THE ANNEXES

The Aarhus Convention has two annexes. Annex I contains the list of activities referred to in article 6, paragraph 1 (*a*), to which the Convention requires Parties to apply public participation in decision-making. Annex II contains mandatory arbitration procedures that will govern Parties if they submit a dispute over the interpretation or application of the Convention to arbitration pursuant to article 16, paragraph 2.

Annex I

LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (*a*)

1. Energy sector:

   - Mineral oil and gas refineries;
   - Installations for gasification and liquefaction;
   - Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
   - Coke ovens;
   - Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors[1] (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
   - Installations for the reprocessing of irradiated nuclear fuel;
   - Installations designed:
   - For the production or enrichment of nuclear fuel;
   - For the processing of irradiated nuclear fuel or high-level radioactive waste;
   - For the final disposal of irradiated nuclear fuel;
   - Solely for the final disposal of radioactive waste;
   - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:

   - Metal ore (including sulphide ore) roasting or sintering installations;
   - Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
   - Installations for the processing of ferrous metals:
     (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
     (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
     (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
   - Ferrous metal foundries with a production capacity exceeding 20 tons per day;
   - Installations:
     (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;

(ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;

- Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m^3.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m^3 and with a setting density per kiln exceeding 300 kg/m^3.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (*a*) to (*g*):

(*a*) Chemical installations for the production of basic organic chemicals, such as:

(i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);

(ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;

(iii) Sulphurous hydrocarbons;

(iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;

(v) Phosphorus-containing hydrocarbons;

(vi) Halogenic hydrocarbons;

(vii) Organometallic compounds;

(viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);

(ix) Synthetic rubbers;

(x) Dyes and pigments;

(xi) Surface-active agents and surfactants;

(*b*) Chemical installations for the production of basic inorganic chemicals, such as:

(i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;

(ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;

(iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;

(iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;

(v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;

(*c*) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);

(*d*) Chemical installations for the production of basic plant health products and of biocides;

(*e*) Installations using a chemical or biological process for the production of basic pharmaceutical products;

(*f*) Chemical installations for the production of explosives;

(*g*) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.

5. Waste management:

- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
- Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
- Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
- Landfills receiving more than 10 tons per day or with a total capacity exceeding 25,000 tons, excluding landfills of inert waste.

6. Waste-water treatment plants with a capacity exceeding 150,000 population equivalent.

7. Industrial plants for the:

(*a*) Production of pulp from timber or similar fibrous materials;

(*b*) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (*a*) Construction of lines for long-distance railway traffic and of airports[2] with a basic runway length of 2,100 m or more;

(b) Construction of motorways and express roads;[3]

(*c*) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (*a*) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tons;

(*b*) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (*a*) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(*b*) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2,000 million cubic metres/year and where the amount of water transferred exceeds 5 per cent of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500,000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

    (*a*) 40,000 places for poultry;

    (*b*) 2,000 places for production pigs (over 30 kg); or

    (*c*) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tons or more.

19. Other activities:

    - Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;

    - Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;

    - (*a*) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

      (*b*) Treatment and processing intended for the production of food products from:

        (i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

        (ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

      (*c*) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

    - Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;

    - Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;

    - Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (*a*) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless

they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (*a*) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (*b*) of this Convention.

Notes

[1] Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

[2] For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

[3] For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

Annex I is based on the annexes relating to similar provisions in Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,[170] as amended by Directive 97/11/EEC (the "EIA Directive"), the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC).[171]

Article 6 (Public participation in decisions on specific activities) must be seen in the context of articles 7 and 8 and annex I. Articles 6 to 8 lay down the public participation part of the Aarhus Convention. The provisions of article 6 apply "with respect to decisions on whether to permit proposed activities listed in annex I". Many specific public participation provisions are triggered as soon as a proposed activity falls within the scope of annex I.

Annex I to the Aarhus Convention has 20 sections: 1. Energy sector; 2. Production and processing of metals; 3. Mineral industry; 4. Chemical industry; 5. Waste management; 6. Waste-water treatment plants; 7. Specific industrial plants; 8. Railway and airports; 9. Inland waterways and ports; 10. Groundwater abstraction or recharge schemes; 11. Works for the transfer of water resources; 12. Extraction of petroleum and natural gas; 13. Dams; 14. Pipelines; 15. Installations for the intensive rearing of poultry or pigs; 16. Quarries and opencast mining; 17. Construction of overhead electrical power lines; 18. Installations for the storage of petroleum; 19. Other activities; 20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation. It also includes two further qualifying paragraphs and three notes that define the terms "nuclear power stations and other nuclear reactors", "airport" and "express road".

The Directive on EIA contains three annexes. Annexes I and II together can be compared with the content of annex I to the Aarhus Convention. Projects within the scope of annex I to the Directive on EIA "shall be made subject to an assessment in accordance with articles 5 to 10".[172] Annex I does not group the projects into systematic sections but mentions crude-oil refineries, power stations, disposal of radioactive waste, melting of cast-iron and steel, extraction of asbestos, integrated chemical installations, motorways and express roads, ports and waste-disposal installations. Annex II to the Directive on EIA lists projects that "shall be made subject to an assessment, in accordance with articles 5 to 10, where Member States consider that their characteris-

tics so require."[173] Annex II groups 1. Agriculture; 2. Extractive industry; 3. Energy industry; 4. Processing of metals; 5. Manufacturing of glass; 6. Chemical industry; 7. Food industry; 8. Textile, leather, wood and paper industries; 9. Rubber industry; 10. Infrastructure projects; and 11. Other projects. Here we can already observe groupings similar to annex I to the Aarhus Convention, such as "energy industry" and "energy sector". Other sectors are missing in annex I to the Aarhus Convention, such as the special food industry group. Otherwise, the characteristics of the projects are very similar in annexes I and II to the Directive on EIA and in annex I to the Aarhus Convention.

Appendix I to the Espoo Convention (List of activities) can be compared with annex I to the Aarhus Convention. For instance, article 2 (General provisions), paragraph 3, of the Espoo Convention refers to appendix I. The appendix lists: 1. Crude oil refineries; 2. Thermal power stations; 3. Installations for the production of nuclear fuels; 4. Smelting of cast-iron and steel; 5. Extraction of asbestos; 6. Integrated chemical installations; 7. construction of motorways, express roads, railways and airports; 8. Oil and gas pipelines; 9. Ports and inland waterways; 10. Waste-disposal installations; 11. Dams and reservoirs; 12. Groundwater abstraction; 13. Pulp and paper manufacturing; 14. Mining, on-site extraction and processing of metal ores and coal; 15. Offshore hydrocarbon production; 16. Storage of petroleum and chemicals; and 17. Deforestation.

