

## **IMPROVING INTERACTION WITH CITIZENS**

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This paper provides background information on the possible use of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) for managing participation in sustainable development, it indicates the challenges of bringing this tool into a broader sustainable development perspective, and discusses how the Convention could be expanded and the limits or impediments to doing so. Finally, the paper discusses methods and possibilities for broader stakeholder involvement in decision-making on sustainable development policies, and gives some preliminary suggestions for developing criteria for assessing a country's performance concerning public participation on sustainable development policy making, with a view to developing a possible checklist for performance in the field.

### **Background**

The Aarhus Convention is a new and unique international agreement which provides the public with rights of access to information, participation in decision-making, and access to justice in environmental matters; it also prescribes obligations for government officials to implement those rights.

The Convention was developed within the framework of the United Nations Economic Commission for Europe (UNECE), with strong NGO participation between 1996-1998. The UNECE region includes 55 countries from Europe and North America. The Convention was adopted and opened for signature at Aarhus, at the 4th Environment for Europe Conference of European Ministers for environment, in June 1998. To date, 39 countries and the European Union have signed it, and 17 countries have ratified or acceded to it. It is open for accession to other non-ECE countries as well. The Convention entered into force on October 30, 2001. The high numbers of signatures, ratifications and accessions, the relatively short time within which the Convention entered into force and the

substantial changes in the national legislative and institutional framework in the ECE countries to meet the Convention's requirements all demonstrate the importance these countries attach to this instrument, as well as their commitment to its implementation.

Considered a model of environmental democracy, the Aarhus Convention took root in Principle 10 of the Rio Declaration and in other earlier international efforts.<sup>1</sup> In his recent message on the occasion of entry into force of the Convention, the Secretary-General of the United Nations, Kofi Annan, called it « the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations. » He went on to say that : « Its adoption was a remarkable step forward in the development of international law as it relates to participatory democracy and citizens' environmental rights. Its entry into force today, little more than three years after it was adopted, is further evidence of the firm commitment to those principles of the Signatories -- including States in Eastern Europe and Central Asia, whose role in this process clearly demonstrates that environmental rights are not a luxury reserved for rich countries ... And we must use next year's World Summit on Sustainable Development to strengthen our commitment to environmental rights -- not only in Europe but throughout the world. »<sup>2</sup>

The Aarhus Convention offers an international legal framework for access to information, public participation in decision-making and access to justice in environmental matters. Its scope is broader than strictly the environmental sector, as we will see below. With the Convention, a new opportunity opens up: to use it for decisions within 'environmental matters' *and* to expand it to other areas, including, for example, health, economy, social matters and more specifically, sustainable development policies. We will examine the challenges and limitations of such an effort.

### **How can the Aarhus Convention be used for managing participation for sustainable development?**

The Convention's objective, scope, definitions and articles orient us as to what 'environmental information' access is provided, what type of decision-making is covered, who is entitled to participate, and when and what access to justice is given to the public under this instrument.

Novel among the environmental conventions, Aarhus goes somewhat beyond what have been strictly understood as 'environmental matters' and refers not only to a

basic right of every person « to live in an environment adequate to his or her health and wellbeing » but also to a conceptual framework where the rights of « present and future generations to live in an environment adequate to his or her health and wellbeing » are to be secured. This we can take as a reference to the concept of sustainable development.<sup>3</sup>

The Convention's definitions outline the scope of environmental matters in a rather broad way. 'Environmental information' is defined as covering any information in written, visual, aural or any other material form on:

- a) the state of the elements of the environment, and the interaction among these elements;
- b) the factors, activities or measures affecting or likely to affect the elements of the environment, cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- c) the state of human health and safety, conditions of human life, cultural sites, and built structures, inasmuch as they are or may be affected by the state of the elements of the environment, or through these elements, by the factors, activities or measures referred to in subparagraph b).

