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(Item 9 of the provisional agenda)

**ACCESS TO INFORMATION, PUBLIC PARTICIPATION AND  
ACCESS TO JUSTICE IN INTERNATIONAL FORUMS \*/**

**Introduction**

1. This paper explores how the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) can be used to promote public participation in international decision-making. The Aarhus Convention requires each Party to “promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”<sup>1</sup>/ The term “forums” is used in this paper to try to capture the many different types of organizations and processes reflected here.

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\*/ Prepared by a consultant.

2. International organizations and processes increasingly have the power to impact on national decision-making processes and determine social and economic policies that have far reaching environmental effects. Yet, international organizations are often less transparent and less open to public participation than national agencies. The UNECE Committee on Environmental Policy therefore decided that an analysis of public participation practices in international forums, and its potential problems, should be prepared.<sup>2/</sup> This paper provides that analysis, setting out a series of lessons learned from a survey of existing rules and practices.

3. The Aarhus Convention grew out of an international process to define the concept of public participation in the context of sustainable development. The three principles of the Convention, broadly stated, are that the public should have access to information, a right to participate in the environmental decision-making process, and access to justice through an independent review process. Although the Convention's obligations are addressed primarily to the national level, they reflect the agreement among States, already at the 1992 Earth Summit, that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level."<sup>3/</sup> In fact, Agenda 21 calls on the United Nations, international finance and development agencies, and intergovernmental organizations and forums to promote public participation.<sup>4/</sup>

4. Although the international organizations and processes reviewed for this paper at times approach public participation very differently, they all agree on the importance of public input in the development of their policies, rules, programmes, treaties, and other decision-making processes. For example, the United Nations has long recognized the benefits of public participation in its activities. The United Nations General Assembly in establishing the United Nations Environment Programme (UNEP) at the 1972 Stockholm Conference on the Human Environment invited "those non-governmental organizations that have an interest in the field of the environment to lend their full support and collaboration to the United Nations with a view to achieving the largest possible degree of cooperation."<sup>5/</sup> UNEP recognizes that engaging the public brings many different perspectives to the table, that it expands the reach and impact of UNEP strategies, and that it assists UNEP in meeting its goals at the national level.<sup>6/</sup> Similarly, the Organisation for Economic Co-operation and Development (OECD) has emphasized the benefits of public participation as a sound investment in better policy-making and a core element of good governance that taps new sources of policy-relevant ideas, contributes to public trust in the organization, and raises the quality of democracy.<sup>7/</sup>

5. For this paper, the rules and practices in public participation in a selection of international forums have been explored. These include the United Nations Economic Commission for Europe (UNECE), its five environmental treaties and the UNECE "Environment for Europe" process; the United Nations Environment Programme (UNEP), including two of its multilateral environmental agreements (the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora); the European Commission (EC); the Organisation for Economic Co-operation and Development (OECD); the Commission on Environmental Cooperation of North America (CEC); the United Nations Economic and Social Council (ECOSOC); the United Nations Commission on Sustainable Development (CSD); the World Trade Organization (WTO); and two European regional forums, the International Commission for the Protection of the Rhine and the Baltic Marine Environment Protection Commission (Helsinki Commission).

6. This paper is designed to try to find principles that are both in accordance with the Aarhus Convention and which make sense from the perspective of the differing needs of international forums (different from the national governments as envisioned in the Aarhus Convention itself). This report is not about evaluating compliance with the Aarhus Convention.

7. This paper takes the principles for public participation agreed upon under the Aarhus Convention and examines them in the light of the rules and practices of various international forums and develops lessons learned from these rules and practices. These lessons reflect the best practices of the reviewed organizations, as well as the aspects of public participation that could be improved, as seen through omissions or bad practices of these organizations. The purpose of this document is to try to look beyond those differences to common elements of good practices for public participation.

8. The organizations reviewed for this study represent a wide range of mandates and work with their member countries in different ways: the purpose of the addendum (English only) is to reflect this as much as possible.

9. Each of the reviewed organizations has a different mandate and decision-making process. For example, the European Union, unlike other international organizations, is a regional economic integration organization with a certain amount of sovereignty. The European Union has signed the Aarhus Convention and when it ratifies the Convention, the Convention will apply to the EU as a public authority.<sup>8/</sup> UNECE and UNEP provide a negotiating forum for multilateral environmental agreements, in addition to setting regional and international environmental policy. OECD is a forum of member countries that develop common policy positions based on consensus. CEC is an international organization created to address regional environmental concerns in North America, help prevent potential trade and environment conflicts, and promote the effective enforcement of environmental law.<sup>9/</sup> The World Trade Organization is not only a forum for the negotiation of trade agreements, but also has an important dispute settlement function. ECOSOC coordinates and monitors all United Nations operations in the field of economic and social work, including environment, while CSD was established to continue the work to promote environmentally sustainable development started at the 1992 United Nations Conference on Environment and Development. Various European regional forums exist to manage shared natural resources. However, even considering these differences, some common principles and lessons for improving public participation can be drawn from each of them.

10. This document tries to bring together trends and general practices and omissions concerning environmental access to information, public participation and access to justice in international forums, drawing from the organizations and processes surveyed in the addendum.

11. Access to information tends to occur on an ad hoc basis in practice with few clear rules and procedures in many international forums. Most forums surveyed in this report do not distinguish between access to information generally and access to environmental information. International forums tend to provide public access to final documents through their web sites. Few have a written policy or clear guidelines on how staff and members of the public are to process such requests. The lessons that can be drawn from this survey concern the public right to access information, the need for a consistent process, the importance of access for all members of the public, access to all relevant information, a transparent information system, timeliness, low cost and accessible form, and reasoned grounds and clear process for refusal.