The IPPC Directive's annex I (Categories of industrial activities referred to in article 1) can be compared with annex I to the Aarhus Convention. Article 1 of the Directive refers to its annex I by stating that "The purpose of this Directive is to achieve integrated prevention and control of pollution arising from the activities listed in annex I". The IPPC Directive's annex I consists of six groups of activities. The first five groups, 1. Energy industries, 2. Production and processing of metals, 3. Mineral industry, 4. Chemical industry and 5. Waste management, are the same as in annex I to the Aarhus Convention. Paragraphs 2 [Production and processing of metals] and 3 [Mineral industry] are even identical in both annexes. Paragraph 4 [Chemical industry] is almost identical but the Aarhus Convention has, in addition to the text of the IPPC Directive, subparagraph (*g*), which regulates "Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances". Paragraph 6 of annex I to the IPPC Directive lists under "Other activities" various industrial plants dealing with the production of pulp from timber or other fibrous materials, the pretreatment or dyeing of fibres or textiles, the tanning of hides and skins, slaughterhouses, the disposal or recycling of animal carcasses and animal waste, extensive rearing of poultry or pigs, organic solvents and the production of carbon or electrographite. Paragraph 6 is almost identical to paragraph 19 [Other activities] of annex I to the Aarhus Convention but with minor differences, the main one being that industrial plants dealing with the production of pulp from timber or other fibrous materials and the specific production of paper and board are regulated in paragraph 7 of annex I to the Aarhus Convention. Installations for the extensive rearing of poultry or pigs are addressed in paragraph 15 of annex I to the Aarhus Convention and not in paragraph 19 [Other activities].

Three paragraphs of annex I bear special mention—paragraphs 20-22.

Annex I includes any activity not otherwise listed which requires public participation under an environmental impact assessment procedure in accordance with national legislation (para. 20). This should not be read to require the application of article 6 to any activities for which environmental impact assessment is required. The national legislation must also include public participation as a requirement in the environmental impact assessment. If the national legislation of a Party provides for a form of EIA such as ecological expertise without public participation, article 6 applies automatically only to activities listed in annex I. The applicability of article 6 to non-listed activities requires the reference to article 6, paragraph 1 (*b*).

With respect to paragraph 21, the authorities may avoid public participation only under very special circumstances if their decision concerns activities listed in annex I that are performed within various kinds of research. Research must be the primary goal of the activity and the period of the project may not exceed two years. If the research project may cause a significant adverse effect on the environment or health, article 6 automatically applies. In this context it seems that such a provision shall be implemented in line with the general obligation set out in article 6, paragraph 1 (*b*), except that this provision specifically mentions health in addition to the environment. That is, the

significant effect need not be an effect on the environment, as in article 6, paragraph 1 (*b*), but may be solely an effect on health.

Paragraph 22 of annex I applies article 6 to certain changes or extensions of activities. It takes an approach similar to that of article 7 of the Espoo Convention. The latter speaks of "post-project analysis" and the obligation to monitor activities covered for environmental impacts or factors that may result in such impacts. When a Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or where factors have been discovered which may result in such an impact, the concerned Parties are obliged to consult on further measures to be taken.

Annex II

ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(*a*) Provide it with all relevant documents, facilities and information;

(*b*) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

Arbitration is a process of dispute settlement, based on the determination of facts and law by an independent third person or persons, that results in a binding decision. As discussed above, article 16 names arbitration as one of several dispute settlement methods available under this Convention. Specifically, article 16, paragraph 2, gives parties the ability to choose between arbitration and adjudication by the International Court of Justice when non-binding methods such as negotiation and mediation are not sufficient to resolve the dispute.

While arbitration is not unique to the international context, it has been used extensively throughout the twentieth century to resolve disputes between States, international organizations, and non-State parties of different nationalities because of its ability to consider and reconcile multiple systems of law. This capacity is achieved primarily through the use of a panel structure whereby multiple arbitrators are selected, in part because of their familiarity with one or more of the legal systems of parties to the dispute. The arbitrators, functioning much like a traditional judicial body, then work together to decide the facts of the case, determine the applicability of various laws, and reach a decision. Parties entering into arbitration agree to abide by the procedures selected and the awards granted, and in practice most tend to honour this commitment.

Annex II establishes the framework under which parties can use arbitration to resolve disputes arising under the Convention. The terms of the annex are almost identical to those of several other UN/ECE conventions, including the Convention on the Transboundary Effects of Industrial Accidents and the Convention on Environmental Impact Assessment in a Transboundary Context. In practice, the point at which parties enter into arbitration is comparable to when they would seek judicial remedies. There are alternative mechanisms available, such as negotiation or mediation, that parties sometimes look into before, or instead of, arbitration. Arbitration is, thus, a process that is used when parties cannot reach an agreement independently and require an impartial decision-making body to intervene.

The scope of annex II is limited to disputes between Parties to the Convention, so arbitration with third parties, such as NGOs, is not covered. This does not mean, however, that Parties are prevented from engaging in arbitration with third parties to resolve disputes arising under the Convention. Agreement by a Party to arbitrate with a third party would not violate the terms of the Convention—in this case, the terms of annex II simply would not apply. The Permanent Court of Arbitration, an independent international organization established in 1899 by the Convention for the Pacific Settlement of International Disputes, regularly settles disputes between States and private parties and therefore has a special set of procedural rules that govern such cases. Alternatively, Parties participating in other international treaties that do not recognize third parties in the context of arbitration have extended diplomatic protection to NGOs and citizens by espousing their claims and arbitrating on their behalf.

Pursuant to paragraph 1 of annex II, once parties have decided to use arbitration, the first step in constituting a tribunal is notifying the secretariat to the Convention. Parties must indicate the subject matter of the desired arbitration and the articles of the Convention that form the basis of the dispute. In keeping with the Convention's emphasis on the active dissemination of information, the secretariat will then forward the information received to all Parties to the Convention.

