

THE AARHUS CONVENTION

Celebrating Twenty Years Promoting Environmental Democracy

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**A background paper prepared by the European Environmental Bureau
and the Italian Ministry for the Environment, Land and Sea**

INTRODUCTION

Almost twenty years ago, governments from more than 50 countries from the United Nations Economic Commission for Europe (UNECE) region, assembled in the Danish city of Aarhus for the Fourth Ministerial 'Environment for Europe' Conference, adopted a new international treaty guaranteeing key procedural environmental rights for the public: access to information, public participation and access to justice.

The adoption of the Aarhus Convention was heralded as a major breakthrough in international law. The then UN Secretary General Kofi Annan described it as "the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations".

Today, the Convention has 47 Parties covering the vast majority of countries in Europe, Caucasus and Central Asia. Its governing body, the Meeting of the Parties, has held six ordinary sessions and adopted far-reaching decisions and declarations. The Convention has had a positive transformative effect on domestic laws and practices throughout the region, even if its implementation is far from perfect.

In this short paper, we trace the Convention's evolution over those two decades and summarise its achievements.

Before the beginning...

In 1992, world leaders met in Rio for the UN Conference on Environment and Development, known as the Earth Summit. Among the outcomes of the Summit was the Rio Declaration on Environment and Development, whose Principle 10 begins with the words "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level." The text of Principle 10 went on to encompass in a single paragraph the notions of access to information, public participation and access to justice, thereby securing their place as part of agreed international policy or soft law.

Closer to home, Principle 10 was taken up within the 'Environment for Europe' process, a pan-European process launched in 1991 that brought together Environment Ministers from the two halves of a previously divided continent in a series of Ministerial Conferences. The theme of Principle 10 was appealing to the newly emerging democracies in the east as well as to more established

western democracies, the former bringing a certain idealism, the latter more practical experience. Negotiations on a set of non-binding guidelines began in early 1994 and led to the adoption of the Sofia Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making at the Third Ministerial 'Environment for Europe' Conference held in Sofia in October 1995.

Civil society organisations were actively involved in the 'Environment for Europe' process from the start and leading up to their adoption had advocated for the Guidelines to be followed by a legally binding instrument (e.g. NGO Declaration from Groznjan, June 1995). This call was also taken up by others, e.g. GLOBE Europe, the European Parliament's Environment Committee and the European Greens. A number of governments saw merit in the proposal, notably Denmark which would host the next 'Environment for Europe' Conference. So the Ministers' decision to adopt the Sofia Guidelines was accompanied by a decision to explore the possibility of a legally binding instrument on the topic.

The negotiations

In January 1996, the UNECE Committee on Environmental Policy established the mandate for an ad hoc working group to conduct the negotiations for a new instrument, to be chaired by Willem Kakebeeke, a senior official from the Netherlands. The negotiations took place from June 1996 to March 1998 over ten sessions of the working group. For most of the negotiating period, the EU (then called the European Community) did not have a negotiating mandate and its Member States intervened directly in the negotiations, often with divergent positions. Towards the conclusion of the negotiations (and even more subsequently), there was increasing EU coordination and presentation of a single EU position. The US and Canada opted out of the negotiations at an early stage. Russia and Turkey played an active role, with many of their textual proposals being accommodated by the other negotiating parties, but did not sign or accede to the Convention.

The level and depth of NGO engagement in the negotiations, while following a tradition established in the 'Environment for Europe' process, was unprecedented in the context of the formulation of an international environmental treaty and possibly any legally binding treaty. Even before the formal negotiations began, NGOs were represented in a small 'friends of the secretariat' group that assisted the secretariat with preparing draft elements for the Convention text. Thereafter, environmental NGOs were able to be involved not just in the plenary but in every small drafting group. As the NGOs had the relevant experience and would end up being, on behalf of the public, the main 'clients' of the Convention, their active participation was not only justified from a principle standpoint but contributed materially to the relevance and robustness of the text.

The Convention was adopted on 25 June 1998 in Aarhus, Denmark, within the framework of the Fourth Ministerial 'Environment for Europe' conference. The same day, it was signed at the Conference by 35 States and the European Community, with four more States signing in December 1998 before the Convention was no longer open for signature.

The early years

Entry into force: Following the Convention's adoption, there were some concerns that the text of the Convention, while falling short of what NGOs had wanted, would prove too ambitious to be ratified by the required number of governments (sixteen) to enter into force. These fears proved

unfounded: the momentum generated during the negotiations continued and the Convention entered into force in October 2001, little more than three years after its adoption. It is noteworthy that the majority of the first sixteen States whose ratifications triggered the entry into force were from Central and Eastern Europe and Central Asia. Western European countries were slower to ratify, being keen (and often legally required) to ensure that their implementing legislation was in place before ratifying, whereas this was not legally a requirement for many of the countries to the east of the region.