12. Public participation in environmental decision-making also tends to be on an ad hoc basis with few clear rules and procedures in many international forums. Most of the international forums surveyed in this report do not distinguish between public participation generally and public participation in environmentally related activities. In general, most forums provide rules for the accreditation of NGOs for participation as observer at meetings, but do not have clear rules concerning commenting within decision-making processes such as drafting decisions or policies. Many forums do allow and encourage public participation in various working groups or task forces, but this is mostly left to the discretion of the governing bodies in question. The lessons that can be drawn from this survey concern the need to further facilitate public participation, the need for clear procedures, the importance of ensuring that all members of the public can participate, an accessible accreditation process, opening of all decision-making processes to some level of public participation, timeliness, ensuring a wide variety of mechanisms for public participation, and provision of some financial assistance to members of the public to participate.

13. Public access to justice is rare in international forums. "Access to justice" is here defined very broadly to include instances where citizens are able to request an investigation or participate in existing dispute settlement mechanisms. In general, even where mechanisms exist in theory it tends to be difficult for citizens or NGOs to access justice in the context of an international forum and when they do the remedy often is an investigation rather than enforcement, a change of policy, or an order for an action. The lessons that can be drawn from this survey concern the importance of public access to some type of review process, the need for fair, open and transparent proceedings, broad interpretation of standing, review of access to information and public participation, review of international organization rules and review of national rules.

14. The "lessons learned" in this report build both on the Aarhus principles, the rules and practice of international organizations, and the differences between international organizations and national governments (to which the Aarhus Convention was directed). The purpose is to satisfy the spirit of the Aarhus Convention in the context of international forums: this means that the wording will not necessarily be exactly the same in each case.

## I. ACCESS TO INFORMATION

15. The Aarhus Convention requires each Party to guarantee the right of access to information in environmental matters. Article 4 sets out a framework through which the public can gain access to environmental information from public authorities. Once a member of the public has requested information, the Convention establishes criteria and procedures for providing or refusing information. Under the Convention, all persons have the right of access to information.

16. Most of the international forums surveyed for this paper have access to information practices that apply to any information – not just information in environmental matters. All forums surveyed for this paper provide public access to certain documents through their web sites and upon request and many have rules concerning classification and declassification of information. However, few have a written policy or clear guidelines on how staff and members of the public are to process such requests.

### General principles

17. The Aarhus Convention establishes the right to information for members of the public. Increasingly, international organizations are developing access to information policies that assume that information should be publicly accessible unless criteria are met to show that the information needs to be kept confidential. For example, the WTO information rule makes all official documents unrestricted with certain exemption criteria and a process for derestriction.<sup>10/</sup> The OECD access to information policy makes all OECD documents publicly accessible unless specifically designated as classified for official use or as confidential.<sup>11/</sup> EU citizens, residents and people with offices registered in the EU have the *right* to access the documents of EU institutions. There are certain restrictions and cases where the right to access documents will not be granted, but these restrictions are defined and some can be balanced against the public interest in public access to the information.<sup>12/</sup>

***Lesson Learned:*** Public access to information increasingly is viewed as a right and international forums benefit from making the information that they hold publicly accessible unless it falls within explicitly delineated grounds for refusal.

18. Very few international organizations have clear standards for providing public access to information. Although they encourage such policies at the national level, many organizations provide most of their documents on their web site or on request with limited guidance that primarily covers which documents are accessible and who can access them. This can make public access more difficult in those cases where documents may fall into a “grey” area, such as preparatory or background documents used in decision-making processes. It also makes access difficult in situations where documents are not available through the web site, where members of the public do not have access to electronic information, or where the document has been classified as not being for public distribution. International forums seem to be acknowledging that providing clear standards improves access to information.

For example, the UNEP draft strategy on civil society engagement in the work of UNEP recognizes the need to provide “much more effective” mechanisms for upholding the principles of access to information.<sup>13/</sup> In addition, the new EU access to information regulation sets out a clear process that both members of the public and EU staff can understand.<sup>14/</sup> The clearly stated process also provides grounds for appeal if information is wrongly denied.<sup>15/</sup>

**Lesson Learned:** The public would have more consistent and reliable access to information if international forums developed a clear set of procedures for members of the public to request information.

### **Defining who has access**

19. In most cases, international forums seem to assume that the more people who have access to their information, the better for public awareness and public participation. International organizations tend to place most final documents and any preparatory documents relevant to a call for comments on their web sites. This means that these documents will be accessible to any member of the public who can access the web site, or, in the case of the United Nations, access to an information depository. For example, the United Nations tries to designate most of its documents as “general distribution documents” and make them accessible through its web site and through depositories around the world.<sup>16/</sup>

**Lesson Learned:** Under best practices, any natural or legal person would be able to request and receive publicly accessible information, without regard to citizenship, nationality or domicile and without having to prove a legal or other interest.

### **Scope of information**

20. The current public access to information policies of international organizations tend not to be limited to any one particular sector, such as the environment. This supports the broad definition of the Aarhus Convention, where “environmental information” includes the state of the elements of the environment, factors that affect the environment, decision-making processes, and the state of human health and safety. International organizations seem to realize that members of the public wish to have access to all types of information. In addition, as environment is a sector that is impacted by every other social, economic and institutional decision, international organizations have come to recognize that environmental citizen organizations will be interested both in environmental decisions and in decisions that impact on the environment. For example, before the attempted development of a multilateral agreement on investment, OECD did not realize how much interest this type of agreement would raise among environmental citizen organizations and did not provide access to drafts under discussion. The widespread reaction and cries for openness that this secrecy caused prompted OECD to handle access to documents in the drafting process for the Guidelines for Multinational Enterprise with much more openness.<sup>17/</sup>

**Lesson Learned:** International forums would benefit from providing public access to information that is relevant for decision-making that impacts on the environment. In practice, this could include information on agriculture, transport, infrastructure, finance, trade and other areas relating to environmental protection and environmentally sustainable development.