Paragraphs 2, 3 and 4 stipulate the manner in which the arbitral tribunal will be formed. Pursuant to paragraph 2, a total of three arbitrators will constitute the tribunal. If there are only two parties to the dispute, each has authority to appoint one arbitrator. The third, who will serve as president of the tribunal, is to be agreed upon by the two arbitrators selected. If there are more than two parties to the dispute, parties sharing a common position appoint one arbitrator. Arbitrators selected by the parties are expected to be impartial and independent. They are not supposed to represent the interests of those parties; rather, are they usually chosen on the basis of their familiarity with the legal and cultural systems of those parties and their expertise in the subject of the dispute. The president of the tribunal is also expected to be impartial and independent. To avoid any appearance of partiality he or she may not be a national of one of the parties to the dispute, reside in any of their territories, or have prior affiliations with the parties or the case.

To ensure that arbitration is not prevented by failure to appoint the requisite arbitrators, paragraphs 3 and 4 establish several specific time-frames by which arbitrators must be chosen. Those paragraphs also outline procedures to be followed when one or more of the arbitrators is not promptly selected. If the two arbitrators selected by the parties fail to appoint a president, the Executive Secretary of the Economic Commission for Europe is authorized to designate one. If one of the parties does not appoint an arbitrator, the Executive Secretary is authorized to designate the president, who will then encourage the party to select an arbitrator or appoint one unilaterally if the party does not comply. In practice, many arbitral tribunals are established more promptly than required by law in order to expedite dispute settlement, making such intervention unnecessary.

The annex outlines some guiding principles that govern the conduct of the tribunal, although considerable discretion is left to the arbitrators to determine both the procedural and the substantive elements of the arbitral process. For example, paragraph 5 instructs tribunals to render their decisions in accordance with international law and the provisions of this Convention. But the arbitrators determine what will constitute the applicable body of international law in this context. The Permanent Court of Arbitration's rules for disputes between States provide that international law consists of: international conventions, international custom, general principles of law "recognized by civilized nations", and judicial and arbitral decisions, which shall be used as a subsidiary means to aid in determining the rule of law. This is based on a similar provision followed by the International Court of Justice. Ostensibly, the body of international law to be recognized under this Convention will be determined case by case in the drafting of procedural rules.

Pursuant to paragraph 6, the arbitral tribunal will draw up its own rules of procedure. In practice, many tribunals choose to adopt or copy by reference existing rules of procedure, such as those available through the Permanent Court of Arbitration, to the extent that those rules are consistent with the terms of the convention in question. Where necessary, tribunals then modify existing rules to comply with the terms of the particular convention. As arbitration begins to take place under this Convention, potential models for procedural rules will likely emerge. Such models may be of consid-

erable use to future arbitrators, as they will have determined mechanisms for accommodating the terms of annex II and, more specifically, the requirement that decisions should be rendered in accordance with the entire Convention. Additional guidance may emerge from the "procedural rules in the field of environmental protection" that the Permanent Court of Arbitration is developing.

Paragraph 7 of the annex specifies that the decisions of the tribunal will be made by majority vote of the arbitrators. The president's role is, thus, limited to presiding over the arbitral hearing and casting a vote equal in weight to those of the other two members. This type of voting structure is similar to that used in other conventions, such as the Convention on Biological Diversity, but differs from some procedural rules that make the president sole arbitrator when the other two arbitrators cannot agree on a decision.

Paragraph 8 instructs the tribunal to take all appropriate measures to establish the facts of the case. In practice, this usually includes gathering evidence and calling witnesses. Pursuant to paragraph 9, parties to the dispute are required to facilitate this work of the tribunal using all means at their disposal, including provision of relevant documents and assistance in obtaining witnesses and expert testimony. In the past, tribunals have found it useful to allow for presentation of views or evidence by third parties such as NGOs. The Iran-United States Claims Tribunal, for example, permitted submission of oral or written statements by any person who was not a party to a particular case if that information was likely to assist the Tribunal in carrying out its task.

Paragraph 10 requires the arbitrators to protect the confidentiality of any information received in confidence during the proceedings of the tribunal. This provision does not cover all information received; rather, it is limited to information expressly agreed upon as confidential in nature by the parties and the arbitrators. Unless such an agreement is made in advance of submission, the right to access information used in an arbitral proceeding is protected by the terms of this Convention.

Under paragraph 11, the arbitral tribunal may recommend interim protection measures at the request of one of the parties. Interim protection measures include mechanisms, such as injunctions, that require or restrict a certain behaviour on the part of one or more parties to the dispute until a final remedy is selected. Since the Convention provides that arbitrators can only recommend such mechanisms at the request of one of the parties, responsibility for conceiving of and advancing interim measures falls on that party. The tribunal is also limited in its capacity to guarantee adherence to interim measures selected. Since it has no enforcement mechanism, it may only recommend parties to implement interim measures. But, in practice, parties tend to comply, possibly out of consideration for how their cooperation could influence the final award.

Pursuant to paragraph 12, failure on the part of a party to appear before the tribunal or to defend its case does not prevent the tribunal from conducting the proceedings. A party may request that the tribunal proceed with arbitration and render its final decision without the input of the other party. As such, it would be possible for the appointment of arbitrators and the adjudication of the dispute to proceed from beginning to end without a party ever responding to another party's initial notification of the secretariat or otherwise participating.

If a responding party wishes to file a counter-claim against one or more parties initiating arbitration, such action is governed by paragraph 13. The only restriction is that counter-claims must be directly relevant to the subject matter of the original dispute being arbitrated. When parties do have a claim that meets this requirement, filing a counter-claim would presumably expedite resolution of the matter, whereas initiating a separate claim would necessitate the formation of a new tribunal and the development of new procedural rules.

The costs of arbitration are discussed in paragraph 14, which stipulates that all the expenses of the tribunal should be divided equally among parties to the dispute unless the arbitrators determine that some other payment scheme is appropriate given the specific circumstances of the case. Aside from compensation for the arbitrators, the annex does not specify what types of costs may be included. In practice, costs often include the fees of the arbitrators, including travel and other expenses; the cost of expert advice required by the tribunal; the travel and other expenses of witnesses; rental of a space in which to conduct the arbitral hearing; fees for secretarial assistance; and any fees or expenses of the secretariat or the appointing authority, who under this Conven-

tion is the Executive Secretary of the Economic Commission for Europe. The tribunal is required to keep a record of all its expenses and provide a final list of charges to the parties. It is quite common in international arbitration for tribunals to apportion costs disproportionately among parties, with losing parties covering some or all of the costs of the prevailing parties.

