECE/MP.PP/2008/5, para. 67).
- ... 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 (ACCC/C/2007/21 (European Union), ECE/MP.PP/C.1/2009/2/Add.1, para. 30).

Access to Raw Data



- Does raw data constitute environmental information at all?
- Often raw data are included in databases, which makes them difficult to understand for the public as technical corrections need to be applied further to have meaningful information about the state of certain elements of the environment.

Case Law of the Compliance Committee

- The Committee found that the raw data constitutes environmental information and, therefore, it should be released. (Advance unedited draft of findings and recommendations ACCC/C/2010/53 UK)

Public Interest Test



Main Features:

- Sensitivity of the issues at stake (e.g. nuclear projects);
- Whenever it comes to the issue of the confidentiality of commercial and financial data, it is difficult to decide and to balance, in each case, between the public interest and the private interest.

● **Criteria to ensure reasonable balance:**

The exemptions of the Convention under article 4, paragraph 4, are to be interpreted in a restrictive way, taking into account the public interest served by disclosure. Thus, 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 (ACCC/C/2007/21 (European Community), para. 30 (c)).

Challenges

- Specific provisions are not in place yet for all reporting countries.
- General provision is established that information may not be refused on the grounds of business secrets if there is an imminent danger to human health or the environment (Czech Republic).

Automatic Right to Appeal?



General Rule

A decision by an authority can be appealed at an administrative or general court or other established independent body, determined in legislation.

- Request for information is denied or is not dealt with properly:
 - Request is to be considered a denial if not responded to within five working days, giving the applicant an automatic right to appeal.

Case Law of the Compliance Committee

- *The Committee finds that the requirement for a separate “official notification” as a precondition for an appeal of a denial of an information request is not in compliance with **article 4, paragraph 7, of the Convention.** (ACCC/C/2010/48 (Austria) ECE/MP.PP/C.1/2012/4, para. 78)*

General Challenges Encountered in Implementation of Article 5



- Need for further improvement of the infrastructure and resources for continuous environmental monitoring to ensure the primary data collection system is consistent (common for most post-soviet countries).
- Need for ongoing development of links among various databases;
- Underdeveloped system of eco-labeling and need for accredited laboratories (particularly in post-soviet countries);
- Receiving information from business might be problematic.
 - Management of a larger number of data derived by the increased number of industrial activities requested to report, and the obligation to evaluate the data quality under EU Regulation 166/2006.
 - Progressive step: Risk-based environmental control system and Methodology of Self-control for industrial facilities are envisaged to be enacted in Armenia.

THANK YOU FOR YOUR
ATTENTION!