The **first session of the Meeting of the Parties (MoP-1)** took place almost a year later, in October 2002, hosted by the Italian Government in the ancient town of Lucca. While all MoPs are important, MoP-1 was particularly important because it established the institutional ‘architecture’ of the Convention, notably:

Rules of procedure: all international treaty bodies need rules of procedure (RoPs). The Aarhus RoPs are distinguished by the extent to which they reflect the Aarhus principles, with specific provisions on the openness of meetings, public accessibility of meeting documentation and NGO participation in the Bureau (rules 7, 11 and 22).

Compliance mechanism: while it was not unusual for multilateral environmental agreements to have compliance review processes in place, the Aarhus compliance mechanism established at MoP-1 was ground-breaking in its combination of an independent compliance review body (as opposed to a body made up of representatives of the Parties) with a so-called ‘public trigger’ whereby any member of the public could trigger a review of compliance through a communication to the review body.

Reporting mechanism: the reporting mechanism established at MoP-1 was also innovative through its incorporation of Aarhus principles, with the relevant MoP decision requesting Parties to prepare their reports through a transparent and consultative process involving the public.

Other mechanisms and procedures: the MoP agreed to establish, among other things, an intersessional body, the Working Group of the Parties; a voluntary financing mechanism; a clearinghouse and capacity building mechanism; and procedures for preparing, adopting and monitoring work programmes.

Alongside the work to put in place these key structures, the Parties and Signatories were also active in addressing certain important thematic issues from an early stage:

Pollutant release and transfer registers (PRTRs): building on the references to pollution inventories in Arts. 5(9) and 10(2i) of the Convention, negotiations towards a separate legal instrument on this topic began in 1999 and culminated in the adoption of the Kyiv Protocol on Pollutant Release and Transfer Registers in May 2003 within the framework of the Fifth Ministerial ‘Environment for Europe’ Conference. The Protocol requires its Parties to establish publicly accessible registers containing information on releases and transfers of a specified range of pollutants from a specified range of activities, maintained through mandatory reporting by the owners or operators of the facilities carrying out the activities. The Protocol entered into force in October 2009 and as of 1 May 2018 had 36 Parties. Apart from its first session, the sessions of the Protocol MoP have been held back to back with sessions for the Convention MoP.

Genetically modified organisms (GMOs): even as the Convention was being adopted in June 1998, the accompanying Resolution (para. 15) called on the Parties at their first meeting to further develop the application of the Convention to the deliberate release of GMOs, thus implicitly recognising that the requirements in Art. 6(11) in relation to public participation in decision-making on GMOs were insufficiently precise. This led first to the adoption of non-binding guidelines at MoP-1 and then to the adoption of an amendment to the Convention at MoP-2 (Almaty, May 2005) establishing a new Art. 6 bis and Annex I bis with more precise provisions. A decision at MoP-3 (Riga, June 2008) on the interpretation of the provision in Art. 14 on the procedure for entry into force of amendments deemed that only ratifications of amendments by the specific Parties that were Parties at the time of the adoption of the amendment count towards meeting the target for entry into force of the amendment. Accordingly, while as of 1 May 2018 the GMO amendment had been ratified by 31 Parties, it still requires two more ratifications from those Parties that were Parties at the time of its adoption before it will enter into force.

Application of the Aarhus principles in international forums: the fact that many decisions are taken at intergovernmental level and the concern that this should not lead to a lack of government accountability to the public were discussed during the Convention negotiations. This resulted in Article 3(7) which requires each Party to promote the application of the principles of the Convention in (to paraphrase) international forums relating to the environment. This provision provided the basis for developing the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, adopted at MoP-2 in May 2005. This topic was followed first by an Expert Group, then by a Task Force and in more recent years directly by the Working Group of the Parties. It has included surveys of how various international forums handle issues of transparency and participation and how Parties implement Article 3(7) and the Almaty Guidelines as well as a compendium of good practices.

Geographical scope of Aarhus

The number of Parties to the Convention has grown steadily but more slowly as the years have progressed and the more obvious candidates have already become Parties. A decade after the adoption of the Convention (MoP-3, Riga, June 2008), there were 41 Parties, with the total increasing to 47 through the second decade. A number of large UNECE Member States remain non-Parties, notably Russia, the US, Canada and Turkey.

Article 19(3) of the Convention allows that UN Member States from outside the UNECE region may also become Parties to the Convention upon approval by the MoP. To date this has not happened, despite an objective set in the first Strategic Plan of the Convention (2009-2014) that the Convention would have non-UNECE Parties by 2011. A procedure for non-UNECE countries to accede was elaborated through a decision at MoP-4, which tended to accentuate the difference between UNECE Member States and non-UNECE Member States rather than facilitating or encouraging accession by the latter. The only non-UNECE State that has shown persistent interest in acceding to the Convention is Guinea Bissau.

