Lessons Learned

Iceland Nature Conservation Association

Report on Iceland's Implementation of the Aarhus Convention

2021 Reporting Cycle

21 April 2021

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1. Introduction

1.1. Reporting NGO

The Iceland Nature Conservation Association (INCA) was established in May 1997. INCA is a conservation NGO, with the primary objective of conserving and protecting the wilderness of Iceland. INCA has been heavily involved in the public debate on sustainable and wise use of hydroelectric and geothermal resources and emphasizes other resource use such as nature conservation and tourism. INCA has also focused on the climate change issue from the outset.

Since 1999 INCA has been represented by Árni Finnsson at the Conference of the Parties of the UN Framework Convention on Climate Change 1999 - 2009. And, also COPs 2015 – 2019. INCA has been the leading NGO in Iceland on this issue. INCA has gained a reputation as a reliable source of information in the media and is called on for representation in events dealing with Nature conservation, including fisheries issues, whaling and climate change.

INCA has vigorously defended the role of civil society in conservation of nature.

This report has been drafted by Sif Konráðsdóttir, Attorney at Law, in cooperation with Árni Finnsson, CEO of INCA, on behalf of INCA.

Reference is made to UNECE's webpage on the 2021 reporting cycle, referring to the possibility to submit reports prepared by NGOs about their programmes or activities and lessons learned.

1.2. Ratification

Iceland ratified the Aarhus Convention (hereafter: the Convention) in 2011.

1.3. Earlier reporting

Iceland submitted its first National Implementation Report (NIR) to the Meetings of the Parties in 2014 (hereinafter: the 2014 NIR). However, not in time to be included in the Synthesis Report. Comments on that procedure and the lack of consultations were provided in an NGO report 2014 (hereinafter: the 2014 NGO report).[1] Iceland submitted its second NIR in 2017 (hereinafter: the 2017 NIR) after public consultation according to the Convention. Information from the 2017 NIR was included in the Synthesis Report 2017.

2. Preparation of the 3rd National Implementation Report

2.1. Consultation During the 2021 Reporting Cycle[2]

Public consultation during the 2021 reporting cycle was non-existent. We are not aware of any stakeholder consultations. Neither are we aware of any consultation between the Ministry for the Environment and Natural Resources and government agencies, such as the National Planning Agency, the Environment Agency or the Appeal Committee on Environmental Matters, or other ministries, such as ministries for foreign affairs, for justice, for education, for transport and for

[1] See Alternative_report_2014_Iceland_NGO_rev.pdf (unece.org)

[2] ECE/MP.PP/C.1/2006/4, para. 36 (c) and Guidance on Reporting Requirements, prepared by the Compliance Committee, I.A.ii.

tourism and industry.[3] We are not aware of any dialogue at any stage of the preparation of the 2021 NIR[4].

2.2. Draft National Implementation Report 2021

At the time of writing, no draft NIR has been introduced to NGOs in Iceland during the 2021 reporting cycle that we are aware of. Neither has a 2021 NIR from Iceland has been uploaded to UNECE´s website at the time of writing. We are therefore not able to comment on any substance of a NIR or draft.[5] Thus, this NGO report will be a stand-alone document, elaborating on the progress made by Iceland since 2014 and 2017 reporting cycles and on the 2017 NIR, in principle following the list of issues for possible considerations as presented in Annex to the Guidance on Reporting Requirements, prepared by the Compliance Committee in 2007, but also taking into account the Format for the Aarhus Convention implementation report in accordance with Decision IV/4.

3. Article 3 General Provisions

The 2017 NIR, in Chapter IV, Obstacles encountered in the implementation of Article 3, the Ministry for the Environment and Natural Resources states that it will, as a follow up from that report, increase efforts in ensuring that ministries and other authorities are aware of the Convention and what it entails, as well as promoting education and environmental awareness among the public. The Ministry adopted Action Plan 2018 to 2021 for the implementation of the Aarhus Convention. Some of these intentions are stated in that Action Plan. However, most of the points in the Action Plan have not yet been implemented. Please, see further discussion on the Action Plan is in Chapter 9 of this report. The 2017 NIR further states in Chapter V that there will be a follow up on points made on the accessibility of internet sites of agencies.

We are not aware of increased efforts in the respect of the above points.

3.1. Clear, transparent and consistent framework – Article 3(1)

A change in law, adopted in 2016 will likely *limit*, in practice, public participation in cases regarding the environment. This is the abolishing of Act No 23/2006 on Information in Environmental Cases (incorporating Directive 2003/4/EC) and the adoption of a new VII. Chapter in the general Information Act No 140/2012,[6] thereby not only disconnecting any monitoring by the Ministry for the Environment and Natural Resources regarding the application of the right to environmental information.

This legislative change in 2016, on access to information on the environment, moved this category of issues under the auspices of the Prime Minister's Office. This merging of these two different acts on public access to information moved the focus further away from the objectives of and the specific grounds for the access to information about environmental matters and moved the Aarhus Convention aspect still further away from the application of the rules on information in environmental matters in Iceland, thereby moving , the first pillar of the Convention away from the Ministry for the Environment and Natural Resources and the expertise of its officials in matters related to the Convention.