The definition of 'public authority' under the Convention is also rather broad, including public authorities (government) at all levels which perform « public administrative functions under national law, including specific duties, activities or services in relation to the environment » or « having public responsibilities or functions, or providing public services in relation to the environment... »

The definition of 'public' is the same as that generally used in UN-ECE conventions, meaning one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups. « The public concerned » is put in the context of « the public affected or likely to be affected by, or having an interest in, the environmental decision-making ». It also specifically includes « non-governmental organisations promoting environmental protection and meeting any requirements under national law...deemed to have an interest ».<sup>4</sup>

The above definitions essentially encompass the scope of the Convention articles. However, each of the articles related to public participation have some further qualifications, either in their title or in their text, further specifying the scope of the instrument:

- a) Article 6, « Public Participation in Decisions on Specific Activities » covers decisions on proposed activities listed in Annex I « which may have a significant effect on the environment ». It also applies « in accordance with...national law » to those other decisions which are not listed in the Annex I but « may have a significant effect on the environment »<sup>5</sup>
- b) Article 7 applies to decisions on public participation concerning plans, programmes and policies « relating to the environment »; and
- c) Article 8, « Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments » applies for decisions on those executive regulations and other generally binding rules which « may have a significant effect on the environment ».<sup>6</sup>

The access to justice provisions of the Convention (Article 9) apply only to infringements on rights provided under Article 4, « Access to Environmental Information », and Article 6, « Public Participation in Specific Decisions ». In addition to this, Article 9, para. 3 gives members of the public the right of « access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of ...national law relating to the environment », provided « they meet criteria, if any, laid down in ...national law » of the country.<sup>7</sup>

Also, within the Aarhus Convention, the different pillars give different levels of rights for active or passive access to environmental information, decisions on specific activities, plans, programmes, policies and legislation, and justice. The Convention gives enforceable rights to the public only regarding passive access to environmental information (Article 4) and to public participation in specific decision-making (Article 6); the other provisions of the Convention prescribe obligations for the public authorities but do not give enforceable rights to the public.

In short, the scope of the Aarhus Convention covers rights of access to information, participation in decision-making « related to the environment », or which « may have a significant effect on the environment », and access to justice in certain environmental matters specified above. The phrase « which may have a significant effect on the environment » is more specific and puts higher standards and thresholds on activities or decisions in all sectors than the term « related to the environment » which is more general in nature. Also, the convention covers environmentally-related health matters.

It is evident that the Aarhus Convention can be directly applicable to other sectors and thus also for certain types of sustainable development policies which fall within the above-mentioned decision-making processes. There are certainly numerous examples of such decisions regarding sustainable development policy which also have an impact on the environment. However, decision-making on sustainable development policies can include an even broader framework than the one mentioned above. Sustainable development policies include social, economic, environmental and other aspects; the environment is only one factor among many. Sustainable development includes several sectors as well as cross-sectoral activities, promoting interaction and integration among these sectors. Thus there might be activities or decisions constituting sustainable development policies not expressly addressed by the Convention's language.

Nevertheless, in the cases of both the environment and sustainable development, the Aarhus Convention can be a basis for developing a framework for managing public participation concerning decision-making on sustainable development policies. Doing this would also require examining the limitations and challenges of using the Convention in a broader sense and expanding its scope substantially to include other sectors or cross-sectoral activities without an evident link with environment. The expansion of the scope of the Convention would require opening it up and applying "sustainable development matters" in a broader sense or at least on "matters related to sustainable development policies" while using its provisions regarding public participation or developing them further.

### **What type of decision-making is covered by sustainable development policy making?**

To discuss limitations and challenges, we need to closely examine what kind of decision-making would actually be included in the category of sustainable development policy. Decision-making on sustainable development policies most probably covers a broad range of efforts on the strategic level (above the project level), and might include decisions on the development and implementation of strategies, policies, plans, programs, and legislation on sustainable development. Also included would be efforts influencing different sectors individually and/or different cross-sectoral activities, with the ultimate aim of achieving sustainable development.

