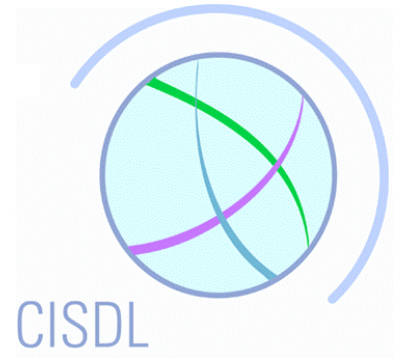


CISDL Doc. #: R3-S3N.E	Session: Plenary Roundtable Three
Date & Time: 2002-06-13 15h30	Speaker: Mr. Jeremy Wates
Rapporteur: [Sagarika]	Language: English



**Plenary Roundtable Three:
Transparency, Participation and Access to Justice in ISDL**
Montreal, 13 June 2002

Conference on Sustainable Justice 2002
Centre for International Sustainable Development Law
Montreal, 13-15 June 2002

**Roundtable: Transparency, Participation and Access to Justice
in International Sustainable Development Law**

**THE AARHUS CONVENTION:
A NEW INSTRUMENT PROMOTING ENVIRONMENTAL DEMOCRACY**

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INTRODUCTION

In recent decades, traditional systems of representative democracy have been increasingly supplemented by measures promoting participatory democracy. This has particularly been the case in the environmental sphere, where the interests of the public are recognized to have a particular legitimacy. Involving the public has been recognized to improve the quality of decision-making as well as tending to strengthen public belief in the credibility of the decision-making process and its outcome. It is also increasingly seen as a question of rights: the notion that the public is entitled to see its views reflected in the decisions of public authorities on an ongoing basis — rather than its role being limited to the occasional trip to the ballot box at election time — has gained ground.

The emergence of participatory democracy is reflected in a host of national measures, of both legislative and non-legislative character. It is also reflected to a more modest extent in global and regional declarations and instruments. Perhaps the most far-reaching example of the latter is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

Aarhus: a new international law on citizens environmental rights

The Convention was adopted on 25th June 1998 in the Danish city of Aarhus — hence its more common name, the Aarhus Convention - at the Fourth Ministerial Conference in the 'Environment for Europe' process. It has been signed by 39 countries and the European Community.

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

TRACING THE DEVELOPMENT OF THE CONVENTION

The origin of the Convention can be traced back to Principle 10 of the Rio Declaration on Environment and Development, which stresses the importance of public access to environmental information and opportunities for the public to participate in decision-making processes and to have effective access to administrative and judicial proceedings.

Within the ECE region, Principle 10 was taken up and further developed, first through the preparation of a set of non-binding Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making. The guidelines were endorsed by ECE Environment Ministers in October 1995 at the Third Ministerial Conference in the Environment for Europe process, and are hence known as the Sofia Guidelines.

At the same time as endorsing the Guidelines, the Ministers acknowledged the need for further work in this area and agreed to consider the possibility of developing a legally binding convention. In January 1996, the Committee on Environmental Policy decided to proceed with the preparation of a draft convention and established an ad hoc working group for the purpose. The negotiations over the draft Convention took place between June 1996 and March 1998 in ten sessions of the Working Group.

At the Ministerial Conference in Aarhus in June 1998, thirty-five countries and the European Community signed the Convention, and in the following six-month period during which it was open for signature, four more countries signed, making a total of 40 signatories.

The Convention entered into force on 30 October 2001, ninety days after the deposit of the sixteenth instrument of ratification as laid down in the Convention itself. To date, twenty countries have become Parties to the Convention, most of these being from Central and Eastern Europe or the Commonwealth of Independent States.¹ Several Western European countries, as well as the European Union itself, are actively working towards ratification. The first meeting of the Parties will take place on 21-23 October 2002 in Lucca, Italy.

The role of NGOs

A unique feature of the Aarhus Convention processes has been the unprecedented level of NGO involvement. During the Convention negotiations, environmental NGOs — also known as environmental citizens organizations or ECOs - were not only represented in the plenary sessions of the Working Group but also in virtually every drafting committee and in the small advisory group which assisted the Secretariat in the preparation of the first draft. Thus the involvement of ECOs began at an early stage and continued right throughout the process. Within each of these fora, at the discretion of the Chair, the ECO delegation was allowed to intervene on more or less the same basis as governmental delegations, and in practice availed of this opportunity intensively. Other non-governmental or quasi-non-governmental bodies, notably the Regional Environmental Center for Central and Eastern Europe, also played an active role.