21. Another aspect of the scope of information concerns which types of documents are accessible, especially given the many types of decision-making processes in which international forums are involved. For example, the OECD web site contains information relating to all the OECD work areas, including decisions, decision-recommendations, declarations, guidelines and reports.<sup>18/</sup> One difficult issue is whether or not draft and preparatory documents should be publicly accessible. The trend among international forums seems to be to make draft and background documents accessible when this is necessary for the public to be able to make informed comments during a decision-making process.<sup>19/</sup> For example, CEC posts most documents, including decisions, reports, drafts for comment and meeting minutes, on its web site.<sup>20/</sup>

**Lesson Learned:** “Publicly accessible information” could be interpreted broadly to include all relevant final documents, draft documents, background data and analyses, studies, raw data, organizational information, information concerning the decision-making processes, and information concerning the contact points and timing for decisions.

22. Some international organizations have developed special registers or databases for environmental data, including information to facilitate the implementation of multilateral agreements. For example, the Cartagena Protocol on Biosafety is establishing a Biosafety Clearing House to facilitate the exchange of information concerning living modified organisms.<sup>21/</sup> Under the UNECE Convention on Long-range Transboundary Air Pollution, the emissions programme, EMEP, houses a database containing aggregated information on long-range transboundary air pollutant emissions in the UNECE region.<sup>22/</sup>

**Lesson Learned:** International forums can provide a useful service by providing a single, compiled source or register for public access to environmental data when these data are collected under the forum’s substantive mandate.

23. Also relevant to scope is the question of when and how classified documents become publicly accessible. Several international forums have established automatic declassification systems with clear time frames. For example, under the 2002 WTO derestriction rules, when a member submits a document as restricted, the document will be automatically derestricted after its first consideration by the relevant body or 60 days after the date of circulation - whichever is earlier.<sup>23/</sup> If the member wishes to avoid derestriction at this point, it must make a special request every 30 days for a further 30 days of restricted status for the document. This same process applies to documents prepared by the secretariat at the request of a member - with the exception that secretariat documents can remain restricted only through the first 30-day period, after that derestriction is automatic.

Under the OECD classification rules, unless a member objects, after three years, classified documents are automatically downgraded to a level of greater accessibility, so that within a maximum of six years, all OECD documents, except for those about which an explicit decision has been made, are publicly accessible. <sup>24/</sup> After a period of ten years, all OECD documents become publicly accessible no matter what their status.

**Lesson Learned:** Access to information is promoted when classified documents have a set lifetime, such as 30 days, attached to their classification, after which they are automatically declassified, unless a specific decision concerning that document is made.

24. The scope of information often includes the provision of notice of events, of the availability of information or of opportunities for public participation. Many international organizations do provide notice to the public through postings on their web sites and through mailings to identified lists of interested members of the public. For example, CEC gives notice to interested members of the public and NGOs when their comments are requested and posts the background information, call for comments and process for commenting on its web site.<sup>25/</sup> In the case of public meetings, CEC must provide notice to the public through letters and posting on its website no less than 30 days before the meeting.<sup>26/</sup>

**Lesson Learned:** International forums benefit from public input when they provide timely public notice of opportunities for public participation in decision-making and provide public notice of the availability of information for the public, such as drafts for comments, final documents, decisions and reports.

### **Transparency of information system**

25. As an increasing amount of information from international organizations becomes publicly accessible, difficulties can arise in finding documents, even when they are classified as publicly accessible. In addition, most international forums are trying to establish clear systems on their web sites to facilitate the use of their information systems. For example, UNEP has established several information networks and monitoring systems with public information accessible through the UNEP web site. These information sources include: the Global Resource Information Database (GRID); the International Register of Potentially Toxic Chemicals,<sup>27/</sup> an inventory of information sources on chemicals; and UNEP.net,<sup>28/</sup> a web-based interactive catalogue and multifaceted portal that offers access to environmentally relevant geographic, textual and pictorial information. EU maintains a register of Commission documents on its web site to assist the public in finding documents by providing a reference number, title, date and responsible department.<sup>29/</sup> The register links to the main sources of EU documents in electronic form. CEC maintains a register of all the information provided in the citizen submission process with a timetable and links to each document.<sup>30/</sup>

**Lesson Learned:** International forums benefit from a transparent information system, e.g. when they specify the type and scope of the information available and the basic terms and conditions under which it is made available and the process by which it can be obtained, and when they establish and maintain registers and designate information officers.



## Timing

26. Clear timelines give both the public and the staff a schedule upon which they can rely. They also provide the public with a standard that makes review of the lack of a response to a request easier. Beyond the fact that much information is accessible immediately through their web sites, many international organizations do not have policies about answering public requests for information and have not designated clear timelines for responding to requests and providing the information. However, where timelines are specified, they tend to favour rapid response. For example, in the EU, the relevant official must inform the applicant within 15 working days if the application has been granted or if the intention is to refuse access.<sup>31/</sup> In other organizations, the unwritten policy is to try to answer requests for information as soon as possible. For example, OECD tries to respond to e-mail requests for information within 24 working hours.<sup>32/</sup>

**Lesson Learned:** Public accessibility is best served when international forums answer public requests for information as soon as possible with clear timelines for response and provision of the information specified in their guidelines and rules, such as at the latest one month with the possibility of extending with justification to two months. In particular, international forums benefit from ensuring that timelines for providing information are connected to the public participation process so that the public receives information with sufficient time to provide input into the process.