[3] Guidance on Reporting Requirements, prepared by the Compliance Committee, I.A.i.
[4] See 2021 Reporting Cycle | UNECE
[5] Guidance on Reporting Requirements, prepared by the Compliance Committee, II.
[6] Lög um breytingu á upplýsingalögum, nr. 140/2012, með síðari breytingum (útvíkkun gildissviðs o.fl.). | Þingtíðindi | Alþingi (althingi.is)

During the Parliamentary consultation of the Bill of Law proposing this legislative change, one NGO put forward detailed comments and arguments as to why the adoption of the new VII. Chapter and abolishing of Act 23/2006 would violate the *principles, definitions*, *exemptions* and *narrow interpretation of such,* and *maximum deadlines,* provided for in Article 2(3)(g), Article 3; in particular Article 3(2), Article 4(3)(c) and Article 4(4) *in fine* of the Convention and Article 2(1)(c) and (d) of Directive 2003/4/EC.

During the consultation period in the Parliament it transpired that the Association of Municipalities had intervened prior to the preparation of the Amendment Bill of Law, arguing that in a certain profiled case, which is discussed in the 2017 NIR (e.g. power lines to Bakki, Húsavík), in which an NGO had challenged a license for a controversial development project and had been granted access to a certain memo by the lawyer of the municipality which issued the license, in an environment information denial challenged before the Appeal Committee in Information Matters. The Bill of Law limited the access to such information.

The Prime Minister's office appears to have overlooked the principles of the access to environmental information in its decision to propose the abolishing of Act No 23/2006. The Parliament's permanent committee in question merely reflected on whether the adoption of a new chapter in the Information Act No 140/2012 only incorporated the text of the previous Act No 23/2006, without consulting the Ministry for the Environment and Natural Resources and/or the permanent committee on the environment and transport. Thus, the implementation flaws from Act 23/2006 are still in the legislation, in addition to disconnecting the right to information from the Ministry for the Environment and Natural Resources This has further threatened the clear, transparent and consistent framework to implement the Convention. Plans to review and strengthen the implementation of the right to information, addressed in the 2017 NIR, has thus failed.

In addition, two 2021 legislative changes that *limit* public participation in certain cases are under way. First, a Bill of Law has been proposed by the Ministry for the Environment and Natural Resources establishing a special committee (i. raflínunefnd) to authorize works in which the National Transmission System Operator (TSO), Landsnet, is the developer and the power lines are planned across municipal boundaries. This Bill of Law was introduced following legal actions during the past decade, initiated by both NGOs and landowners, in particular in two locations. These power lines are referred to as Suðurnesjalína 2 and Blöndulína 3, and were discussed in the 2014 NGO report and in the 2014 NIR. These disputes concern whether and to which extent the TSO shall present an *underground cable as an alternative* in their Environmental Impact Assessment (EIA) for transmission lines.

Landowners have taken the TSO to the Supreme Court for refusing to include this alternative in their EIAs, and still refuses to do so despite a court order. Also, the TSO has ignored the reasoned opinion by the competent authority in the EIA, recommending the use of underground cables. We are concerned, that Iceland is putting this Bill of Law forward to limit the say NGOs can have in the EIA participatory procedure for this type of infrastructure. To put this into context, private consumers buy approximately 5% of the total electricity consumed in Iceland while only a few aluminum smelters and other power intensive companies use about 80%. Hence, the transmission capacity of the network must be much bigger whan is needed for public use.

The other Bill of Law concerns *new EIA/SEA legislation*, which we have not been able to review carefully and is at the time of writing subject to a two weeks public consultation in the Parliament, also discussed in Chapters 6 and 8 of this report.

Finally, no specific mechanism is in place to *monitor implementation* of the Convention's provisions and those of the relevant domestic legislation. The Ombudsman of the Parliament (Althingi) has hardly mentioned the Convention in decisions or reports to the Parliament. Indeed, only in one case after the ratification of the Convention in 2011, case No 8879/2016, addressed the rights therein. This case will be discussed in detail in subsection 3.6.3. below.

3.2. Assistance and Guidance to the Public in Participation Matters – Article 3(2)

After the merging of Act 23/2006 into VII. Chapter of the general Information Act No 140/2012, discussed above, Iceland does not provide for any tools in *environmental legislation,* in addition to general administrative law, to facilitate the exercise by the *members of the public* of their procedural rights.

We are not aware of any *institutional and budgetary* arrangements for capacity building. Neither does the 2017 NIR make reference to such government actions. The same applies to such arrangements concerning the *public authorities*.

Despite the concerns put forward in the 2014 NGO report regarding the lack of awareness and the lack of opportunities for *judges*, to get education and information on the Convention, are still missing. No "Cooperation with Judges Programme" exists and the situation is still the same as described in the 2014 NGO report, subchapter 5.1. The same applies with regard to education for practicing lawyers. No progress has been made during the seven year period and in the few court cases during these years since the Convention was ratified.

In the 2017 NIR it is stated in Chapter V, Further Information, that the lack of education is addressed by provisions in the Civil Procedure Act to appoint expert judges. This does in our view not compensate for the lack of education of judges, since procedural law, planning law, administrative law etc. is part of the general knowledge of judges, and the Judicial Administration Agency would never accept that the Aarhus Convention or environmental law in general would justify appointing an expert judge. We also point out that such expert is probably not be available in Iceland and if so, the individual would in most cases be disqualified, due to the small population.

3.3. Environmental Education and Environmental Awareness – Article 3(3)

We note, that in the detailed account on the education and awareness provided for in the 2017 NIR, there is no mentioning of the general *curricula* of education institutes (i.e. for those 50-80% of schools who do not participate in the Eco-Schools Programme) which addresses environment and governance, in particular those addressed in the Convention. It is safe to say that the general lack of education and awareness is currently a major concerns, as noted in the 2014 NGO report. In particular, no arrangements between the ministries on such education seem to exist. We believe this must be addressed by the Icelandic government. Neither do we have any information about *awareness-raising campaigns* implemented by the environmental administration since the last reporting cycle.