Paragraph 15 provides a mechanism for additional parties with a compelling interest in a dispute to become involved in the arbitral process. Specifically, it allows any Party to the Convention to intervene in the proceedings, thereby becoming a party to the case, provided that it has a legal interest in the subject matter of the dispute and may be affected by the decision rendered. While the Convention does not specify what constitutes a legal interest, it is typically interpreted as one that could form the basis of judicial proceedings. When parties intervene after a hearing has already begun, the business of the tribunal proceeds as normal. Intervening parties are not permitted to appoint additional arbitrators.

According to paragraph 16, once a tribunal has been established, it has five months to render its decision. If the tribunal finds it necessary, however, it may extend the time limit by another five months. Grounds for granting such an extension are not specified in the annex, and the tribunal has sole authority to determine when a delay is appropriate. In practice, extensions may be granted for a variety of reasons ranging from the personal circumstances of one or more arbitrators to the inability to obtain a majority vote. But whenever possible, tribunals are expected to render their decisions within the first five-month period and reserve the use of the extension for unusual or uncontrollable circumstances.

Pursuant to paragraph 17, the award granted by the tribunal is final and binding on all parties. The decision must be accompanied by a statement of reasons, which typically addresses both factual and legal explanations for the outcome of the case. Once the decision is rendered, it must be transmitted by the tribunal to all of the parties to the dispute and the secretariat of the Convention. The secretariat then forwards the information received to all the Parties to the Convention. This dissemination structure allows the Parties to keep abreast of issues involving implementation of the Convention, to track the role of arbitration in resolving disputes, to see how arbitrators interpret specific provisions of the Convention, and to develop a sense of how arbitrators might react to similar issues in the future.

Paragraph 18 addresses the possibility that a further dispute may arise over the interpretation or implementation of the award granted. In such cases, the parties to the original dispute may call upon the tribunal that made the award for further assistance. If, for whatever reason, the original tribunal cannot be reconstituted at that time, parties can seek the establishment of a new tribunal.

NOTES

The authors have made no attempt to develop full and comprehensive notes to the text. These notes are provided for background information only, and appear at the request of experts and researchers involved in the subject matter of the Convention. If an opportunity presents itself, the notes may be more fully developed in a future edition of the *Guide.*

[1] Jeremy Wates, *Access to Environmental Information and Public Participation in Environmental Decision-making: UN ECE Guidelines: From Theory to Practice* (EEB, 1996), p. 5.

[2] Article 19 (1.) Everyone shall have the right to hold opinions without interference. (2.) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3.) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (*a*) for respect of the rights or reputations of others; (*b*) for the protection of national security or of public order (*ordre public*), or of public health or morals.

[3] The Conference was organized by the Institute for European Environmental Policy and the International Institute of Human Rights.

[4] General Assembly resolution 37/7 of 28 October 1982 on the World Charter for Nature.

[5] *Our Common Future*, World Commission on Environment and Development, 1987.

[6] The parties to the Declaration call in article 22.2 "for the elaboration of proposals by the UN/ECE for legal, regulatory and administrative mechanisms to encourage public participation in environmental decision making, and for cost-efficient measures to promote public participation and to provide, in cooperation with the informal sectors, training and education in order to increase the ability of the public to understand the relevance of environmental information".

[7] Philippe Sands, *Principles of international environmental law I: Frameworks, standards and implementation* (Manchester and New York, Manchester University Press, 1995), pp. 144-145.

[8] Ibid.

[9] Document of the Economic and Social Council of the United Nations (Commission on Human Rights—Sub-Commission on Prevention of Discrimination and Protection of Minorities). Draft principles on human rights and the environment (annex I to the final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur), United Nations document E/CN.4/Sub.2/1994/9 (6 July 1994).

[10] Hans-Dietrich Treviranus, Preamble, in: R. Bernhardt ed., *Encyclopedia of Public International Law* (Amsterdam, Elsevier, 1997), vol. III, p. 1097.

[11] The Vienna Convention can be found at: *http://www.tufts.edu/fletcher/multi/texts/BH538.txt*, 1999.07.14.

[12] Treviranus, op. cit., p. 1098.

[13] L. Glowka and others, *A Guide to the Convention on Biological Diversity,* 2nd printing (1996) (Gland and Cambridge, IUCN, 1994), p. 9, Preamble.

[14] Article 3 of the Convention on Biological Diversity states:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

[15] See, for example, Alexandre Kiss, *Manual of European Environmental Law.*

[16] Legality of the Threat or Use of Nuclear Weapons, I.C.J., 1996, pp. 241-242, para. 29.

[17] United Nations General Assembly resolution 2398 (XXIII) (1968).

[18] United Nations General Assemby resolution 44/228.

[19] Sands, op. cit., p. 99.

[20] The resolution can be found in: 23 ILM (1983). It was adopted by a vote of 111 in favour, 18 abstentions and one vote against.

[21] Sands, op. cit., p. 42.

[22] E/CN.4/Sub.2/1994/9.

[23] Environmental Health, *www.who.org/peh/index.htm*, 5 April 1998.

[24] *Environment and Health: The European Charter and Commentary/First European Conference on Environment and Health*, Frankfurt, 7-8 December 1989 (WHO Regional Publications, European series; No. 35).

[25] WHO Regional Office for Europe, *Access to Information, Public Participation and Access to Justice in Environment and Health Matters*, EUR/ICP/EHCO 02 02 05/12, 03879-6 April 1999, p. 6.

[26] WHO European Centre for Environment and Health, *Concern for Europe's Tomorrow; Health and Environment in the WHO European Region*. Stuttgart, Wissenschaftliche Verlagsgesellschaft, 1995.

[27] WHO Regional Office for Europe, *Overview of the Environment and Health in Europe in the 1990s*, EUR/ICP/EHCO 02 02 05/6, 04229-29 March 1999, p. 3.

[28] WHO Regional Office for Europe, *Access to Information* . . ., p. 5.

[29] WHO Regional Office for Europe, *Declaration of the Third Ministerial Conference on Environment and Health—Final Draft*, EUR/ICP/EHCO 02 02 05/18 Rev.4, 08259-17 June 1999, p. 9.

[30] WHO Regional Office for Europe, *Access to Information* . . . .

[31] WHO Regional Office for Europe, *Declaration of the Third Ministerial Conference* . . ., p. 9.