The nature of the decision-making, while above the project level, might eventually also lead to project-level development when it comes to implementing strategic-level decisions, since it is « setting the framework for future development

consent ». It could also cover different levels of decision-making on sustainable development including international, national, regional and local level decisions. (This paper will address only the national and sub-national levels.)

The most important limitation is that presently, very few international or national legal instruments cover decision-making above the project level and none gives enforceable rights for public participation. The Aarhus Convention and the Espoo Convention on Environmental Impact Assessment in a Transboundary Context only cover project-level decision-making by enforceable rights for public participation, and do not cover decisions on plans, programmes, policies and legislation. Each of these instruments addresses only those decisions « related to the environment », which « may have a significant effect on the environment ».

Another serious limitation, however, is the substantial resistance to including public participation (with strong and enforceable public participation rights) in strategic level decision-making. Each of the above-mentioned instruments lacks the access to justice rights for the strategic decision-making level.

The recently adopted Directive no. 2001/42/EC « On the Assessment of the Effects of Certain Plans and Programmes on the Environment » (SEA Directive) of the European Union, which will have to be transposed into national legislation by the EU Member States within 3 years, includes certain access to information and public participation for certain plans and programmes « on the environment ». However, it is limited compared to the Aarhus Convention standards regarding public participation rights, and does not include access to justice rights.

A new international legal instrument, a Protocol on Strategic Environmental Assessment (SEA) is currently being negotiated under the Espoo Convention in the UNECE framework; it will be open to non-ECE countries as well and plans to include explicit rights for access to information and public participation in decision-making on plans, programmes, policies or legislation. The new instrument, which builds on the EU Directive but most probably will also go beyond it, will be ready for signature at the Environment for Europe Conference to be held in Kiev in Spring 2003. The scope of the instrument, as well as the access to information, public participation and especially the access to justice provisions for the enforcement of these rights are still unclear. However, both the EU instrument and the future international instrument on SEA include or plan to include as their objective (in addition to the high-level protection of the environment) the integration of environmental considerations into strategic decision-making in other sectors and the promotion of sustainable development.<sup>8</sup>

There are a few countries in the West as well as in the Central and Eastern Europe region where the use of such an instrument is required on a mandatory or recommendatory basis and where public participation on strategic level decisions are to some extent also covered by legal or non-binding requirements. Examples include among others Finland, Norway, the Netherlands, US, Canada, Australia and recently, Slovakia, Czech Republic and Poland, where a certain level of strategic decision-making is mandatory and there is some level of legally required public participation. There are also countries (for example, Hungary, Slovenia, Estonia) where substantial good practices have been developed for involving the public in such decisions through ad hoc public participation mechanisms or traditions. Though these good practices are also very valuable, in the absence of a mandatory basis there are no guarantees for their enforcement.

The Strategic Environmental Assessment Directive and the future Protocol could be a very efficient tool for sectoral integration, and thus could be a valuable mechanism to ensure progress towards sustainable development, along with the extended use of the Aarhus Convention principles. If synergies could be built between these instruments - and provided that the SEA Protocol could be formulated strongly enough in this respect so as to make up for the omissions of the SEA Directive - they could complement each other and could ensure proper public participation at the level of strategic decision-making. They could also ensure that the sustainable development considerations along with the environmental considerations are integrated at a very early stage of decision-making when the options for development consent are still open. In addition to this, the legislative, institutional framework and practices regarding these matters at the national level need to be improved.

To achieve the above goals, the following is recommended:

- 1) to use the existing legal instruments at the international and national levels, including the implementation of the Aarhus Convention, the implementation of the EU Directive on SEA for EU Member States and candidate countries, and existing legislation at the national level to cover to the greatest extent possible strategic decisions on sustainable development policies with strong public participation rights.
- 2) to influence the current drafting process of the SEA Protocol, as well as the development of new national legislation in this direction, and incorporate in both this instrument and the national level instruments more specific legal rights

for the public for access to information, participation in decision-making and access to justice regarding strategic level decisions.