Apart from a visit paid by Professor Jonas Ebbesson, Chair of the Aarhus Convention Compliance Committee in April 2018, on the invitation by the Ministry for the Environment and Natural Resources, no education efforts regarding the Aarhus Convention have been undertaken since the publication of the 2017 NIR.

The general concerns raised in the 2014 NGO report, Chapter 5, regarding the lack of education and awareness of the Convention are, therefore, still valid. To our knowledge the May 2012 seminar mentioned above, is still the last and only seminar to be held in Iceland on the principles

of the Convention. However meeting were s organized during Ebbessen's visit in 2018. Neither has any dissemination of the Convention text, booklets, webpages, etc. been established, not already described in the 2014 NIR.

The general lack of education for *journalists* on environmental issues constitutes a serious concern. However, it is worth mentioning that the Minister for the Environment and Natural Resources annually awards one journalist a prize for outstanding reporting in the field of the environment.

A number of environmental NGOs are active in environmental awareness raising. Annually, the Ministry for the Environment and Natural Resources awards grants to persons, companies and associations for different projects, including for awareness raising. However, a longstanding lack of funding for continuous activities of the NGOs, in order to guarantee their financial sustainability is still the biggest challenge. The total amount of grants for ALL *projects* was EUR 346 000 for 2021, for 42 projects.

3.4. Support for environmental NGOs – Article 3(4)

Again, here we have serious concerns regarding the lack of operational funds. Only two operating environmental NGOs can be considered to have permanent staff. This is INCA, with less than 2000 members, and Landvernd, with around 6000 members. Whereas the Ministry for the Environment and Natural Resources granted in total 323 000 EUR for *operations* of 25 NGOs in 2021, (on average 13 000 per NGO) many of them are not environmental NGOs in the sense of the Convention, but rather outdoor groups. Typically, a regional environmental NGO has between 50 and 200 members and is granted 2 000 or 3 000 EUR for their operations per annum. Obviously they cannot pay for staff. Neither can they rely on membership fees. Their operations, including both management and when contributing expert opinion therefore depend entirely on *pro bono* work, except for the two NGOs mentioned above, which are staffed. Currently, no NGO has staff with legal training. Only two NGOs have since the ratification of the Convention been financially able to challenge government decisions in court and one of them had to rely almost exclusively on funds from foreign grantors for such purposes.

The local-level organizations are of particular concern, since the criteria for the granting of operational state funded grants from the Ministry for the Environment and Natural Resources is both the number of members and whether the local NGO or grassroots organizations operate on a national or are territorial/regional level, resulting in smaller grants if the latter is the case.

While the barrier for NGO *registration is low*, the operation is quite difficult in this country with a tiny population and very limited possibilities to maintain a steady fundraising for environmental NGOs. This was briefly addressed in the 2017 NIR. While the total annual state grants by the Ministry for the Environment and Natural Resources for operational costs have increased lately, the grants are currently also distributed to non-environmental NGOs, such as association of 4x4 enthusiasts and hunters. At the same time, public participation in big power production and transmission facilities requiring technical expertese and the legal context, is becoming increasingly complex. Furhtermore, it is practically impossible to pursue cases according to Article 9 of the Convention without being represented by a lawyer, even when appealing to the Appeals Committee on Environmental Matters. The legal issues are complex and the counterparts are government agencies, other authorities and developers with legal departments and ample funds.

The public consultation period is often only two weeks for draft bills of law and bills of law. This is the case in the currentrevision of the EIA and SEA Acts. The Bill of Law is 82 pages of total revision of the legislation in this core field in terms of the Convention. Its obvious that it is extremely difficult for any NGO have financial capacity to take on such work with deadline 29 April 2021, requiring considerable expert knowledge.

No established practice exists to *include NGO*s in decision making structures like committees. Indeed, there is no practice at all to include environmental NGOs in Iceland, with the only exception of the Ministry for the Environment and Natural Resources. In addition, environmental NGOs are frequently left out in advisory groups under the auspices of that ministry, e.g. in the recent preparation of the amended National Planning (i. Landsskipulagsstefna, now subject to participation procedure in the Parliament with two weeks deadline to submit comments). In the preparation of the envisaged Highland National Park, environmental NGOs had not a seat on the committee preparing the Bill of Law establishing the NP and currently debated in the Parliament, even if a representative had a seat on a previous 2016 committee. In contrast, a representantive from the Association of Municipalities had a seat on the comittee drafting the Bill of Law, together with political representatives amongst other.

We have a specific comment regarding negations on a new legally binding treaty on the conservation and sustainable utilization of marine biodiversity (BBNJ), see next subsection and discussion in Chapter 7 of this report.

One of the greatest concern here is, on top of all the above, Iceland prohibits in practice any financial support in order to enable NGOs to take cases to court. This will be addressed in the next subsection, under Article 3(8) discussion in subsection 3.6.2, and under Article 9 discussion in Chapter 9 of this report.

3.5. International Environmental Decision-Making Processes and Organizations – Article 3(7)

Article 3(7) of the Convention states that:

> 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.

Reference is made to discussion below as regards the non-existence of legal aid to NGOs.

Guidelines on Public Participation in International Forums adopted at the second Meeting of the Parties is not applied in Iceland. We are not aware of any internal consultation between the officials dealing with the Convention and officials involved in other international forums in matters related to the environment with regard to implementation of the above mentioned Guidelines. This matter will be further discussed in subsection 7.1.

The Guidelines on reporting requirements prepared by the Compliance Committee 2007 pose the following question to the Parties under this paragraph:

> Is there a practice of including NGO members in delegations representing the State in international environmental negotiations or in any national-level discussion groups forming the official position for such negotiations?