## Costs and form of information

27. Increasingly, information is available in both electronic and paper form. Most international organizations do not have explicit policies about providing information in the form requested. However, in practice international organizations tend to provide electronic documents through their web sites and send paper documents by post upon request. Some even provide facilities for on-site consultation of documents. For example, the United Nations provides documents both electronically through its web site and in paper form through depositary libraries throughout the world. The EU allows the public to access information through on-the-spot consultation, receiving a copy or by electronic means.<sup>33/</sup>

**Lesson Learned:** Public access is best served by ensuring that information is available in the form requested (assuming this already exists) whether through on-the-spot consultation, receiving a paper copy or by electronic means.

28. Most of the international organizations do not have explicit policies about charging members of the public for paper copies of documents – other than those on a publications list with a cost already associated with them. Information requested by members of the public tends to be sent at no charge, although some organizations provide for a charge to cover costs in certain cases. For example, under EU rules, consultation, small copies and direct electronic access shall be free of charge. Other costs shall not exceed real costs of producing and sending the copy.

***Lesson Learned:*** Public access is best served by ensuring that information is available at no charge or, at most, at a reasonable charge (for example one that reflects only the costs of reproduction and dissemination).

### **Grounds and process for refusal and review**

29. All international institutions have some criteria for withholding certain information, usually because of the request of a member State, a determination of legitimate commercial confidentiality and the confidentiality of personal information. Along with the trend to make more information publicly accessible, international organizations are more often balancing the public interest in disclosure against the public interest in secrecy and requiring that an affirmative decision be made if information is to remain secret. For example, OECD can prohibit or limit public access to certain documents for a time by designating them as “classified for official use” or as “confidential.”<sup>34/</sup> “Classified for official use” means that the information should not be communicated except for official purposes. “Confidential” means that the unauthorized disclosure would seriously prejudice the interest of OECD or any of its member countries.

30. The EU restrictions on public access to information are related to public security, defence and military matters, international relations, financial, monetary or economic policies, individual privacy, commercial interests, court proceedings and legal advice, and inspections, investigations and audits.<sup>35/</sup> They are determined in a balancing test with the public interest in disclosure where possible.

***Lessons Learned:*** It is useful to have clear terms for refusing requests for information. Perhaps most relevant for international organizations would be exemptions such as (a) when the State or company requests confidentiality on the basis that release would affect national security or commercial confidentiality; or (b) when release of the information would threaten individual privacy. The grounds for refusal are best interpreted in a restrictive way with the public interest served by disclosure weighed against the interests of non-disclosure in each case.

31. The refusal to grant public access to information is likely to be a point of contention between members of the public and an international organization. The clearer the process for granting refusal is, the easier it is to review such situations to ensure fair and equitable resolution of any disputes. For example, in the EU, the relevant official must inform the applicant within 15 working days if the application has been granted or if the intention is to refuse access.<sup>36/</sup> In the latter case or if there is no answer within the given time frame, the applicant has 15 working days to apply to the Secretary-General of the Commission for review of the intention to refuse access or the lack of response. EU institutions have to publish an annual report that includes the number of cases where access to documents was refused, the reasons for refusing access and the number of sensitive documents not contained in the register.<sup>37/</sup>

**Lessons Learned:** It is also useful to have clear rules and time frames regulating refusals to provide public access to information. Lack of a response to an information request can be considered a refusal for these purposes. Reasons for a refusal to comply with a request for information can best be stated in writing. Where only part of the information requested falls within one of the exempt categories, the remainder of the information can be separated out and supplied to the person making the request.

32. Those international forums with processes in place for reviewing administrative decisions have also built in the capacity to review citizen complaints about lack of access to information. For example, the public has the resource of the European Ombudsman for review of cases where the institutions of the European Union have denied public access to information.<sup>38/</sup>

**Lesson Learned:** Public access is strengthened when international forums ensure that a person who considers that his or her request for information has been wrongfully refused or ignored, or has been inadequately answered by the international forum, or overcharged, may seek judicial, non-judicial or administrative review.

*[Box: Aarhus Convention access to information standards*

- Information is accessible unless it falls within one of the grounds for refusal.
- No showing of interest is required from members of the public.
- Information should be provided in the form requested.
- Responses to requests should be made within one month.
- Denials of requests for information shall be in writing and state the grounds for refusal.
- Grounds for refusal are to be narrowly construed, balancing the interest to be protected against the public interest.
- Public authorities should redact confidential portions out of documents and disclose non-confidential portions, where this can be done without prejudicing the confidential information.
- Copies of the actual document will be provided when requested.
- In general, information should be free of charge, but reasonable charges may be made for supplying information, subject to an established schedule.
- Public authorities must collect and disseminate environmental information.
- The public must be informed of their opportunities to participate in decision-making processes.]

## II. PUBLIC PARTICIPATION

33. The Aarhus Convention establishes procedures for public participation in decisions on specific activities, including notification of the public, time frames for public participation procedures and taking account of the public participation outcome. The Convention also establishes requirements concerning public participation in plans, programmes, and preparation of law and rules.

34. All of the international forums surveyed for this paper provide some level of public participation. However, most do not have a written policy or clear guidelines concerning how staff and members of the public are to handle public participation on a consistent basis.

### General principles

35. Over the past ten years, international forums have allowed the public greater access to their decision-making processes – although still in a fairly ad hoc manner. All the international forums surveyed for this paper have some level of public participation and acknowledge the importance of public input to their processes. For example, OECD recognizes that public participation improves policy-making and is a core element of good international governance.<sup>39/</sup> According to OECD, public participation allows international forums to tap new sources of policy-relevant ideas, information and resources when making decisions. It also contributes to building public trust in government and international organizations.