- 3) to promote the development of a similar tool for the assessment of strategic decisions strictly on sustainable development policies which would go beyond the integration of environmental considerations. Such instruments now exist in only a few countries (the UK, Canada, Belgium, the Netherlands, and Italy, among others)<sup>9</sup>.
- 4) to promote the development of good practices for public involvement in decisions on sustainable development policies based on best practice models, for example through development of best practice guidelines for public participation which could help in establishing such practices in different countries. However, this approach would not have legal certainty or guarantee participation.

### **How should we manage public participation in decision-making on sustainable development policies? Which stakeholders should be involved and in what way?**

The basic underlying principles for public participation include transparency, democratic governance, and a commitment to giving citizens a say in decisions which affect them, are likely affect them or in which they may have an interest.

The Aarhus Convention, as well as some other UNECE legal instruments, many of the EU directives, and the national legislation of most of the European countries usually make a distinction between the « public » and the « concerned public ». While they provide access to environmental information to everyone, project-level participation is only provided for the « concerned public ». According to the Aarhus Convention, for example, this is a subset of the public limited to those « affected or likely to be affected by or having an interest in the environmental-decision-making ». At the same time, the « concerned public » which in this case also includes the NGOs promoting environmental protection « and meeting any requirements under national law », have very strong and enforceable participation rights which are detailed in Article 6 of the Convention.

As a rule, the more specific the legal requirements regarding the rights of the public and obligations of the authorities, the more specified is the « public » who can participate.

The more specific rights and obligations in the Aarhus Convention include the following:

- the right to be notified and the content of the notification,
- the time and content of the relevant information to be provided,
- procedures and rights for the public to submit, in writing, or as appropriate, at a public hearing or enquiry any comments, information, analyses, opinion that it considers relevant to the proposed activity, and
- legal guarantee that due account is taken in the final decision of the outcome of the public participation.

There are also provisions which use the term « public » instead of « public concerned ». These provisions sum up the general principles for public participation, which are or can be relevant and applicable to all types and levels of decision-making:

- reasonable time-frames for public participation for the different phases;
- sufficient time for informing the public to prepare and participate effectively during the decision-making;
- early public participation when options are open and involvement can be effective;
- prompt notification of the public regarding decisions;
- accessibility to the text of the decision along with the reasons and considerations on which the decision is based.<sup>10</sup>

At the more strategic level, the Aarhus Convention has two different approaches:

Concerning plans and programmes, it builds on the general provisions of Article 6, making sure that the general principles and elements of public participation described above are respected. There is a legal obligation on the part of the authorities to « make appropriate practical and /or other provisions for the public to participate » but a great flexibility is allowed regarding how participation will actually be managed (no specific procedures are established). Furthermore, the Convention also leaves it to the relevant public authority to identify the public « which may participate ».

On the other hand, for policies and legislation, the legal requirement is rather vague, prescribing only « to the extent appropriate, each party shall endeavor to provide opportunities for public participation ». For decisions on the preparation of executive regulations and/or generally applicable legally binding normative instruments, obligations are even weaker. Parties are only required to « strive to promote effective public participation at an appropriate stage, and while options are

still open .» The text includes recommendations for a few general principles and elements which leave up to the authorities how they will provide for public participation. In both of these cases, the general public can participate; however, the rights and procedures are not very specific or strong. The articles and provisions regarding public participation at strategic level decision-making in the Aarhus Convention drafting process were strongly criticised by the NGO community as inadequate.

Decision-making on sustainable development policies, as seen in the previous section, must first be addressed at a strategic level in the form of sustainable development strategies, policies, programs, or plans, legislation. Here, depending on the level and type of decision-making, decisions can affect the public in general (or some specific subset of the public) and NGOs at national, regional or local levels.