The participation of ECOs unquestionably increased the relevance of the text and ensured that many of the real concerns of the public were known to the officials. ECOs were in a

¹ The twenty countries are Albania, Armenia, Azerbaijan, Belarus, Denmark, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Hungary, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Malta, Republic of

sense recognized as the principal clients of the Convention — whether regarded as the subset of the public likely to make most active use of the rights which the Convention would confer, or as the stakeholder group most likely to make use of them on behalf of the wider public. Many important elements in the text were introduced as a result of proposals by the ECO coalition, even if not always in the form initially proposed.

The contribution made by the ECOs to the drafting process was acknowledged at the Aarhus conference by several Environment Ministers and senior UN officials, as well as in the Resolution of the Signatories which accompanied the adoption of the Convention. The Resolution went on to recommend that NGOs should be allowed to participate not only in the activities of the Meeting of the Signatories to the Convention but also in the preparation of instruments on environmental protection in other international fora.

THE CONTENT OF THE CONVENTION

As its title suggests, the Convention contains three broad themes or 'pillars': access to information, public participation and access to justice. However, before describing these, it is worth referring to a number of important general features of the Convention.

General Features

Rights-based approach: The Convention adopts a rights-based approach. Article 1, setting out the objective of the Convention, requires Parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. It also refers to the goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being, which represents a significant step forward in international law. These rights underlie the various procedural requirements in the Convention.

A 'floor', not a 'ceiling': The Convention establishes minimum standards to be achieved but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice.

Non-discrimination: The Convention prohibits discrimination on the basis of citizenship, nationality or domicile against persons seeking to exercise their rights under the Convention.

Definition of public authorities: The main thrust of the obligations contained in the Convention is towards public authorities, which are defined so as to cover governmental bodies from all sectors and at all levels (national, regional, local, etc), and bodies performing public administrative functions. Although the Convention is not primarily focussed on the private sector, privatised bodies having public responsibilities in relation to the environment and which are under the control of the aforementioned types of public authorities are also covered by the definition. Bodies acting in a judicial or legislative capacity are excluded.

Inclusion of EU institutions: The definition of 'public authority' also covers the institutions of regional economic integration organisations which become a Party to the Convention. Therefore, if the EU ratifies the Convention, the provisions of the Convention will apply to the EU institutions. The main impact of this would probably be on the European Commission but it would also apply to the Council when it is not acting in a legislative capacity, and to the European Environment Agency.

International bodies: Apart from the special case of regional economic integration organisations such as the EU, the Convention contains a more general requirement on Parties to promote the application of its principles within the framework of international bodies in matters relating to the environment. While the wording is not particularly strong, the inclusion of this provision shows some recognition of the need to prevent any loss of transparency and public accountability as decision-making moves onto an international level.

Non-compliance mechanism: The Meeting of the Parties to the Convention is required to establish, on a consensus basis, optional arrangements for reviewing compliance with the provisions of the Convention. Such arrangements are to allow for 'appropriate public involvement'. Although the wording is not particularly strong (due mainly to opposition during the negotiations from countries which subsequently did not sign the Convention in Aarhus), this provision is given emphasis in the Resolution² which accompanied the adoption of the Convention.

Non-ECE countries: Finally, the Convention is open to accession by non-ECE countries, subject to approval of the Meeting of the Parties.

Access to Information

The information pillar covers both the 'passive' or reactive aspect of information, i.e. the obligation on public authorities to respond to public requests for information, and the 'active' aspect dealing with other obligations relating to information, such as collection, updating, public dissemination and so on.

The passive aspect is addressed in Article 4, which contains the main essential elements of a system for securing the public's right to obtain information on request from public authorities:

Presumption in favour of access: Any environmental information held by a public authority must be provided when requested by a member of the public, unless it can be shown to fall within a finite list of exempt categories.

'Any person' right: the right of access extends to any person, without his or her having to prove or even state an interest.

Broad definition of 'environmental information': the scope of information covered is quite broad, encompassing a non-exhaustive list of elements of the environment (air, water, soil etc.); factors, activities or measures affecting those elements; and human health and safety, conditions of life, cultural sites and built structures, to the extent that these are or may be affected by the aforementioned elements, factors, activities or measures.