*Lesson Learned:* International forums benefit from facilitating public participation in decision-making.

### Defining who can participate

36. In general, international forums distinguish between who can participate through providing written comments on draft documents and positions, who can participate in meetings as observers and who can participate in an institutionalized way through membership in advisory boards and other bodies.

37. International forums tend to accept written public input from anyone who is interested enough to prepare comments.<sup>40/</sup> For example, CEC, CSD and the UNECE “Environment for Europe” process post drafts for comments and the commenting process on the Internet for anyone to use.<sup>41/</sup>

38. OECD placed on its web site successive drafts for public comment of the Guidelines for Multinational Enterprises and encouraged any interested civil society organizations to comment.<sup>42/</sup>

*Lesson Learned:* In general, public participation is best served when any natural or legal person may participate in the decision-making processes of international forums, without regard to citizenship, nationality or domicile and without having to prove a legal or other interest.

39. Many of the international forums surveyed did put specific limits on who could participate in meetings and stakeholder consultations and dialogues, through some type of accreditation or stakeholder selection process. For example, ECOSOC requires that to qualify for general consultative status in United Nations conferences, an organization must demonstrate that (a) it has substantive and continued contributions to make to United Nations objectives; (b) it is closely involved in the economic and social life of the people in the areas it represents; and (c) its membership is broadly representative of major segments of society in a large number of countries.<sup>43/</sup> Specific United Nations conferences often have developed their own accreditation processes as well to ensure that NGOs have good access. For example, the 2002 International Conference on Financing for Development extended its accreditation process almost up to the opening of the Conference to ensure that all interested NGOs could participate.<sup>44/</sup>

**Lesson Learned:** Public accreditation or stakeholder selection for specific meetings serve the purpose of public involvement best when they are fair, accessible and open as long as possible to newcomers, with clear selection criteria, including for example criteria such as field of expertise, representation, democratic structure and accountability, and geographic representation.

40. Many international forums have a history of organizing representatives from specific groups, such as business, labour and academia to provide input in their activities. However, the types of special advisory groups and task forces that often result from these efforts usually do not represent the broader spectrum of public interest organizations. International forums seem to be moving towards balancing these types of special advisory groups with broader public participation, and in some cases with advisory groups that also include representatives of public interest organizations or coalitions. For example, for many years, OECD has had formal relations with business and labour organizations through the Business and Industry Advisory Committee (BIAC) and through the Trade Union Advisory Committee (TUAC), both of which participate in all of its activities through bureau and informal consultations. During the past decade, OECD has started to interact more with other parts of civil society that are able to participate in its work mainly through informal activities, including consultations, conferences, seminars and workshops.<sup>45/</sup> Some international forums have established advisory groups that include representatives from public interest organizations. For example, the Joint Public Advisory Committee (JPAC) is a public, non-governmental group that advises the CEC Council in its deliberations and the secretariat in its planning and activities.<sup>46/</sup> JPAC members include representatives from North American environmental citizen organizations.

**Lesson Learned:** International forums benefit from the widest input when they give public interest organizations at least the same standing and participation rights in decision-making processes as those enjoyed by business organizations.

### **Types of decision-making processes**

41. The decisions (in the broadest sense) made by international forums can have a substantial impact on local communities and members of the public. Even the most general policy-making exercise can benefit from public input. Many international forums have recognized this and have opened their full range of decision-making processes to public participation. For example, UNECE involves the public in developing its themes and decisions for its periodic “Environment for Europe” ministerial meetings and in the negotiation and implementation of its environmental conventions. UNEP has held civil society consultations on the role of civil society within UNEP <sup>47/</sup> and concerning international environmental governance.<sup>48/</sup> OECD involves the public in the development of guidelines and in advancing discussions in various public policy areas.<sup>49/</sup> CEC involves the public in the formulation of policies and directives, the preparation of programmes, the development of projects and comparative studies among its three member countries.<sup>50/</sup> CSD involves the public in developing the themes and decisions for its annual meetings.

*Lesson Learned:* Decision-making processes in international forums, including the formulation of rules, plans, programmes, policies and projects, the negotiation and implementation of conventions, and the preparation of international conferences, will benefit from public participation and should facilitate and incorporate public input in a timely fashion.

### **Timing**

42. As international forums develop more formal processes for public input, they tend to pay attention to the timing of the public participation. Some of the international forums surveyed for this paper tried to provide an opportunity for the public to comment early in the decision-making process – although often only as early as preliminary drafts were available as opposed to the stage in which the scope of the decision is determined. Still, some international forums provide examples of early public involvement. For example, public participation started early in the UNECE development and negotiation of the Aarhus Convention. Through the “Environment for Europe” process, members of the public had already been involved in the drafting of the UNECE guidelines for public participation prior to the 1995 Conference in Sofia.<sup>51/</sup> They then continued in developing the framework and participating in the negotiation of the Convention that was ultimately signed at the 1998 Conference in Aarhus, Denmark. Public participation was started fairly early in the development of the OECD Guidelines for Multinational Enterprises with civil society members first participating in 1998 and being present at each negotiating session until the Guidelines were completed in 2000.<sup>52/</sup>

*Lesson Learned:* Consultations are most useful when they take place early in the decision-making process, at a stage when options are still open and effective public influence can be exerted.