A decision on a national sustainable development strategy, a sustainable transport policy or sustainable energy policy would outline the future sustainable development strategy for a whole country (or the development of certain sectors might affect everyone in the country), but it might be technically very difficult to involve everyone in the decision-making process. Everyone should have the opportunity to know about such upcoming decisions in the early phases of decision-making, although some will choose not to participate. It is important, then, to have a practical mechanism which allows for participation of all those affected and interested.

For regionally or locally-oriented decisions such as a sustainable development program or plan for a certain region or community, it might be easier to organise the participation of everyone who is affected, may be likely to be affected or who may have an interest. In this case the organisation of public involvement might be similar to the mechanisms described in Article 6 of the Aarhus Convention for the project level. As a minimum, we can suggest that more specific participation rights and procedures should be applied when the decision-making level is closer to the « concerned public ». A number of decisions could be made at the community level, rooted in direct citizen initiatives, put forward by citizens as community development plans or programs.

Although there is obvious merit in involving the public at large in discussions on important higher-level strategic decisions, the notion of completely open public input in such decision-making processes still meets with some resistance. The usual arguments against broad public involvement include the difficulties of involving

and informing everyone, collecting comments and answering all who submitted comments, the length of the process delaying the final decision, costs, etc. These are often seen as more significant than the advantages of broad public involvement and support.

At the moment, standard practice in many countries is to invite NGOs or so-called major groups to make comments. But in many countries even their participation is limited to ad hoc consultations at a late stage of decision-making. Inclusion of NGOs often takes place without any procedural requirements or legal guarantees for access to information, participation and access to justice, and without the opportunity to challenge decisions. This process can be improved by following or building on the Aarhus Convention model, or by using the good practices of countries such as Denmark, Norway, the Netherlands, Poland, Czech republic and Hungary where there are legal or ad hoc mechanisms to involve the public and the NGOs in decision-making at strategic level through various methods of regular public consultations, meetings or through other forms of public input which in this respect go beyond the current requirements of the Convention.

The following principles could guide public involvement in such decision-making processes:

- define the « public » which participates as broadly as possible;
- begin public participation at an early stage when all options are open;
- effectively notify potential participants;
- provide sufficient time for comments;
- make all relevant information available and accessible throughout the process, whenever it becomes available;
- organise access to information, notification of public and the gathering of comments in a coherent manner through a variety of media, including electronic tools ;
- ensure due consideration of participants' contributions; the public should get feedback on how comments were taken into account, in a form that includes the reasons and justification of the decision made;
- provide the opportunity to challenge decisions; if not in court, then at least provide the opportunity for a reconsideration.

A few of the methods to inform and involve the broader public, include:

- to make the necessary information available and accessible for everyone both actively and passively, early in the drafting phase, when all options are still open;

- to provide regularly, throughout the decision-making process, all the relevant information to those who participate and to those who do not participate but would like to be informed;
- a mixed approach wherein the « public » which should participate is identified and recruited by relevant public authorities and another mechanism leaves open the possibility of participation for members of the public who were not deliberately invited to participate. This mechanism is known as the open notification or lobby list system, and is managed by the public authorities; anyone can request to be on the list and then receive information and submit comments or otherwise participate ;
- notification and recruitment of NGOs with relevant experience and expertise; NGOs can also be asked to help notify and involve other relevant stakeholders;
- various methods for notification and participation, including the possibility of dissemination/information workshops, media events, public hearings or public meetings where the interested public can submit comments, including through electronic channels, in written or oral form, etc.

### **What criteria can be developed for assessing and evaluating a country's performance in the field of public participation in sustainable development policy-making?**

After considering the possibilities for public participation in decision-making on sustainable development policies, and the experiences or the extended use of the Aarhus Convention, we can propose a few general questions useful for developing a method of assessing and evaluating a country's performance in this area. Generally, criteria should be able to assess a country's legislative framework, its institutional background for fulfilling obligations, and how its legal obligations are implemented in practice.