[32] For a more in-depth discussion, see S. Stec, *Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case,* 29 Golden Gate U. L. and accompanying text.

[33] The preamble to the Rio Declaration refers to "the integrity of the global environmental and developmental system". Principle 2 repeats the formulation of principle 21 of the Stockholm Declaration, while adding the words "and developmental" between "environmental" and "policies". Principle 4 states: "[I]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Principle 25 provides "[P]eace, development and environmental protection are interdependent and indivisible".

[34] N. Singh, "Sustainable development as a principle of international law", *International Law and Development*, 1-12, at 3, 5 (1988).

[35] For a discussion of its origins back to 1975, see M. Pallemaerts, "International law in the age of sustainable development: a critical assessment of the UNCED process", *Journal of Law and Commerce*, vol.15, No. 36 (1996), p. 623.

[36] The consolidated versions of the relevant treaties may be found as Treaty on European Union, Official Journal C 340, 10.11.1997, pp. 145-172. Treaty establishing the European Community, *Official Journal*, C 340, 10.11.1997, pp. 173-308.

[37] United Nations General Assembly resolution 2398 (XXIII) (1968), recognizing the relationship between the enjoyment of basic human rights and the quality of the human environment.

[38] Earlier mentions can be found in African and Inter-American regional agreements on the environment. Thus, with Europe joining, the right is approaching global recognition.

[39] See, for instance, the World Charter for Nature, the Stockholm Declaration, principle 1; the draft principles on human rights and the environment (E/CN.4/Sub.2/1994/9, annex I), principle 21.

[40] See E/CN.4/Sub.2/1994/9, annex I.

[41] "Protected Forests Case", Decision of the Hungarian Constitutional Court, MK. 28/1994 (20 May 1994). See S. Stec, "Ecological rights advancing the rule of law in eastern Europe," *Journal of Environmental Law and Litigation*, vol. 13 (1998), pp. 275, 320-21. The case is described in S. Stec, "New phase in the legislative struggle for environmental protection in central and eastern Europe", *Ecodecision*, vol. 15 (winter 1995), pp. 22-23.

[42] *Minors OPOSA* v. *Sec'y of the Department of Environment and Natural Resources,* 33 *ILM* 168 (1994). This case is described in A.G. M. La Vina, "The right to a sound environ-

ment in the Philippines: the significance of the Minors Oposa case". *RECIEL*, vol. 3, No. 4 (1994), p. 246.

[43] See Pres. Trib. First Inst. Antwerp, Dec. of 20 April 1999 (on file with author).

[44] The Constitutional Court of Slovenia (Dec. No. U-I-30/95-26, 1/15-1996) recognized a legal interest of individuals on the basis of the constitutional right to healthy living environment "to prevent actions damaging the environment". See Milada Mirkovic, Legal and Institutional Practices of Public Participation: Slovenia, *in Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998).

[45] Nov. 4, 1950, 213 U.N.T.S. 222, as amended. Article 8, titled "Right to Respect for Private and Family Life", states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Idem* at 230.

[46] S. Stec, *Do Two Wrongs Make a Right? . . .*

[47] Guerra & Others *v.* Italy, XX Eur. Ct. H.R. (ser. X) (116/1996/735/932).

[48] Lopéz Ostra *v.* Spain, XX Eur. Ct. H.R. (ser. A), Judgment of 9 Dec. 1994, series A No. 303-C, p. 55, § 55 (1994).

[49] E. Brown Weiss, "Our rights and obligations to future generations for the environment", *AJIL*, vol. 84 (1990), pp. 198-199.

[50] Sands, op. cit., pp. 199-200.

[51] Glowka, op. cit., p. 14, Preamble.

[52] Legality of the Threat or Use of Nuclear Weapons, . . .

[53] *Minors OPOSA* v. *Sec'y of the Department of Environment and Natural Resources, . . .*

[54] For an examination of intergenerational standing in the context of the United States Endangered Species Act, see "Comment: intergenerational standing under the Endangered Species Act: giving back the right to biodiversity after *Lujan* v. *Defenders of Wildlife*", *Tulane Law Review*, vol. 71 (1996), pp. 529, 597-633.

[55] Quoted in La Vina, op cit., p. 247.

[56] See PELA, *Co-operation amongst environmental authorities and environmental NGOs in six Central and Eastern European Countries*, Wroclaw, 1998.

[57] See Stockholm Statement on the draft convention on access to environmental information and public participation in environmental decision-making, *GLOBE Europe News*: Issue 1 –January 1998.

[58] See, for instance, Agenda 21, 29: Strengthening the role of workers and their trade unions, paras. 29.4-29.5.

[59] Agenda 21, 37: National mechanisms and international cooperation for capacity-building in developing countries.

[60] United Nations document UNESCO-EPD-97/CONF.401/CLD.

[61] For more about particular problems in the implementation of EU environmental law in non-environmental fields, see Ludwig Kramer, "Right of Complaint and Access to Information at the Commission of the EC". *In* Deimann, Sven and Bernard Dyssli eds., *Environmental Rights: Law, Litigation and Access to Justice* (London, Cameron May, 1995), pp. 53-69.

[62] See *Official Journal* L 099, 11/04/1992, p. 1-7.

[63] EP.DEJ./92/99, 28 May 1999. See also NATO Committee on the Challenges of Modern Society, Environment and Security in an International Context.

[64] CSCE Meeting on the Protection of the Environment, Sofia, 3 November 1989. This meeting produced the mandate for the UN/ECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992) and the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992).

[65] Proposal submitted by the delegations of Austria, Finland, Sweden, Switzerland and those of Bulgaria, Canada, Cyprus, Czechoslovakia, France in the name of the twelve participating States members of the European Community, the German Democratic Republic, the Holy See, Hungary, Iceland, Liechtenstein, Malta, Monaco, Norway, Poland, San Marino, Turkey, the Union of Soviet Socialist Republics, the United States of America and Yugoslavia, Report on Conclusions and Recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, CSCE/SEM.36/Rev (3 Nov. 1989). The

document is called a proposal because it was not agreed to by all the countries present. (The one hold-out was Romania, even the host country, Bulgaria, agreed to the proposal.)

[66] Wates, op. cit.

[67] "Environment for Europe" Process: From Dobris to Sofia, *www.unece.org/env/europe/dobtosof.htm*, 29 June 1999.