43. Once comments have been requested, international forums are learning that they receive better comments when they provide sufficient time for members of the public to review the draft documents and give their comments before the final decision is made. For example, an EU Green Paper concerning greenhouse gas emissions trading distributed in March 2000 requested comments by September 2000.53/

***Lesson Learned:*** Consultations are most useful when the public receives a reasonable time in which to prepare comments and when the timing of the opportunity to participate is harmonized with public access to the relevant documents in order to facilitate informed public participation.

### **Public participation mechanisms**

44. There are many different ways in which international forums do and can involve the public in their decision-making. International forums tend to experiment with a range of different public participation mechanisms. As long as the basic goals and principles of public participation such as described above are met, these mechanisms can improve overall public involvement in international forums. For example, granting consultative status to NGOs in meetings (e.g. ECOSOC, UNEP), using NGO advisory committees (e.g. CEC's JPAC), hosting NGO forums and dialogues (e.g. UNEP, OECD, CSD, WTO), and posting calls for public comment (e.g. CEC, EU, UNECE) are all valid ways to involve the public and the more of these mechanisms an international organization uses, the more effective will be its public involvement.

***Lesson Learned:*** A variety of forms of effective public participation exist, for example consultative status, NGO advisory committee, NGO forums and dialogues, general calls for comment.

45. Many international forums hold formal governing meetings to which they grant NGOs limited access and participation rights. For instance, ECOSOC accreditation enables an NGO to participate in most United Nations conferences and meetings with, for example, the right to propose agenda items, the right to designate representatives as observers in the meetings, the right to submit written statements and the right to make oral statements during the meeting.54/

***Lesson Learned:*** International forums' governing and other formal meetings also benefit from public participation, especially when they establish rules concerning inter alia the right to propose items for the agenda, speak at meetings and circulate written statements.

46. To ensure the continued credibility of any public participation mechanisms, international forums need to provide the public with a reasoned decision that shows how the public input was taken into account. For example, CEC has established a process to try to ensure public accountability of the public participation process through: (a) clear objectives for public participation set in advance of meetings; (b) publicly accessible information on next steps and decisions relevant to the areas under discussion; (c) public information concerning how and when public comments will be considered; and (d) evaluation of the effectiveness of the public meetings.55/

**Lesson Learned:** The public is able to assess its impact on a process and is therefore more likely to continue to provide constructive input when public participation mechanisms culminate in reasoned decisions that clearly take account of the public comments.

### **Providing assistance**

47. Public participation often costs money that public interest organizations, including environmental citizen organizations, do not possess. Some international forums recognize this and provide financial assistance to some participating public interest organization representatives. For example, CEC sometimes provides financial travel assistance to public participants in its meetings and processes, as does UNECE.

48. Often only a few public interest organization representatives are able to participate in meetings or decision-making processes. In these cases, the best citizen input will come from those representatives who participate on behalf of a coalition of other organizations and members of the public with whom they have consulted extensively. This coalition-building and coordination also takes resources that public interest groups often do not possess. At times, a coalition exists to ensure the coordination of the participation, such as the Climate Action Network. But at other times, the best practice would demand creating or strengthening a coalition for a specific international process. For example, the governments involved in the negotiation of the Aarhus Convention provided financial assistance to strengthen the European ECO Forum coalition of environmental citizen organizations from across the UNECE region. This, in turn, was one of the reasons that ECO Forum participation was so well informed, constructive and representative of the ideas, opinions and experiences of environmental citizens organizations from the entire UNECE region.

**Lesson Learned:** To ensure widespread and economically diverse participation, international forums can provide public interest organizations with financial assistance to participate in their processes and to organize informed coalition responses to specific issues.

[Box: Aarhus Convention public participation standards

- Provide opportunities for the public to comment and give input into decision-making, including decisions concerning specific activities, plans, programmes, laws and rules.
- Conduct public participation early in decisions.
- Establish reasonable time frames for phases of public participation.
- Establish clear procedures for public participation.
- Authorities should take account of the public's comments.
- Authorities should provide the public with a reasoned final decision.]



### III. ACCESS TO JUSTICE

49. Access to justice is an emerging concept in the context of public participation in international forums. The Aarhus Convention provides for public access to justice at the national level to redress violations of the access to information and public participation standards and to enforce environmental law. In the context of the Aarhus Convention, access to justice can be interpreted broadly to include review processes that result in investigations or factual determinations in addition to those that result in traditional legal remedies. This broader interpretation has been used in gathering examples of practices for this chapter, as it goes well beyond access to courts for members of the public.

#### General principles

50. The most important elements for access to justice, whether at the national or international level, are that the public has access to impartial and independent administrative review or judicial proceedings and that these proceedings are fair, open, transparent and equitable. Of the international forums surveyed, three had some type of public access to justice mechanism for review and establishment of a factual record. This is found in the office of the European Ombudsman, the OECD Guidelines for Multinational Enterprises public complaint mechanism, and the CEC citizen complaint submission process. Only one institution, EC, provided citizens with some level of access to judicial proceedings – through the EC complaints process and through limited citizen access to the European Court of Justice and the European Court of First Instance.

*Lesson Learned:* International forums can benefit from public access to justice both to ensure accountability of their own rules and as an additional resource in monitoring implementation of their environmental rules. In order to provide access to justice, international forums can ensure that the public has access to impartial and independent administrative review, and quasi-judicial and judicial proceedings. Suitable legal guarantees can include that proceedings are fair, open, transparent and equitable.