Time limits: The information must be provided as soon as possible, and at the latest within one month after submission of the request. However, this period may be extended by a further month where the volume and complexity of the information justify this. The requester must be notified of any such extension and the reasons for it.

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Form of information: The definition of environmental information covers information in any material form (written, visual, aural, electronic etc). There is a qualified requirement on public authorities to provide it in the form specified by the requester.

Charges: Public authorities may impose a charge for supplying information provided the charge does not exceed a 'reasonable' amount.

Exemptions: Public authorities may withhold information where disclosure would adversely affect various interests, e.g. national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy, the confidentiality of the proceedings of public authorities; or where the information requested has been supplied voluntarily or consists of internal communications or material in the course of completion. There are however some restrictions on these exemptions, e.g. the commercial confidentiality exemption may not be invoked to withhold information on emissions which is relevant for the protection of the environment.

Public interest test: To prevent abuse of the exemptions by over-secretive public authorities, the Convention stipulates that most of the aforementioned exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account.

Refusals: Refusals, and the reasons for them, are to be issued in writing where requested. A similar time limit applies as for the supply of information: one month from the date of the request, with provision for extending this by a further month where the complexity of the information justifies this.

Onward referral of requests: Where a public authority does not hold the information requested, it should either direct the requester to another public authority which it believes might have the information, or transfer the request to that public authority and notify the requester of this.

The Convention also imposes active information duties on Parties. These include quite general obligations on public authorities to be in possession of up to date environmental information which is relevant to their functions, and to make information 'effectively accessible' to the public by providing information on the type and scope of information held and the process by which it can be obtained. It also contains several more specific provisions:

Internet access: Parties are required to 'progressively' make environmental information publicly available in electronic databases which can easily be accessed through public telecommunications networks. The Convention specifies certain categories of information (e.g. state of the environment reports, texts of legislation related to the environment) which should be made available in this form. In view of the advantages to both suppliers and requesters of information of making information available in this form (e.g. reduced costs, less administrative burden, immediacy of access, possibility of linkages with related databases) and the rapid pace of technological growth in this area, it can be imagined that this is an area where further elaboration of the current provision could usefully take place, either in the Convention or in its transposition at national level.

State-of-the-environment reporting: Parties are required to produce national reports on the state of the environment at regular intervals not exceeding four years. Further elaboration

under this provision could potentially lead to improved harmonisation of reporting methods across the region, thereby helping to support the EEA's reporting on the state of the Pan-European environment.

Pollutant release and transfer registers (PRTRs): PRTRs have proven to be a highly effective and relatively low cost means of gathering environmental information from the private sector and putting it into the public domain, thereby exerting a downward pressure on levels of pollution. However, very few countries in the region have established PRTRs. The Convention requires Parties to take steps to progressively establish such registers. It also requires the issue to be on the agenda of the first Meeting of the Parties, where further steps are to be considered, including the elaboration of an appropriate instrument which could be annexed to the Convention. This is now the subject of ongoing work so I will return to this later.

Emergency situations: Public authorities are required to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.

Public Participation

The Convention sets out minimum requirements for public participation in various categories of environmental decision-making.

¶ *Specific projects or activities:* Article 6 of the Convention establishes certain public participation requirements for decision-making on whether to license or permit certain types of activity listed in Annex I to the Convention. This list is similar to the list of activities for which an Environmental Impact Assessment or Integrated Pollution Prevention and Control licence is required under the relevant EU legislation. The requirements also apply, albeit in a slightly more ambivalent form, to decision-making on other activities which may have a significant effect on the environment. Activities serving national defence purposes may be exempted. Somewhat controversially, decision-making on genetically modified organisms (GMOs) was not included on the Annex I list. However, Parties are required to apply the provisions of the article to decision-making on the deliberate release of GMOs to the environment 'to the extent feasible and appropriate'. Furthermore, the issue of GMOs is given emphasis in both the preamble and the accompanying Resolution.

The public participation requirements include timely and effective notification of the public concerned; reasonable timeframes for participation, including provision for participation at an early stage; a right for the public concerned to inspect information which is relevant to the decision-making free of charge; an obligation on the decision-making body to take due account of the outcome of the public participation; and prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible. The 'public concerned' is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making', and explicitly includes NGOs promoting environmental protection and meeting any requirements under national law.