In the meantime, countries from Latin America and the Caribbean (LAC) have negotiated a Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters that was adopted in March 2018 and will be open for signature from September 2018 by the 33 countries of the region. The Aarhus secretariat and various Aarhus stakeholders have contributed expert

support to the process. While the new regional agreement reduces the likelihood that any countries in that region would accede to the Aarhus Convention, it should help to achieve more effective implementation of Principle 10 in that part of the world.

Role of European Union

The fact that the EU, as distinct from its Member States, is a Party to the Convention in its own right merits particular mention. This brings added value for at least a couple of reasons. If EU Member States are in violation of the Convention, they are (or should be) also in violation of EU law, which carries more significant sanctions. Furthermore, the fact that the EU is a Party makes the Convention's obligations applicable to the EU institutions, to the extent that these are covered by the Convention's definition of 'public authority'.

As the EU has more or less doubled in size since the negotiating period, its role within the Convention has become even more significant. The fact that it needs to coordinate its positions has had a significant impact on the dynamics of the intergovernmental process and the fact that that coordination takes place behind closed doors has led to criticisms from the NGO community of a lack of transparency concerning the positions of individual EU Member States – in contrast to the positions of non-EU Parties who intervene individually in the plenary. The EU has tried to respond to the NGO concerns by routinely meeting with NGOs in advance of and during the intergovernmental meetings – a gesture which is appreciated by the NGOs but which has not addressed the concern about transparency.

Role of NGOs

The tradition of active NGO participation established during the negotiations has continued up to the present, coordinated by the European Environmental Bureau within the framework of the European ECO Forum. The secretariat consistently provides financial support from the Convention Trust Fund to enable an NGO presence at all meetings of the MOP and subsidiary bodies. Funding for NGO coordination activities has been constrained in recent years, limiting the possibilities for more proactive engagement in promoting the Convention's implementation.

Financing the Convention

The voluntary scheme of financial contributions established at MoP-1 in 2002 was supposed to be an interim one that would be replaced by a more permanent scheme that would meet "the need for stable and predictable sources of funding and a fair sharing of the burden". However, at successive MoPs it has proved impossible for the Parties to agree upon a more permanent and less voluntary scheme. Thus the original scheme, with some small adjustments over the years, remains in place, and the goal of a stable, predictable and equitable scheme remains elusive.

The implementation challenge

From the outset, it was recognised that Parties and prospective Parties would benefit from support in implementing or preparing to implement the Convention. A number of international and regional bodies joined forces with the secretariat to coordinate capacity building activities, notably the REC for CEE which ran several programmes in Central, Eastern and South Eastern Europe, OSCE which spearheaded the spread of Aarhus Centres, UNITAR and UNEP, as well as the European ECO Forum, to mention a few.

Implementation of the Convention remains a significant challenge for many Parties, as reflected in the number of communications alleging non-compliance that have been submitted by members of the public to the Compliance Committee and the significant proportion of those that have resulted in findings of non-compliance. This does not necessarily mean that the implementation challenges for the Aarhus Convention are much worse than with other environmental treaties: if other treaties had similar compliance mechanisms, then it is highly likely that more cases of non-compliance with those treaties would come to light. But it does show that there is much work to do.

Whereas the first decade since the adoption of the Convention saw the MoP adopt a number of new obligations for or recommendations towards Parties, in its second decade, Parties have been keen to put emphasis on implementation. For example, the Strategic Plan for 2009-2014 states “We see it as our mission .. [a]s a first priority, to work towards full implementation of the Convention ...”.

This emphasis gives the compliance mechanism a particular importance. Up until MoP-5, all findings of non-compliance by the Compliance Committee had been endorsed by the MoP. This practice was challenged for the first time at MoP-6 when the EU opposed MoP endorsement of a Committee finding that the EU itself was in non-compliance, preferring instead that the MoP would only take note of the finding. No other Party or stakeholder supported the EU position, with many being concerned that this would weaken the status of the Compliance Committee and thereby undermine the mechanism and the Convention itself. The resulting stalemate led to the issue being postponed to MoP-7 in 2021. The EU has in the meantime started to follow up on its commitment at MoP-6 to “continue to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review, taking into account concerns expressed within the Convention”. Finding a satisfactory solution to this issue is important not only in relation to the problem at the root of the non-compliance (the insufficient possibilities for access to justice at the level of the EU institutions) but for the future health and wellbeing of the Convention itself.

Promoting Aarhus for a sustainable future

By adopting the 2030 Agenda on Sustainable Development with its 17 Sustainable Development Goals (SDGs), UN Member States took an ambitious commitment for the future. The Aarhus Convention and the 2030 Agenda share a common concern of ensuring the health and well-being of present and future generations. By enhancing transparency and accountability, the Convention plays a central role in promoting peaceful and inclusive societies, and good governance. The principles of accountability, transparency, inclusivity and the rule of law contained within SDG 16 and enshrined within the Aarhus Convention are therefore key for the implementation of all the SDGs, whether directly referred to or otherwise. The role of the Convention is critical in this regard.