The answer is: Apart from the one mentioned in the 2017 NIR regarding occasional participation of NGO representation in UNFCCC COP meetings, NGO representative has from 2005 been a part

of the Icelandic delegation in UN Climate Change Conference and recently also IMO. However, NGO representative have never been invited to regular consultation meeting regarding the UN Climate Change Conference and apart from this, there have been no measures taken to inviting NGO members to participate at national level with respect to international forums and environmental negotiations, or to be involved in forming Iceland's official position for such negotiations.

No measures appear to be taken to coordinate between ministries in forums according to this provision. However, this may have taken place, without our knowledge.

The ministries for the environment and foreign affairs both consider that Article 3(7) is not binding, just non-binding recommendation, see replies from these ministries attached.

3.6. Prohibition of Penalizing for Public Participation – Article 3(8)

3.6.1. Remedies for Harassment

The text in the 2017 NIR under this provision, on page 6, appears to be based on a misunderstanding of its content.

The 2017 NIR discusses a comment in Chapter V, Further information on the practical application of the general provisions of article 3, received during the 2014 reporting cycle on the wrongful implementation of Article 3(8), referring to the so-called Gálgahraun Case, reported in the 2014 NGO report. The case involved the arrest, prosecution and sentencing of protesters. In our view, the discussion in the 2017 NIR does not really address the issue and we would welcome discussion on whether this provision of the Convention in this particular case was respected.

As for lessons learned since the 2017 reporting cycle, we can at this point in time inform, that in a recent discipline case of libel, false light and defamation (criminal offence under Icelandic law, but subject to private prosecution only) within the governance system of Vatnajökull National Park, the Ministry for the Environment and Natural Resources has not yet acted on a request from a private person in the case submitted months ago. We would welcome a discussion on the general culture in a low population country such as Iceland for unsanctioned defamation in environmental decision-making processes in Iceland.

3.6.2. Reasonable Costs in Judicial Proceedings

There has been no court cased filed by an environmental NGO in Iceland since a judgment of the Appeal Court (Landsréttur) in 2018 ordering an NGO to pay the legal costs, EUR 21 600 at the time (exchange rate 125), to the Road Authority and a local municipality when dismissing (lack of standing) a case challenging the ruling of the Appeal Committee in Environmental Matters 2017 and the development consent for the construction of a road across protected area, Case No 418/2018. The costs were such in this case, that the NGO in question as a consequence suffered from serious financial difficulties, even though it is by far the biggest NGO in Iceland and the only NGO that had has the financial means to file court cases, locally funded. There is no doubt that this 2018 judgement has and will continue to deter this NGO, let alone the smaller ones in Iceland, from judicial review under the Convention. Even though the NGO was not sentenced to pay damages, this must be seen as a threat to the public interest and participation in environmental protection activities.

Even if a party to a court case, as a general rule in the Civil Procedure Act, shall be ordered to pay the winning party his legal costs, this is at the discretion of the judge, and an individual

would not be ordered to pay the state, even if he or she would lose a case, as a general practice. This was indeed the case, in a previous court case 2017, in which the NGO's claims were dismissed, but the same NGO was not ordered by the Supreme Court to pay the costs of the opponent, the TSO, Case No 432/2017.

3.6.3. Legal Aid in Judicial Proceedings

In addition, two decisions of the Ministry of Justice, 2018 and 2021, have ruled out to grant environmental NGO legal aid according to Article 126 of Act No 91/1991 on Civil Procedure. This is the only provision for legal aid in Iceland. The 2018 case was brought to the attention of the Althingi Ombudsman, who investigated and put forward recommendation to the Ministry of Justice in Case 8879/2016. However, the practice has since not changed and no legal clarity has been provided by the legislator or the Ministry of Justice. We consider the practice of the Ministry of Justice to be in breach of the Convention.

Whereas the 2018 case the Ministry of Justice in their rejection for legal aid specifically referred to the finances of the applicant, which was the largest NGO in Iceland, the 2021 case concerns a small regional NGO which had a case, No 66/2020, regarding road construction within Vatnajökull National Park, close to the Dettifoss Waterfall, the largest one in Europe. The case was referred to the Appeal Committee on Environmental Matters in July 2020 with a request for interim measures, against the Road Authority, the local municipality and the NP. Subsequently the Road Authority stopped the construction. The ruling came in February 2021, rejecting the NGO's claim to annul the development consent. This case is also discussed in subsection 6.5 of this report. The NGO in question has less than 200 members, very low income from member fees and was granted just over 5 000 EUR for its operations 2021 and received a grant of 2 000 EUR for its 2020 operations. Based on this, it was financially not viable for this NGO to take the risk of entering into legal procedure before the courts, even if it was legally and practically viable; the Civil Procedure Act providing for accelerated procedure in such court cases and the case strong on substance. The Ministry for Justice denied to grant legal aid also this time around, and put forward only one argument: that Article 126 of the Civil Procedure Act does not provide for the possibility to grant legal entities legal aid, only individuals. This is however not explicitly prohibited according the text of Article 126. This NGO will consider to submit a complaint to the Althingi Ombudsman following this result. However, the construction of the road in the National Park will start once ice and snow has melted, and the damage will be done long before any result can be expected.

We would welcome a discussion on the lessons learned in terms of this lack of any provision or practice to grant legal aid to NGOs.

