

AARHUS STORYTELLING

Stories Part I – Convention’s Early Days and Evolution

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Historical perspective: reflections on some past dilemmas and present situation

1. Draft Elements, final text and current implementation challenges regarding access to justice

Following standard practice in international negotiations a small group of experts was convened by the UNECE Secretariat (so called “Friends of the Secretariat”) to prepare draft elements for the convention so that the Working Group would not start negotiations from the scratch¹.

The Friends of the Secretariat Group consisted of representatives of governments from various regions (Norway, Russian Federation, Poland, Germany) and representatives of other stakeholders (ICEL, REC and NGOs Coalition). The text with the Draft Elements prepared by them was further significantly elaborated during the negotiations. In particular the draft provisions related to access to justice were significantly modified to make them generally more clear and detailed.

It is to be regretted however that after all the modifications one important element, which heavily instructed the negotiations on the provisions related to access to justice, was finally embedded into the final text in a way which is not so apparent. The Draft Elements clearly mentioned the need for possibilities of public interest litigation without “having to show an impairment of its own interest”. Had it been left clearly mentioned in the final text of the Convention the rationale for introducing article 9.3 would have been much more visible and many of the recently encountered problems with implementing this provision could have probably been avoided.

2. Aarhus Negotiations:

a. GMO and PRTR

The final version of the Convention did not succeed in satisfactorily resolving the two of the most contentious issues during the negotiations: PRTR and public participation in decision-making concerning GMOs.

The issue of Pollutant Release and Transfer Registers (PRTR) remained in fact not resolved in the Convention itself but at least with a clear mandate to be solved soon. In article 5 para 9 the Convention introduced the concept of PRTR (though without using this precise term) by requiring Parties to take steps to progressively establish coherent, nationwide systems of pollution inventories and registers. This requirement was supplemented with the obligation in

¹ J. Ebbesson, H. Gaugitsch, J. Jendroska, S. Stec and F. Marshall, Aarhus Convention Implementation Guide, second edition, United Nations 2013, p 16

Article 10.2 i) to elaborate appropriate instrument. The adoption of a new legally-binding instrument on PRTRs was one of the first priorities of the process following on the adoption of the Aarhus Convention. This in fact happened and the issue was finalized with signing in 2003 in Kiev the PRTR Protocol to the Convention.

The issue of public participation in the decision-making concerning GMOs was addressed in the Convention only in the recommendatory manner, which did not satisfy the NGOs and some of the other actors. They immediately started attempts to review this clause and make it more binding. The first step was the Guidelines adopted at I MOP in Lucca², while the ultimate goal was to have the issue addressed in the binding form. Meanwhile a new piece of EU legislation - Directive 2001/18³ provided for a binding requirement for public participation in the decision-making concerning deliberate release of GMOs into the environment which paved the way, albeit not so easy as in case of EPER and PRTR, to introduce binding obligations in this respect to the Convention. It has taken the form of a new Article 6a introduced to the Convention at II MOP in Almaty in May 2005.

Both issues, while so hotly debated, do not seem to be subject to any vivid public debate anymore. This may either show that both issues were finally resolved in a fully satisfactory manner and everything works so perfectly that there is no reason for any debate, or alternatively - that both issues, for whatever reasons, do not remain high on the agenda of civil society.

b. Forward looking re electronic means

The Convention introduced a requirement in article 5.3 that environmental information become progressively available in electronic databases which are easily accessible to the public through public telecommunications networks. The issue was hotly debated during the negotiations as at that time electronic means of communication were by far not so common as they are now and, in many countries, neither public administration nor civil society did have wide access to it.

The use of word “progressively” allowed to introduce a binding requirement related to making information electronically available yet providing for necessary flexibility to cover countries at different level of development. The approach taken by the Convention in this respect seems to be extremely successful and can serve as one of the most apparent examples of employing a very forward-looking attitude towards the future development.

3. Implementation Guide

After adoption of the Convention there was an idea of following some other international treaties in providing a guidance for the Parties in implementing the Convention in form of an Implementation Guide. The Guide was meant inter alia to provide a record of the rationale

² Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms (MP.PP/2002/7), adopted by the Decision 1/4

³ Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ L 106, 17.4.2001)

behind the specific provisions of the Convention and the examples of the possible ways of their implementation in practice.

The idea was originally not enthusiastically shared by all the Parties but the final outcome in form of the Implementation Guide 2000 has proven to be so useful that a second revised edition was provided in 2012.

The Implementation Guide is currently widely recognised as a valuable source of interpretation of the Convention and is commonly used for the purpose in the proceedings under, and the verdicts of the courts, including the Court of Justice of the European Union, as well as in the proceedings under, and findings of the Aarhus Compliance Committee.