¶ *Programmes, plans and policies:* Article 7 requires Parties to make "appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment". It can be argued that the term 'relating to the

environment' is quite broad, covering not just plans or programmes prepared by an environment ministry, but also sectoral plans (transport, energy, tourism etc) where these have significant environmental implications. Though the Convention is less prescriptive with respect to public participation in decision-making on plans or programmes than in the case of projects or activities, the provisions of Article 6 relating to reasonable timeframes for participation, opportunities for early participation (while options are still open) and the obligation to ensure that "due account" is taken of the outcome of the participation are to be applied in respect of such plans and programmes. Article 7 also applies, in more recommendatory form, to decision-making on policies relating to the environment.

¶ *General rules and regulations:* Article 8 applies to public participation 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. Although the Convention does not apply to bodies acting in a legislative capacity, this article clearly would apply to the executive stage of preparing rules and regulations even if they are later to be adopted by parliament.

Access to Justice

The third pillar of the Convention (Article 9) aims to provide access to justice in three contexts:

- review procedures with respect to information requests;
- review procedures with respect to specific (project-type) decisions which are subject to public participation requirements;
- challenges to breaches of environmental law in general.

Thus the inclusion of an 'access to justice' pillar not only underpins the first two pillars; it also points the way to empowering citizens and NGOs to assist in the enforcement of the law.

Access to information appeals: A person whose request for information has not been dealt with to their satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law (the latter option being included to accommodate those countries which have a well-functioning office of Ombudsperson). The Convention attempts to ensure a low threshold for such appeals by requiring that where review before a court of law is provided for (which can involve high costs), there is also access to an expeditious review procedure which is free of charge or inexpensive. Final decisions must be binding on the public authority holding the information, and the reasons must be stated in writing where information is refused.

Public participation appeals: The Convention provides for a right to seek a review in connection with decision-making on projects or activities covered by Article 6. The review may address either the substantive or the procedural legality of a decision, or both. The scope of persons entitled to pursue such an appeal is similar to, but slightly narrower than, the 'public concerned', involving a requirement to have a 'sufficient interest' or maintain impairment of a right (though the text also states that these requirements are to be interpreted in a manner which is consistent with 'the objective of giving the public concerned wide access to justice').

General violations of environmental law: The Convention requires Parties to provide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment. Such access is to be

provided to members of the public 'where they meet the criteria, if any, laid down in ... national law' - in other words, the issue of standing is primarily to be determined at national level, as is the question of whether the procedures are judicial or administrative.

Other access to justice requirements: The procedures in each of the three contexts referred to above are required to be 'fair, equitable, timely and not prohibitively expensive'. Decisions must be given or recorded in writing, and in the case of court decisions, made publicly accessible. Assistance mechanisms to remove or reduce financial and other barriers to access to justice are to be considered.

IMPLEMENTATION AND FURTHER DEVELOPMENT OF THE CONVENTION

Although the adoption and entry into force of the Convention are big achievements, its implementation will undoubtedly be an even greater challenge. Amending national laws to bring them into compliance with the provisions of the Convention will be a major task. Ensuring that those laws are then applied effectively will be a further challenge.

Having in mind these challenges, many activities have been undertaken since the adoption of the Convention, both to promote its effective implementation and to pave the way for its further development.

The first meeting of the Signatories to the Convention took place in Chisinau, Republic of Moldova, in April 1999. The meeting adopted a work plan aimed at preparing for the first Meeting of the Parties and supporting countries in their efforts to implement the Convention. Under the work plan, three task forces were established, dealing respectively with PRTRs, GMOs and the issue of a compliance mechanism for the Convention.

A second meeting of the Signatories took place in Cavtat, Dubrovnik, Croatia, 3-5 July 2000, at which the activities of the three task forces were reviewed. It was proposed that the PRTR task force should be replaced by an intergovernmental working group on PRTRs, charged with the task of preparing a legally binding instrument on PRTRs under the auspices of the Convention, with a view to its being ready for adoption at the 5th Ministerial Conference Environment for Europe (Kiev, 2003). This proposal was accepted by the Committee on Environmental Policy at its seventh session (September 2000), and negotiations on the new instrument started early in 2001. At its eighth session (September 2001), the CEP further decided that the instrument should take the form of a protocol to the Convention, which would also be open to accession by non-Parties and non-ECE States. The negotiations are ongoing and involve active participation of both industry and environmental NGOs.