4. Article 4 Access to Environmental Information

4.1. Ensuring provisions of information and other general issues – Article 4(1)

We are not aware of a specific requirement to *keep records* of information requests received and responses provided or any reporting of such by different ministries and agencies. In general, when exercising the right to information, officials appear to be unaware of their obligations, with important exceptions. In January 2021 amendment to the Information Act No 140/2012 entered into force, obliging the ministries to list on a monthly basis all their cases, established by either incoming or outcoming letters. While this has only been in force for a short period of time and so far only been published for two months so far, it is obvious that this tool is not very helpful in the

context of providing access to records in environmental cases. *First*, all types of cases are included; *second,* the titles of the cases are not very transparent; *third*, this only applies to ministries; and *fourth* it's only a simple excel sheet list and search functions are limited.

Statement in Chapter IX of the 2017 NIR, about statistics not being available, still applies.

The 2017 NIR, Chapter IX the Ministry pledged it will increase efforts in raising awareness of the legislation on access to environmental information. This has not happened, as also discussed in Chapter 3 above.

There is no separate body that oversees matters of access to environmental information, see discussion in Section 3 above on the abolished Act No 23/2006 and the first pillar of the Convention as such put under the auspices of the Prime Minister, as all general information matters.

4.2. Information not in the public authority's possession – Article 4(3)(a)

We have repeatedly encountered difficulties in situations where the public authority does not or claims not be in possession of the information requested, but have it *should have it* pursuant to the relevant legislation. There is no procedure or practice for handling such cases, and serious lack of knowledge both in government agencies and local authorities in this regard.

4.3. Confidentiality of administration – Article 4(3)(c)

We have encountered cases in which the free expression of *professional opinion* by officials of agencies have been questioned and an effort made to limit the freedom of expression and we would welcome discussion on this point.

It is a standard procedure of government agencies to deny the access to documents on the basis of the general exemption in the Information Act Nr 140/2012, now referred to directly by the entering into force of the new chapter in that act, covering environmental information, on the grounds only that they are "working documents". The broad exemption in the general information provision does in our view not meet the requirements of Convention or of Directive 2003/4/EC. See also further discussion in Chapter 3 of this report. Overview of the rules, as applicable 2017, can be found at Chapter VII in the 2017 NIR.

As can been seen from the above, the Icelandic government is often non-transparent, and we are aware of cases in which materials that directly or indirectly serve as a basis for an administrative decision are considered and kept confidential.

5. Article 5 Collection and Dissemination of Environmental Information

At this point in time, we are not in the position to further elaborate on the details of Article 4 or at all on Article 5, but we withhold the right to do so in the future, including in a later submission 2021.

6. Article 6 Public Participation - Environmental Impact Assessment

6.1. New Bill of Law 2021

We have already in Chapter 3 of this report mentioned the Bill of Law proposing the merging of two Acts, the EIA and SEA, and implementing Directive 2011/92/EU and 2014/52/EU in a right manner. We are not yet convinced that the Bill of Law will manage to incorporate the latest

changes in the EIA Directive, which is long overdue to incorporate. One point of concern is the conditions that the EIA report needs to be "up to date" at the time of granting development consent. In Iceland, the EIA Act currently and for a long time contains a provision of the "validity" of the reasoned opinion for a minimum of ten years. This clause has been the subject of multiple disputes and the reluctance to review outdated environmental reports and reasoned opinions within the Planning Agency and the Appeal Committee has been notable in the absence of clear legal provisions for such review. We are not convinced that the solution proposed in the Bill of Law will incorporate the "up to date" criteria, however in the right direction.

6.2. Activity falling under Article 6 – Article 6(1)

National legislation and practice only provides for Article 6 procedures in an EIA. Under the current legislation, both planning decisions and development consent require public participation. This will change if the Bill of Law referred to above will be adopted, with the possibility to merge these procedures. However, today public participation is not required for other types of consecutive decisions, such as permit for a power plant, issued by the Energy Agency.

6.3. Early Participation - Article 6(4)

"When all alternatives are open" is not always applied in Iceland. One could even say that it is a part of a general practice to circumvent this, both in EIA and SEA procedure. We have mentioned this before; there is a serious lack of compliance here, in particular with regard to the significant infrastructure and development of renewable energy. This has led to a series of court cases brought about by landowners, complaints submitted by NGOs to the Appeal Committee in Environmental Matters, and is today still a highly debated issue. We confirm that this provision is not implemented and practiced in Iceland in accordance with the Convention.

6.4. Taking Due Account of the Results of Public Participation - Article 6(8)

In taking due account of the results of the public participation, there is a general flaw by the practices of the consultant companies for the big developers in EIA procedures – and in the case of municipalities in the SEA of planning decisions, which to date has not yet been properly addressed by the Planning Authority in an acceptable manner. The obligation is repeatedly circumvented and not taken seriously. Taking due account of the public comments constitutes a serious problem in Iceland, even if both the Convention and the EU Directives have in principle been correctly transposed into national law in this regard. While NGOs do not have legal standing in challenging planning decisions (Article 7 of the Convention) they have not been able to have the EIA decisions properly reviewed by the Appeal Committee in Environmental Cases, and the barrier to go to court on the basis of Article 9 and 6 is impossibly high, as discussed in different sections of this report.

6.5. Information about the Decision - Article 6(9)

Omission to refer to the factual, professional and legal arguments raised in the procedure cannot be challenged by NGOs before the courts (no standing) but can in principle be raised in a case challenging the development consent itself. However, according to current legislation, the authority granting the development consent in the EIA procedures (normally the municipality) does merely have to state its position on the reasoned opinion of the relevant authority issuing them (in Iceland: Planning Authority in all EIA cases). In a recent case this was an issue in a development consent challenge (Case No 66/2020, Vesturdalur) and discussed in subsection 3.6.3 of this report. Despite almost non-existent reasoning by the granting authority, the municipality, the Appeal Committee found that it was not necessary to provide reasoning in the

particular circumstances, and rejected the NGOs argumentation and claim. See also detailed discussion in subsection 3.6.3 above. This ruling cannot be taken to court, for financial reasons.