[68] Aarhus Conference, 23-25 June 1998, *www.ens.dk/mem/faktuelt/Aahuscon.htm*, 7 June 1998.

[69] "Environment for Europe" Process, …

[70] WHO Regional Office for Europe, EUR/ICP/EHCO 02 02 05/8, 05299–24 March 1999.

[71] Convention on Environmental Impact Assessment in a Transboundary Context, *http://www.unece.org/env/eia.htm*.

[72] See ECE/CEP/41, p. 49.

[73] For earlier formulations of the right to a healthy environment in international legal instruments, see the African Charter on Human and Peoples' Rights, adopted at Algiers on 27 June 1981, and the Additional Protocol to the American Convention on Human Rights, adopted in San Salvador on 17 November 1988. According to a 1994 article, at that time more than 60 countries and several federal states of the United States had provisions in their constitutions concerning the right to a healthy environment. See A. Fabra Aguilar and N. Popovic, "Lawmaking in the United Nations: the UN Study on Human Rights and the Environment", *RECIEL*, vol. 3, No. 17 (1994), pp.197, 199.

[74] The United Nations Special Rapporteur, in her preliminary report on human rights and the environment to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1991/8, paras. 13-14, pointed out such a connection between article 3 of the Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights and article 25 of the International Covenant on Economic, Social and Cultural Rights. See A. Fabra Aguilar and N. Popovic, op. cit.

[75] The WCED Legal Experts Report in 1986 stated that it was not yet a well-established right. Not much progress appears to have been made since then. The same conclusion has been reached in V. Koester, "Aarhus-konventionen om 'borgerlige rettigheder' pa miljoomradet—isaer i et menneskerettighedsperspektiv" (The Aarhus Convention on "civil rights" with regard to the environment—particularly in a human rights perspective), *Juristen* (1999), pp. 103-115. See also the United Kingdom Government's interpretative statement on article 1 issued at the Aarhus Conference (annex II below).

[76] For a panoply of possible rights relating to a healthy environment, see the draft declaration of principles on human rights and the environment, principles 1-10 (E/CN.4/Sub.2/1994/9, annex I).

[77] Thus, it addresses one of the shortcomings in the establishment of the right to a healthy environment—that is, the lack of effective implementation. See E/CN.4/Sub.2/1994/9.

[78] R. Hallo, "Chapter 10: the Netherlands", *in Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (Kluwer Law International, 1996), p. 200.

[79] See *Griffin* v. *South West Water Service Limited,* [1995] IRLR 15, described in P. Roderick, United Kingdom, *in* R. Hallo ed., *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (1996), p. 267.

[80] See annex II below.

[81] See Stockholm Statement . . .

[82] See *Official Journal*, L 296 p. 55, 1996/11/21, Article 2(1).

[83] Convention on Biological Diversity, article 2.

[84] A Guide to the Convention on Biological Diversity (IUCN, 1994), p. 16.

[85] 96/61/EC.

[86] See, for instance, S. Rose-Ackerman, "American administrative law under siege: is Germany a model?", *Harvard Law Review*, vol. 107 (1994), pp. 1279, 1292-1293, 1300.

[87] For example, a United Kingdom court found that local residents and active environmentalists who regularly visited a certain park had no legally "sufficient interest" in a local planning agency's permission for a quarry to expand its operations into the park. See R *v.* North Somerset District Council *ex parte* Garnett (Queen's Bench Division, Popplewell J, 24 March 1997), reported in "Access to the courts: a conflict of ideologies", *Journal of Environmental Law*, vol. 10, No. 1 (Oxford University Press, 1998), pp. 161-174. The court looked to ownership of land or being a neighbour to the planned project as factors which may convey standing. Lacking these, the application for judicial review was denied. See p. 170.

[88] Personal communication on 20 October 1999 with Jonas Ebbesson, LL.D., Associate Professor of Environmental Law, Faculty of Law, Stockholm University, Stockholm, Sweden.

[89] See Section 5, Administrative Procedure Code, 21.06.1993; RT I 1993, 50, 694; 15.09.1993 as amended, described in D. Galligan and D. Smilov, *Administrative Law in Central and Eastern Europe*, 1996-1998, p. 85 (1999).

[90] Article 2, paragraph 8, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at Helsinki, on 17 March 1992.

[91] S. Stec, "Access to information and public participation in environmental decisionmaking in the Commonwealth of Independent States", *Review of Central and East European Law*, vol. 23 (1997), pp. 355-529.

[92] This may be contrasted with the Protocol to the Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, which has good active information provisions but did not follow Aarhus principles on passive information.

[93] See annex II below.

[94] 29 U.S.C. 651 et seq.

[95] See 29 U.S.C. 660 (c)(1).

[96] See Thomas F. P. Sullivan, *Environmental Law Handbook*, 14th ed. (Rockville, Maryland, Government Institutes, Inc., 1997).

[97] Law on Public Complaints of Hungary [quotation].

[98] Criminal Code of Hungary, section 257.

[99] Portugal, Law No. 65/93, 31 August, 1993.

[100] Belgium, Ordinance of the Brussels Region, Article 5.3.

[101] Norway, Freedom of Information Act, Section 9 (1970).

[102] Ireland, 1994 Annual Report of the Ombudsman.

[103] The Netherlands, Open Government Act.

[104] Russian Federation Law on State Secrets 1993, *Rossiiskaia gazeta*, 21 September 1993, full amended text at Sobranie zakonodatel'stva RF 1997 No. 41 item 4673. See Stec, *Access to Information . . .*, pp. 355, 472-473.

[105] Hungary, Act LXV of 1995 on State and Official Secrets, art. 3.

[106] For example, United States case law has defined "legitimate economic interest" under the trade secrets exemption to the United States Freedom of Information Act.

[107] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, Article 2. *Official Journal* L 257, 10/10/1996 pp. 0026-0040.

[108] Ireland, Hallo, *op. cit.*, p. 140.

[109] Armenia, Law on Procedures for Consideration of Suggestions, Applications and Grievances of Citizens.

[110] Hungary, Act IV (1954) General Rules of Administrative Procedure, Article 7.1, Article 15.1.

[111] France, Hallo, *op. cit.*, p. 76.

[112] Freedom of Information Act, section 9; see also section 2, para. 2.

[113] The Netherlands, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Western Europe* (Szentendre, REC, June 1998), p. 115.