#### Defining who has standing

51. Standing defines who can ask for an administrative review, a factual investigation, or undertake judicial proceedings. The best practices interpret “standing” very broadly. In the European Union, anyone may lodge a complaint with the Commission against a member State about any measure or practice which they consider incompatible with a provision or principle of Community law.<sup>56/</sup> As of 2000, the process has become more accessible with the publication of the EU Code of Good Administrative Behaviour that governs EU staff relations with the public.<sup>57/</sup> In the EU, anyone can make a complaint to the European Ombudsman for access to justice in cases where the institutions of the European Union have acted wrongly or denied rights such as access to information incorrectly.<sup>58/</sup> In OECD, along with business and labour, civil society organizations have the possibility of raising instances of alleged breaches of the Guidelines’ recommendations before relevant follow-up institutions.<sup>59/</sup>

In CEC, the “citizen submissions on enforcement matters” mechanism allows any member of the public in North America to submit claims to it alleging that a member country government is failing to enforce its environmental laws effectively.<sup>60/</sup>

**Lesson Learned:** International forums can best interpret the concept of “standing” broadly in proceedings involving environmental issues.

### Issues open for review

52. Members of the public tend to be able to ask for reviews in two different types of situations: review of violations of the international forums’ own rules, especially administrative processes regarding access to information and public participation; and international review of violations of or lack of enforcement of national laws. For example, in the EU, access to justice procedures can be divided into two main types: (a) procedures that are available at the Community level to challenge decisions or acts taken by member States; and (b) procedures that are available at the Community level to challenge decisions or acts taken by the European Union institutions.<sup>61/</sup> see paragraphs 31-32 above. The 2000 OECD Guidelines for Multinational Enterprises allow members of the public to allege breaches of the Guidelines’ recommendations before designated follow-up institutions.<sup>62/</sup> Under article 14 of the North American Agreement on Environmental Cooperation, the CEC citizen submissions mechanism allows the public to submit claims to it alleging that a member country government is failing to enforce its environmental laws effectively.<sup>63/</sup>

**Lesson Learned:** When international forums establish procedures for members of the public to request reviews, this can include: (a) any act or omission in the provision of information or the process of public participation; (b) any act or omission in following their own rules and standards; or (c) acts or omissions placed within their special jurisdiction for review (e.g. in some cases national environmental laws).

#### [Box: Aarhus Convention access to justice standards

- Access to justice available for any person within the limits of the Convention means access to judicial or other independent and impartial review in an expeditious and affordable manner.
- Review of the handling of information requests.
- Review of the handling of public participation.
- Review of acts and omissions of persons or public authorities concerning national law relating to the environment.
- Minimum standards, including adequate and effective remedies, fairness, equity, timeliness and reasonable cost.
- Decisions in writing and publicly accessible.
- Appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.]

### Notes

1/ ECE/CEP/43, article 3, paragraph 7.

2/ ECE/CEP/80, paragraph 35 (b).

3/ A/CONF.151/26 (vol. I). The Rio Declaration, principle 10.

4/ A/CONF.151/26 (vol. III). Agenda 21, article 27(9).

5/ Resolution 2997 (XXVII) of 15 December 1972 (paragraph IV.5).

6/ UNEP, Enhancing Civil Society Engagement in the Work of UNEP, Strategy Paper on GC 21/19, October 2001, UNEP-CSO Strategy5.doc.

7/ OECD, Engaging Citizens in Policy-Making: Information, Consultation, and Public Participation, OECD Public Management Policy Brief, PUMA Policy Brief No. 10, July 2001.

8/ Aarhus Convention, articles 2 (d), 17 and 19.

9/ [http://www.cec.org/who\\_we\\_are/index.cfm?varlan=english](http://www.cec.org/who_we_are/index.cfm?varlan=english)

10/ Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, 16 May 2002 (Decision of 14 May 2002). See, [http://www.wto.org/english/forums\\_e/ngo\\_e/bernie\\_derestrictiontext\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/bernie_derestrictiontext_e.htm)

11/ Annex: Guidelines for Implementation: OECD Council Resolution on the Classification and Declassification of Information, C(97)64/FINAL (adopted 10 July 1997). “Classified for official use” means that the information should not be communicated except for official purposes. “Confidential” means that the unauthorized disclosure would seriously prejudice the interest of the OECD or any of its Member countries.

12/ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_145/l\\_14520010531en00430048.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf)

13/ See note 6.

14/ See note 12.

15/ See note 12.

16/ See, <http://www.un.org>

17/ OECD, The OECD Guidelines for Multinational Enterprises, Revision 2000.

18/ See, [www.oecd.org](http://www.oecd.org) and for specific decisions: <http://webdomino1.oecd.org/horizontal/oecdacts.nsf>

19/ Draft documents often means drafts that are meant for public review as opposed to every draft in every stage of the preparation.

20/ See, [www.cec.org](http://www.cec.org)

21/ See, <http://bch.biodiv.org>

22/ See, <http://www.emep.int/>

23/ See note 10.

24/ See note 11.

25/ See, [www.cec.org](http://www.cec.org)

26/ CEC, Framework for Public Participation in Commission for Environmental Cooperation Activities, 22 October 1999. C/DIR/01/Rev.11

27/ IRPTC, <http://irptc.unep.ch/irptc/why.html>.

28/ See, [www.unep.net](http://www.unep.net)

29/ See, [http://europa.eu.int/comm/secretariat\\_general/regdoc/registre.cfm?CL=en&testjs=1](http://europa.eu.int/comm/secretariat_general/regdoc/registre.cfm?CL=en&testjs=1)

30/ Council Resolution 99-06, June 28, 1999, Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under articles 14 and 15 of the North American Agreement on Environmental Cooperation, [www.cec.org/files/english/Newg1-e.doc](http://www.cec.org/files/english/Newg1-e.doc), [www.cec.org/citizen/guide\\_submit/index.cfm?varlan=english](http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english)

31/ Annex, article 2, Commission Decision of 5 December 2001 amending its rules of procedure (2001/937/EC, ECSC, Euratom), [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_345/l\\_34520011229en00940098.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_345/l_34520011229en00940098.pdf)

32/ Meggan Dissly, NGO Liaison Officer, Public Affairs Division, OECD, personal communication, June 10, 2002.