7. Article 7 Public Participation - Strategic Environmental Assessment

The implementation of Article 7 has raised concerns in the past. We have already in Chapter 3 and 6 discussed the merging of the EIA and SEA Acts under a current Bill of Law and concerns regarding taking due account of the public participation.

We would welcome discussion in whether all strategic decisions are considered to be *relating to the environment* that should be regarded as such according to Article 7 of the Convention. In this report we will focus on the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction.

7.1. Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ)

Since 2017, the Intergovernmental Conference, under the auspices of the United Nations, has been working on the recommendations of the Preparatory Committee established by resolution 69/292 of 19 June 2015 on the elements and to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

The fourth session of the Intergovernmental Conference is scheduled to take place 16 to 27 August 2021. Since the negotiations started in 2018, NGOs have not been consulted prior to negotiation sessions. Recently, though, the ministry for foreign affairs has responded to letters from INCA.

See also discussion on Article 3(7) of the Convention in subsection 3.5 of this report.

8. Article 8 Public Participation – Legally Binding Acts

At the date of writing, following drafts for major legally binding acts concerning the environment are under public consultation in the Parliament (this is not an exclusive list of ongoing consultation cases and only includes proposal from one ministry):

Legally Binding Act	*Start of consultation*	*End of consultation*
EIA and SEA Bill of Law	15 April 2021	29 April 2021
Resolution on amended National Planning Strategy	15 April 2021	29 April 2021
Resolution on Areas for Wind Power in Icelandic Nature	15 April 2021	29 April 2021

These legally binding acts have during previous stages properly been subject to a public consultation (samradsgatt.is), except the Resolution on Areas for Wind Power, which was only made subject to consultation under the name of a different legal act, the proposed amendment of the Master Plan Act for nature protection and energy utilization, currently also under public consultation. For reasons other than time restrain, it constitutes a great challenge for any NGO in Iceland to take part in the consultation regarding all these legally binding acts during this final stage before they become legally binding. Reference is made to the discussion in subsections 3.1, 6.1 and 6.2 of this report.

It is worth mentioning, that the representative from NGOs in the committee preparing the EIA and SEA Bill of Law 2019 to 2021 did not receive any remuneration for her participation and was working as a volunteer. All other members of that committee were officials, MPs or staff of

stakeholder groups, i.a. the Confederation of Icelandic Enterprise. Any other representation from NGOs in committees or advisory boards in the above listed cases was non-existent.

9. Article 9 Access to Justice

9.1. General issues

The Icelandic courts have never referred to the text of the Aarhus Convention in their judgements. The courts have not granted an NGO legal standing in any court case since the ratification of the Convention.[7] All cases brought to the courts by NGOs have been dismissed from the time of ratification of the Convention. In all cases reference has been made to the intention of the legislator to incorporate the access to justice provision of the Convention by establishing the Appeal Committee. In contrast, pre-2011 case law granted NGOs legal standing in a couple of instances.

In practice, the Appeal Committee on Environmental Matters exercises only *cassation* and not *reformatory* rights in its rulings.

The independence of the Appeal Committee in Environmental Matters is less than of the general courts, as the members are appointed for five year at a time and the operations are subject to the budgetary decision of the minister and the Parliament.

9.2. Access to Justice in Information Cases – Article 9(1)

Concerns as to the access to justice in the case of information requests have been previously communicated. Reference is made to the discussion in subsection 3.1 above about the abolished Act No 23/2006.

9.3. Access to Court – Article 9(2)

INCA, together with several other parties, submitted a complaint to the EFTA Surveillance Authority on 30 November 2018 based on a breach of Article 11 of Directive 2011/92/EU. On 14 April 2020 the Authority came to the preliminary conclusion in Case No 82787 that Iceland was in breach of the Article. The Icelandic state has not, to date rectified the situation, and the case is still pending.

The adoption of legislation directly following the annulment by the Appeal Committee in Environmental Matters of operational permits for fish farms, was a grave violation of Article 9(2) of the Convention, and needs to be properly addressed in the 2021 reporting cycle.

9.4. Ongoing Concerns Regarding Article 9(3)

Despite intentions, expressed in the 2017 NIR and in the Action Plan for 2018-2021 mentioned earlier, Iceland has not taken any steps towards the implementation of Article 9(3). This constitutes a serious threat to the functioning of the Convention in Iceland.

Members of the public has extremely limited if any right to challenge omissions, acts or decisions of the type regulated by Articles 7 and 8 of the Convention by challenging them as contravening national law.

The threshold for *injuction relief* is high in practice and such has only one been granted in an EIA case by the Appeal Committee. Such claims cannot be brought directly before the courts.

[7] In Supreme Court Case 432/2017 the court did not refer to legal standing when dismissing the case on different legal grounds.

Regarding access to court, reference is also made to the discussion above on lessons learned in Appeal Committee Case No 66/2020 (Vesturdalur),

9.5. Fair, Adequate and Effective Remedies – Article 9(4)

There are no specific *sanctions* available in cases where officials fail to fulfill his/her responsibilities concerning access to information or public participation.

As discussed in previous section, there is not practice and no specialization among *judges* in environmental cases.