[114] Seveso Directives—Council Directive 82/501/EEC (Seveso 1), amended by Council Directive 87/216/EEC (Seveso 2), amended by Council Directive 88/610/EEC (Seveso 3) on major accident-hazards of certain industrial activities and Council Directive 96/82/EC on the control of major accident-hazards involving dangerous substances.

[115] Case of Guerra and Others *v.* Italy (116/1996/735/932), European Court of Human Rights, Strasbourg, 19 February 1998.

[116] *Major Trends in Ratification of the Aarhus Convention in the CEE countries*.

[117] Maastricht Treaty, article 129a. While the Treaty's general principles state that the Community must contribute to the "strengthening of consumer protection", Article 129a is the legal framework for consumer policy.

[118] *Pollutant Release and Transfer Registers (PRTRs): A Tool for Environmental Policy and Sustainable Development—Guidance Manual for Governments* (Paris, OECD, 1996), OECD/GD(96)32.

[119] *Major Trends . . .*

[120] Among the central and east European countries that have adopted this kind of procedure are Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Romania and Slovakia. It should be noted that there is considerable variance in the provisions of the respective national laws with respect to the public's right of access to EIA documentation, its right to comment on the documentation, whether either the competent permitting authority and/or the permit-seeking project developer need respond to the public's comments, and the public's right to the final decision and right of appeal from the final decision. See "Comparative Review of Environmental Impact Assessment Laws in Central and Eastern Europe", Orestes R. Anastasia, USAID Environmental Law Program (1996) (manuscript on file with author).

[121] J. Jendroska, "Current Trends and Practices in Public Participation in Environmental Decisionmaking in Poland" *in*, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 314.

[122] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, article 1, as amended by 397L0011, *Official Journal* L 073 14.03.97, p.5.

[123] See Act on Environmental Protection, Hungary, Act LIII of 1995, Arts. 73-80.

[124] *Official Journal* L 257, 10/10/1996, pp. 0026-0040.

[125] See Par. 3 of Section 33-2, of the Plan and Building Act, which provides for an ordered EIA "where the [environmental, natural resource or social] consequences are regarded as particularly uncertain or controversial".

[126] Anastasia, op. cit., p. 9.

[127] See Environment Law, Article 11(*b*). Source of reference: Anastasia, op. cit., p. 81.

[128] Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, article 6.3, http://europa.eu.int/eur-lex/en/lif/dat/1985/en_385L0337.html, p. 4.

[129] Jendroska, op. cit., p. 316.

[130] P. Jindrova, 1998. *"Regional Overview: Public Participation in Permitting" in Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 51.

[131] "OVOS" stands for Otsenka vozdeyistviya na okruzhayushchuyu sredu, which is Russian for "environmental impact assessment".

[132] See S. Stec, "EIA and EE in CEE and CIS: convergence or evolution?" in Rapporto Mondiale sul Diritto dell'Ambiente/A World Survey of Environmental Law, spec. issue of *Rivista Giuridica dell'Ambiente* (1996), p. 343, 346.

[133] Based on the definition of "proposed activity", Convention on Environmental Impact Assessment in a Transboundary Context (art. 1 (v)).

[134] Law on Environmental Expertise of Ukraine, article 10. *Holos Ukrainy.* - 02. – 1995.

[135] Decree No. 152 of 1995 of the Government of Hungary (12 December 1995). See annex 3.

[136] Law on Environmental Protection, Vidomosti Verkhovnoi Rady Ukrainy, 1995, N 8, p. 54; Regulation on the form and content of materials of the assessment of the impact of a proposed activity on the environment and natural resources (OVNS) in various stages of completing the tasks of constructing new, extension, reconstruction, technical re-equipment of existing industrial and other sites. Approved by the Order of the Minekobezpeky Ukrainy N59 from 08.07.92.

[137] Hungary—Act on Environmental Protection.

[138] See J. M. Evans and others, Administrative Law: Cases, Text, and Materials (1989).

[139] See Law on Proposals, Signals, Complaints and Requests, *Official Gazette* No. 54, 1988, with amendments as of 1999, described in Galligan and Smilov, op. cit., p. 7.

[140] Ibid.

[141] See Constitutional Court Decision of 13 November, 1996. *NN (Narodne novine, i.e., National gazette*, No. 103/96 of 6 December, 1996, described in Galligan and Smilov, op. cit., p. 43.

[142] Based on Evans, op. cit. pp. 309-344.

[143] See Black's Law Dictionary (1979), p. 919.

[144] *Official Journal*, L 117, pp. 15-27.

[145] Article 2(2).

[146] See annex I below.

[147] Article 2, paragraph 7, of the Espoo Convention: "To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes."

[148] *Official Journal*, No. C129, 25/04/1997 P.0014.

[149] A protocol to either Convention raises problems—to the Aarhus Convention because SEA is not only about public participation, to the Espoo Convention because SEA should not relate only to transboundary issues. However, there is a precedent in the UN/ECE region for an approach to allowing protocols to go beyond the scope of the parent convention. See the Protocol on Water and Health, Protocol to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes. The success of this approach is not yet apparent, however. It would seem to be most appropriate for SEA to be the subject of a new convention.

[150] Sofia Initiative Environmental Impact Assessment, "Policy Recommendations on the Use of Strategic Environmental Assessment in Central and Eastern Europe and in Newly Independent States", ARH.CONF/BD.17.

[151] Based on internal reports produced by REC for SEA of the national development plan of the Czech Republic (on file with author).

[152] Quotations.

[153] Webster's New World Dictionary, Third College Edition (1988), p. 1045.

[154] Presentation of Maj.-Gen. E.N. Westerhuis, *The interface between the military and the civil sector in environmental management,* Round-table Discussion (14 April 1997, Budapest), p. 8 (unpublished manuscript on file with author).

[155] Act XI of 1987, arts. 27, 29.

[156] Ibid., article 31.

[157] 5 U.S.C. 553.

[158] 5 U.S.C. 553(c).

[159] S. Fulop, 1998. Current Trends and Practices in Public Participation in Environmental Decisionmaking in Hungary *in Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, REC, June 1998), p. 214.

[160] Commission Decision 97/150/EC of 24 February 1997, Official Journal, L 058 of 27 February 1997, p. 48.

[161] Created by the Law no. 78-753 of 17 July 1978 (*Official Journal*, 18 July 1978, p. 2651).

[162] CEP/AC.3/18, para.15.

[163] Jerzy Jendroska, *State of Environmental Law in Poland* (Centre for International Environmental Law).