Working Groups were also established on GMOs and on compliance and rules of procedure, replacing the corresponding task forces. The former is addressing the task of further developing the application of the Convention in the field of GMOs, following the prompting in the Ministerial resolution. The Working Group on Compliance and Rules of Procedure is preparing draft decisions on these topics, both potentially involving innovations reflecting the spirit of the Aarhus Convention.

Two further task forces were established by the second meeting of the Signatories, dealing with access to justice and electronic information tools respectively.

Other activities have been undertaken to support the implementation process. An Implementation Guide on the Convention has been prepared as a joint project between UN/ECE, the Regional Environmental Center for Central and Eastern Europe and the Danish Environmental Protection Agency. The Guide, which so far has been published in English and Russian, is primarily aimed at policymakers and politicians with responsibility for transposing the Convention into their national legal systems. It aims to promote a deeper understanding of the legal meaning of the Convention's provisions. Other information materials have been developed, including a bulletin. The Convention web site has been upgraded and is regularly updated with the texts of all official documents as soon as they become available.

Efforts have been made to identify common problems and challenges in the implementation process and to support efforts to find practical solutions, especially in countries with economies in transition. To this end, several workshops on the Convention for both government officials and NGOs have been held: one hosted by the United Kingdom focussing on public participation at local level (Newcastle, December 1999); two focussing on the needs of the five Central Asian countries (Turkmenistan, May 2000 and Tajikistan, June 2002) and two on those of the South Caucasus region (Georgia, December 2000 and Armenia, November 2001).

The first meeting of the Parties, which as mentioned will take place in October 2002, is expected to make a number of fairly crucial decisions which will set the path for the coming years, laying down the institutional architecture of the Convention as well as taking steps forward on various substantive issues:

- The rules of procedure, normally a fairly routine item in such an agenda, are expected to include innovative provisions regarding the participation of NGOs in the Convention bodies, including possibly an NGO presence in the Bureau of the Meeting of the Parties, at least in an observer capacity, and to require transparency in the processes under the Convention.
- The envisaged compliance mechanism is expected to be open to consideration of complaints from the public and NGOs about non-compliance, with a compliance committee consisting of independent experts.
- The Meeting is expected to confirm the CEP's decision to prepare a PRTR Protocol and to take over responsibility for its preparation from the CEP.
- It is expected that guidelines on applying the Aarhus principles in the specific field of GMOs will be adopted. There is also likely to be a debate on whether an amendment to the Convention is required to strengthen the requirements for public participation in the field of GMOs.
- The Meeting is expected to support the establishment of a clearinghouse mechanism and a capacity-building service by UNECE in collaboration with UNEP.
- The Meeting is expected to adopt an interim voluntary scheme of financial arrangements and to commit to discussing longer-term financial arrangements at a future meeting.³

The meeting will be held at Ministerial level and is expected to feature a high-level panel discussion focussed on the theme of effective implementation of the Convention and touching on issues such as the link with human rights, poverty and the environment and the outcome of the World Summit on Sustainable Development (WSSD).

³ These expectations are based on the current stage of discussions in the preparatory process. It should be emphasized that final decisions will only be taken by the Meeting and that therefore none of these outcomes is

RELEVANCE OF THE CONVENTION IN A GLOBAL CONTEXT

In conclusion, the Aarhus Convention is widely accepted to be the leading example of implementation of principle 10 of the Rio Declaration on Environment and Development. Although it is a regional instrument, its global significance is widely recognised. The United Nations Secretary-General Kofi Annan has described it as the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations [whose] adoption was a remarkable step forward in the development of international law . Mary Robinson, UN High Commissioner for Human Rights, has stated that the Convention is a remarkable achievement not only in terms of protection of the environment, but also in terms of the promotion and protection of human rights .

The global relevance of the Convention is further enhanced by the fact that it is open for accession not only by ECE Member States but also by other States which are members of the United Nations.

Thus the Convention may be of interest to States outside the ECE region in a number of ways: as an instrument to which such States might eventually accede, as an inspiration for developing a similar instrument in other regions or as a model for development of national legislative frameworks. It could also serve as a valuable reference point if there were a decision, either at WSSD or subsequently, to develop a global instrument, either binding or non-binding, on procedural environmental rights.