The costs in bringing cases to court is considerable for NGOs and only one or two have managed to finance such cases as discussed above. Individuals can apply for legal aid in court cases but not in cases brought to the Appeal Committee. There are no cases of legal aid in environmental court cases that we are aware of since the ratification of the Convention. The legal fees are a serious barrier both for NGOs and for individual to challenge omissions, acts or decisions before the Appeal Committee.

9.6. Challenges identified in the 2017 NIR

The 2017 NIR discusses in details in Chapters XXIX and XXX the *obstacles encountered and practical information on the implementation* of Article 9. This appears to be mainly comments received during the 2017 reporting cycle. Since the public consultation was non existent during the 2021 reporting cycle, NGOs have not been able to comment or request discussion on the many challenges identified during the first decade of Iceland´s ratification of the Convention. This is unfortunate. We refer to the answers provided by Iceland under Chapters XXIX and XXX of the 2017 NIR and call for a discussion on how the issues have been addressed, and in particular how the Action Plan 2018-2021 referred to above, have been implemented as regards the Article 9 challenges identified.

Attachments:

1. Reply from the Ministry for the Environment and Natural Resources 18 October 2018 (the BBNJ discussions)
2. Reply from the Foreign Ministry 6 January 2020 (the BBNJ discussions)
3. Complaint cover sheet 30 November 2018 (initiation of the ESA Article-31 Decision 14 April 2020)

Attachment 1

Reply from the Ministry for the Environment and Natural Resources 18 October 2018 (BBNJ discussions)

From: Hugi Ólafsson <hugi.olafsson@uar.is>
Subject: Aðkoma NÍ að BBNJ-viðræðum
Date: 18 October 2018 at 10:40:44 GMT
To: Árni Finnsson <arni@natturuvernd.is>
Cc: Laufey Helga Guðmundsdóttir <laufey.gudmundsdottir@uar.is>

Sæll,

Varðandi fyrirspurn þína um aðkomu Náttúruverndarsamtaka Íslands að sk. BBNJ-viðræðum, sem utanríkisráðuneytið stýrir fyrir Íslands hönd, þá höfum við skoðað hana hér í ráðuneytinu. Okkar svar er svohljóðandi:

Almennt séð eru samningaviðræður um líffræðilega fjölbreytni utan lögsögu (BBNJ) á forræði utanríkisráðuneytisins og því rétt að beina fyrirspurnum um mótun stefnu og gang viðræðna til þess. Umhverfis- og auðlindaráðuneytið á fulltrúa í viðræðuhópi stjórnvalda og er tilbúið að ræða sína aðkomu að þessum viðræðum, en telur eðlilegt að leitað sé fyrst upplýsinga hjá því ráðuneyti sem fer með málið. Árósamningurinn mælir ekki fyrir um skyldu aðildarríkja að tryggja þátttöku umhverfisverndarsamtaka í stefnumótun á alþjóðavettvangi en hvatt er til þess í 7. mgr. 3. gr. samningsins. Ákvörðun um hverjir eiga sæti í sendinefnd Íslands hefur verið tekin af utanríkisráðuneytinu og umhverfis- og auðlindaráðuneytið getur ekki svarað fyrir það. Réttast er að beina slíkum spurningum til utanríkisráðuneytisins. Velvirðingar er beðist á því að svar hefur dregist.

Með kveðju,
Hugi

Hugi Ólafsson, skrifstofustjóri / Director General
Skrifstofa hafs, vatns og loftslags / Department of Oceans, Water and Climate
Umhverfis- og auðlindaráðuneytið / Ministry for the Environment and Natural Resources
Skuggasund 1, 101 Reykjavik, Iceland
Sími / Tel: (+354) 545 8600 • Fax: (+354) 562-4566
www.umhverfisraduneyti.is - Fyrirvari/Disclaimer

Attachment 2

Reply from the Foreign Ministry 6 January 2020 (BBNJ discussions)

Náttúruverndarsamtök Íslands
Árni Finnsson,
formaður
Þórunnartún 2
105 Reykjavík

UTANRÍKISRÁÐUNEYTIÐ
Rauðarárstígur 25, 105 Reykjavík
Sími: 545 9900, bréfasími: 562 2373
postur@utn.stjr.is, www.utn.stjr.is

Reykjavík, 6. janúar 2020
Tilvísun: UTN20010199/97.B.510; 97.B.560
AJó/--

Vísað er til bréfs samtakanna frá 3. desember sl. til ráðherra. Í erindinu er vísað til texta í þremur skýrslum utanríkisráðherra til Alþingis á síðustu árum og óskað upplýsinga um nefnd sem fjallað er um í þeim skýrslum. Nánar tiltekið er óskað upplýsinga um eftirfarandi atriði í erindinu:

1. Hverjir og/eða fulltrúar hvaða samtaka eigi sæti í nefnd sem getið er í skýrslunum og fari með stefnumótun um málefni hafsins.
2. Hvort eitthvert samráð hafi verið haft við hagaðila og þá hverja.
3. Hvort SFS sé eini hagaðilinn sem eigi sæti í starfshópnum og ef svo er – hver hafi tekið þá ákvörðun og á hvaða forsendum.

Varðandi lið 1.

Rétt er að taka fram að samráðshóparnir sem fjallað er um í þeim skýrslum ráðherra til Alþingis sem vísað er til í erindinu, eru tveir ólíkir samráðshópar.

Í skýrslu ráðherra frá 2017 er verið að vísa í samráðshóp þriggja ráðuneyta; utanríkisráðuneytis, atvinnuvega- og nýsköpunarráðuneytis og umhverfis- og auðlindaráðuneytis, sem m.a. fékkst við samræmingu fyrirsvars Íslands í málefnum hafsins. Sá hópur, samráðshópur um málefni hafsins, var eingöngu skipaður fulltrúum framangreindra ráðuneyta og sátu ekki fulltrúar hagaðila í þeim hópi.