[164] General Administrative Law Act, The Netherlands, articles 7 and 8 (1994).

[165] David Robinson and John Dunkley eds., *Public Interest Perspectives in Environmental Law* (Wiley Chancery, 1995).

[166] Hungary, Act. III [1952] on Civil Procedure, article 156.

[167] Ireland, DTD, p. 106.

[168] Slovakia, Act on Court Fees, No. 71/1992, article 4.

[169] Study on Dispute Avoidance and Dispute Settlement in International Environmental Law and the Conclusions, UNEP/GC.20/INF/16, p. 29, citing P.H. Sand.

[170] *Official Journal*, L 175, 05/07/1985, pp. 0040-0048: amended by 397L0011 (OJ L 073 14.03.97, p. 5)

[171] *Official Journal*, L 257, 10/10/1996, pp. 0026-0040.

[172] EC Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, article 4 (1).

[173] Ibid., Article 4 (2).

ANNEXES

Annex I

RESOLUTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

We, the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,

Resolve to strive for the entry into force of the Convention as soon as possible and to seek to apply the Convention to the maximum extent possible pending its entry into force, and to continue to cooperate in gradually developing policies and strategies related to matters within the scope of this Convention;

Recommend that the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995, should be taken into account in the application of the Convention pending its entry into force;

Emphasize that, besides Governments, parliaments, regional and local authorities and non-governmental organizations also have a key role to play at the national, regional and local level in the implementation of the Convention;

Acknowledge that the Convention is an important element in the regional implementation of Agenda 21 and that its ratification will further the convergence of environmental legislation and strengthen the process of democratization in the region of the United Nations Economic Commission for Europe (ECE);

Emphasize the importance of capacity building to maximize the effectiveness of officials, authorities and non-governmental organizations in implementing the provisions of this Convention;

Call upon each Government to promote environmental education and environmental awareness among the public, particularly in relation to the opportunities that this Convention provides;

Call upon public, private and international fund providers to give high priority to projects that aim to further the objectives of this Convention;

Call for close cooperation between ECE, other bodies involved in the "Environment for Europe" process and other relevant international governmental and non-governmental organizations on the issues of this Convention, for example in the implementation of national environmental action plans and national environmental health action plans;

Recognize that the successful application of the Convention is linked to adequate administrative and additional financial resources being made available to support and maintain the initiatives necessary to achieve this goal and call upon Governments to make voluntary financial contributions to this process so that sufficient financial means are available to carry out the programme of activities of the ECE Committee on Environmental Policy related to the Convention;

Request the ECE Committee on Environmental Policy actively to promote and keep under review the process of ratification of the Convention pending its entry into force by, *inter alia*:

(*a*) Establishing the Meeting of the Signatories to the Convention, open to all members of ECE and to observers, to identify activities that need to be undertaken pending the entry into force of the Convention, to report to the Committee on progress made in respect of the ratification of the Convention; and to prepare for the first meeting of the Parties;

(*b*) Giving full recognition to the activities identified by the Meeting of the Signatories within the Committee's work programme and when the Committee considers the allocation of ECE resources provided for the environment;

(*c*) Encouraging Governments to make voluntary contributions to ensure that sufficient resources are available to support these activities;

Consider that, pending the entry into force of the Convention, the necessary authority should be given to ECE and its Executive Secretary to provide for a sufficient secretariat and, in the framework of the existing budgetary structure, for appropriate financial means;

Urge the Parties at their first meeting or as soon as possible thereafter to establish effective compliance arrangements in accordance with article 15 of the Convention, and call upon the Parties to comply with such arrangements;

Commend the international organizations and non-governmental organizations, in particular environmental organizations, for their active and constructive participation in the development of the Convention and recommend that they should be allowed to participate in the same spirit in the Meeting of the Signatories and its activities to the extent possible, based on a provisional application of the provisions of article 10, paragraphs 2 (*c*), 4 and 5, of the Convention;

Recommend that non-governmental organizations should be allowed to participate effectively in the preparation of instruments on environmental protection by other intergovernmental organizations;

Recognize the importance of the application of the provisions of the Convention to deliberate releases of genetically modified organisms into the environment, and request the Parties, at their first meeting, to further develop the application of the Convention by means of *inter alia* more precise provisions, taking into account the work done under the Convention on Biological Diversity which is developing a protocol on biosafety;

Invite the other member States of ECE and any other State that is a Member of the United Nations and/or of other regional commissions to accede to this Convention;

Encourage other international organizations, including other United Nations regional commissions and bodies, to develop appropriate arrangements relating to access to information, public participation in decision-making and access to justice in environmental matters, drawing, as appropriate, on the Convention and to take such other action as may be appropriate to further its objectives.

Annex II

DECLARATIONS MADE UPON SIGNATURE

DENMARK

Both the Faroe Islands and Greenland are self-governing under Home Rule Acts, which implies *inter alia* that environmental affairs in general and the areas covered by the Convention are governed by the right of self-determination. In both the Faroe and the Greenland Home Rule Governments there is great political interest in promoting the fundamental ideas and principles embodied in the Convention to the extent possible. However, as the Convention is prepared with a view to European countries with relatively large populations and corresponding administrative and social structures, it is not a matter of course that the Convention is in all respects suitable for the scarcely populated and far less diverse societies of the Faroe Islands and of Greenland. Thus, full implementation of the Convention in these areas may imply needless and inadequate bureaucratization. The authorities of the Faroe Islands and of Greenland will analyse this question thoroughly.

Signing by Denmark of the Convention, therefore, not necessarily means that Danish ratification will in due course include the Faroe Islands and Greenland.

GERMANY

The text of the Convention raises a number of difficult questions regarding its practical implementation in the German legal system which it was not possible to finally resolve during the period provided for the signing of the Convention. These questions require careful consideration, including a consideration of the legislative consequences, before the Convention becomes binding under international law.

The Federal Republic of Germany assumes that implementing the Convention through German administrative enforcement will not lead to developments which counteract efforts towards deregulation and speeding up procedures.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the "right" of every person "to live in an environment adequate to his or her health and well-being" to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to 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.

EUROPEAN COMMUNITY

The European Community wishes to express its great satisfaction with the present Convention as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN/ECE region, in accordance with the principle of sustainable development.

Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The Community will consider whether any further declarations will be necessary when ratifying the Convention for the purpose of its application to Community institutions.

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