33/ See note 12.

34/ See note 11.

35/ See note 12.

36/ See note 31.

37/ See note 12.

38/ See, the European Ombudsman Homepage, [www.euro-ombudsman.eu.int/home/en/default.htm](http://www.euro-ombudsman.eu.int/home/en/default.htm)

39/ For an example, see note 7.

40/ However, it is not always clear to what extent unsolicited comments are taken into account in the decision-making process.

41/ See, [www.cec.org](http://www.cec.org), [www.un.org/esa/sutdev/csdback.htm](http://www.un.org/esa/sutdev/csdback.htm), and [www.unece.org/env/wgso/ngo.htm](http://www.unece.org/env/wgso/ngo.htm)

42/ OECD Policy Brief, Civil Society and OECD, 2001, <http://www.oecd.org/pdf/M00018000/M00018283.pdf>

43/ Arrangements for Consultation with Non-Governmental Organizations, ECOSOC Res. 1996/31, at para. 22.

44/ Office of the President of the Millennium Assembly, Reference Document on the Participation of Civil Society in United Nations Conferences and Special Sessions of the General Assembly During the 1990s, Version 1, August 2001.

45/ See note 42.

46/ See, [http://www.cec.org/who\\_we\\_are/jpac/vision/index.cfm?varlan=english](http://www.cec.org/who_we_are/jpac/vision/index.cfm?varlan=english)

47/ Report, Civil Society Consultations on Ways and Means to Enhance the Active Engagement and Participation of Civil Society in the Work of UNEP, Nairobi, 24 and 25 May 2001.

[http://www.unep.org/dpdl/csngo/Files\\_under\\_Docs\\_and\\_Recs\\_from\\_CSOs%20link/Civil\\_Society\\_Consultations\\_on\\_GC\\_21\\_19\\_Nairobi\\_May\\_24\\_25\\_2001.htm](http://www.unep.org/dpdl/csngo/Files_under_Docs_and_Recs_from_CSOs%20link/Civil_Society_Consultations_on_GC_21_19_Nairobi_May_24_25_2001.htm), See also, UNEP Governing Council Decision SS.VII/5, 15 February 2002.

48/ Report on Civil Society Consultations on International Environmental Governance, Nairobi 22-23 May 2001. See also,

[http://www.unep.org/dpdl/csngo/Files\\_under\\_Docs\\_and\\_Recs\\_from\\_CSOs%20link/CIVIL\\_SOCIETY\\_CONSULTATIONS\\_on\\_IEG\\_Nairobi\\_May\\_22\\_23\\_2001.htm](http://www.unep.org/dpdl/csngo/Files_under_Docs_and_Recs_from_CSOs%20link/CIVIL_SOCIETY_CONSULTATIONS_on_IEG_Nairobi_May_22_23_2001.htm)

49/ See note 42.

50/ CEC, Framework for Public Participation in Commission for Environmental Cooperation Activities, 22 October 1999. C/DIR/01/Rev.11.

51/ UNECE Guidelines for Public Participation in Environmental Decision-Making, adopted at the 1995 Environment for Europe Ministerial Meeting in Sofia, Bulgaria. ECE/CEP/24 (1995).

52/ See note 42.

53/ Commission of the European Communities, Green Paper on Greenhouse Gas Emissions Trading within the European Union, Brussels, 8.3.2000, COM(2000) 87 final.

54/ The rights described here belong to the “general consultative” status under the ECOSOC accreditation rules. Arrangements for Consultation with Non-Governmental Organizations, ECOSOC Res. 1996/31.

55/ See note 50.

56/ See, Commission web page at [http://europa.eu.int/comm/secretariat\\_general/sgb/lexcomm/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/sgb/lexcomm/index_en.htm)

57/ Code of Good Administrative Behaviour: Relations with the Public, 13 September 2000, Official Journal of the European Communities: OJ L 267,

20.10.2000. [http://europa.eu.int/comm/secretariat\\_general/code/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/code/index_en.htm) Following the development of the Code of Good Administrative Behaviour, the Nice meeting of the European Council in December 2000 included a right to good administration for citizens as a fundamental right in the new Charter of Fundamental Rights.

58/ The European Ombudsman can produce a non-binding recommendation based on an investigation concerning maladministration in the EU institutions. See, the European Ombudsman Homepage, [www.euro-ombudsman.eu.int/home/en/default.htm](http://www.euro-ombudsman.eu.int/home/en/default.htm)

59/ See note 42.

60/ Council Resolution 99-06, June 28, 1999, Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, [www.cec.org/files/english/Newg1-e.doc](http://www.cec.org/files/english/Newg1-e.doc), [www.cec.org/citizen/guide\\_submit/index.cfm?varlan=english](http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english); North American Agreement on Environmental Cooperation between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 1993, Secretariat for the Commission for Environmental Cooperation, Article 14, [http://www.cec.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec/download/Naaec-e.doc](http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/download/Naaec-e.doc)

61/ European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL Network), Complaint Procedures and Access to Justice for Citizens and NGOs in the Field of the Environment within the European Union, Final Report, May 2000.

[http://europa.eu.int/comm/environment/impel/access\\_to\\_justice.pdf](http://europa.eu.int/comm/environment/impel/access_to_justice.pdf).

62/ See note 42.

63/ North American Agreement on Environmental Cooperation between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 1993, Secretariat for the Commission for Environmental Cooperation.