Í tilvísuðum hlutum skýrslna utanríkisráðherra frá 2018 og 2019 er um að ræða annan samráðshóp sömu þriggja ráðuneyta, þ.e. utanríkisráðuneytis, atvinnuvega- og nýsköpunarráðuneytis og umhverfis- og auðlindaráðuneytis, auk fulltrúa Samtaka fyrirtækja í sjávarútvegi. Eins og kemur fram í skýrslunum er verkefni þess hóps að móta stefnu Íslands í viðræðum og sækja samningafundi um gerð nýs framkvæmdasamnings undir hafréttarsamningi Sameinuðu þjóðanna um verndun og sjálfbæra nýtingu líffræðilegrar fjölbreytni í hafinu utan lögsögu ríka (samningurinn er gjarnan nefndur BBNJ og hópurinn BBNJ-samráðshópur).

Varðandi lið 2.

Fyrstnefndi samráðshópurinn sinnti fyrst og fremst samræmingu á starfi ráðuneytanna sín á milli og samskiptum varðandi það verkefni.
BBNJ-samráðshópurinn hefur hins vegar kynnt BBNJ samningaviðræðurnar á ýmsan hátt út á við, m.a. með opinni ráðstefnu á vegum Hafréttarstofnunar Íslands, greinum í blöðunum, upplýsingafundi í MATÍS, fyrirlestrum á samráðsdegi stjórnvalda og Fiskifélagsins, samtölum og samskiptum við fulltrúa fjölda alþjóðastofnana, frjálsra félagasamtaka, ríkjahópa, einstakra ríkja og við einstaklinga um þetta mál og þ.m.t. kallað forsvarsmann Náttúruverndarsamtaka Íslands á fund hjá samráðshópnum. Hvert ráðuneyti um sig sér um að halda sínum starfsmönnum og undirstofnunum upplýstum eftir þörfum.

Varðandi lið 3.
Eini fulltrúinn í BBNJ-samráðshópnum sem starfar utan stjórnsýslunnar er fulltrúi SFS. Eitt mikilvægasta efnisatriðið í samningaviðræðunum fyrir fiskveiðiþjóðina Ísland er spurningin um að hvaða marki fiskur og fiskveiðistjórnun falli undir nýja BBNJ samninginn og hvernig ákvarðanataka á grundvelli hans muni spila saman við íslenska fiskveiðistjórnunarfyrirkomulagið og svæðisbundin fiskveiðistjórnunarsamtök (RFMOs). Í ljósi þess og vegna sérþekkingar þessara samtaka á framangreindum lykilatriðum samningaviðræðnanna telur ráðuneytið mikilvægt að hafa fulltrúa frá SFS í samráðshópnum.

Ráðuneytið fagnar áhuga Náttúruverndarsamtaka Íslands á málefnum sem tengjast BBNJ og undirstrikar þá afstöðu sína að gagnlegt samráð við hagaðila og ábendingar og upplýsingagjöf varðandi þetta mikilvæga viðfangsefni er að sjálfsögðu mikilvægt. Fulltrúi samtakanna er einnig velkominn á fund BBNJ-samráðshópsins ef óskað er eftir.

F.h.r.

Anna Jóhannsdóttir
skrifstofustjóri laga- og stjórnsýsluskrifstofu

Afrit:
Sjávarútvegsráðuneyti
Umhverfis- og auðlindaráðuneyti

Attachment 3

Complaint cover sheet 30 November 2018 (initiation of the ESA Article-31 Decision 14 April 2020)

COMPLAINT FORM[1] PART 1/2
TO THE EFTA SURVEILLANCE AUTHORITY CONCERNING
FAILURE TO COMPLY WITH EEA LAW

N.B. Both complaint form part 1/2 and complaint form part 2/2 must be filled out and sent to the EFTA Surveillance Authority as two separate documents.

1. Family name and first name of complainant:

1. Náttúruverndarsamtök Íslands (the Icelandic Nature Conservation Association)
2. Laxinn lifi
3. Landssamband veiðifélaga (the Federation of Icelandic River Owners)
4. Stangveiðifélag Reykjavíkur (Angling Club of Reykjavik)
5. Verndarsjóður villtra laxastofna (the North Atlantic Salmon Fund)
6. Umhverfissamtökin Icelandic Wildlife Fund
7. Akurholt ehf.
8. Geiteyri ehf.
9. Mr. Ari P. Wendel
10. Mr. Viðir Hólm Guðbjartsson
11. Mr. Atli Árdal Ólafsson
12. Varpland ehf.

2. Where appropriate, represented by:

Óttar Yngvason, Attorney at Law, Síðumúla 34, Reykjavík, Iceland.

3. Nationality:

Icelandic.

4. Address or registered office:[2]

Óttar Yngvason, Attorney at Law, Síðumúla 34, Reykjavík, Iceland.
E-mail: ottar@iec.is.

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[1] A complaint can be sent by ordinary mail to the following address:
EFTA Surveillance Authority
Rue Belliard 35
B-1040 Brussels
Belgium
Alternatively, this Complaint Form, may be sent by e-mail to Registry@eftasurv.int. To be admissible, a complaint must relate to an infringement of EEA law by an EEA EFTA State, i.e. Iceland, Liechtenstein or Norway.

[2] Please inform the EFTA Surveillance Authority of any change of address as well as any event likely to have an effect on the handling of your complaint.