In developing a method for participation, we should answer the following :

- what forms of access to information, public participation in decision-making and to justice is provided for the different levels of decision-making on sustainable development policies?
- is there any direct participation by the public or NGOs in decision-making or advisory bodies which are responsible for decision-making on sustainable development policies?
- are there any rights covering public access to information, public participation in decision-making and access to justice or opportunities to

challenge such decisions provided by the national legislation of the country?  
If so, what are they?

- are there any legal obligations concerning public authorities responsible for managing access to information, public participation in decision-making and access to justice for the public? If so, what are they?
- what are the practices of the different institutions at the executive and parliamentary level and at different levels of governance to involve the public in decision-making, and what opportunities are there for access to justice or to challenge the decisions at the various levels of decision-making on sustainable development policies?
- who is the « public » that is notified and involved in the different types of decision-making?
- is the general public informed and involved in the different types of decision-making, in addition to NGOs and major groups?
- at what stage is the public notified about upcoming decision-making?
- what is the method for notifying and informing the public before decisions are made?
- what information is made available and at what stage of the decision-making process?
- what are the opportunities for influencing the decision-making process at important stages; what opportunities are there to comment, submit proposals, etc.?
- how are the public comments taken into consideration and what is the method of collecting and assessing them?
- are the reasons for the decision given, indicating how the main comments were taken into account?
- is there prompt information/feedback provided to the public about the decision?
- what are the opportunities to challenge the decision?

In addition to evaluating such criteria, countries could be asked to identify and describe examples of good and bad practices they have encountered, through which more exact practical information could be collected on the implementation of public participation in decision-making.

The evaluation of a country's performance can be based on answers given both by the relevant authorities as well as by members of the public/NGOs and independent experts. The evaluation should ideally take place on a regular basis, at least every 3-4 years.

## NOTES

<sup>1</sup> See paper « Public Participation and the Role of NGOs in the Aarhus Convention process. Case Study for OECD/PUMA work on « Strengthening Government Relations with Civil Society » prepared for PUMA by author of this paper, which describes the roots of the Aarhus Convention.

<sup>2</sup> Statement of the United Nations Secretary-General. What People Are Saying About the Aarhus Convention? Compendium of Statements on the entry into force of the Aarhus Convention, October 30, 2001, prepared by the UNECE Secretariat. Also available at the web site at: [www.unece.org](http://www.unece.org)

<sup>3</sup> Article 1, Objective of the Convention says: « In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention. » (Aarhus Convention, United Nations, New York and Geneva, 1999, p. 4.)

<sup>4</sup> See Definitions, Aarhus Convention, Article 2, par. 2, 3, 4 and 5, p.4.

<sup>5</sup> Article 6, par.1. (b)

<sup>6</sup> See Article 6, « Public Participation in Decisions on Specific Activities », Aarhus Convention, Article 6, p. 7.; Article 7, « Public Participation Concerning Plans, Programmes and Policies Relating to the Environment », Aarhus Convention, p.8; and Article 8, « Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments » Aarhus Convention, p. 8.

<sup>7</sup> Access to Justice, Article 9, Aarhus Convention, p. 9.

<sup>8</sup> Directive no. 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment, Luxembourg, 27 June, 2001, Article 1, Objective, p. 7. Alternative text for the Protocol on Strategic Environmental Assessment as included in Document MP.EIA/AC.1/2001/3, MP.EIA/AC.1/2001/5, Article 1, Objective, p. 2.

<sup>9</sup> See « Organisational approaches to sustainable development within the executive; some examples », Sustainable Development: Critical Issues, Chapter 4. Institutions and Decision-making, OECD, 2001, p. 107 - 109.

<sup>10</sup> See, Article 6, Public Participation in Decisions on Specific Activities, Aarhus Convention, p. 7-8.