



PUBLIC PARTICIPATION IN THE CONTEXT OF TRANSBOUNDARY EIA/SEA: MAIN CONCEPTS AND THE CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE

Heghine Hakhverdyan
Lecturer of Environmental Law at Law Faculty,
Yerevan State University
Research Fellow at Environmental Law Research Center
Member of the Aarhus Convention Compliance Committee

Vilnius 2015

ISSUES AT STAKE

- ▶ Introduction to Aarhus Convention as a new type of international environmental treaty
- ▶ Compliance mechanism
- ▶ Public Participation in the process of decision-making on specific types of activities
- ▶ Public Participation concerning plans, programmes and policies



AARHUS CONVENTION AS A NEW TYPE OF INTERNATIONAL ENVIRONMENTAL TREATY



Adopted on 25 June 1998
In force since 30 October 2001

THE AARHUS CONVENTION: MERITS

- ▶ Links environmental rights and human rights
- ▶ Acknowledges that we owe an obligation to future generations
- ▶ Establishes that sustainable development can be achieved only through the involvement of all stakeholders
- ▶ Links government accountability and environmental protection
- ▶ Enhances government transparency and responsiveness
- ▶ Focuses on interactions between the public authorities in a democratic context
- ▶ Covers obligations that Parties have to the public



“FLOOR NOT A CEILING”

- ▶ Establishment of clear, transparent and consistent framework to implement the Convention
- ▶ Establishment of measures to achieve compatibility between the provisions implementing the information, public participation and access to justice provisions of the Convention
- ▶ Providing guidance to the public in taking advantage of the rights it conveys
- ▶ Promotion of environmental education and awareness-building
- ▶ Support to groups promoting environmental protection
- ▶ Prohibition of persecution, harassment or discrimination against those exercising their rights under the Convention



**principles
into practice**

COMPLIANCE MECHANISM



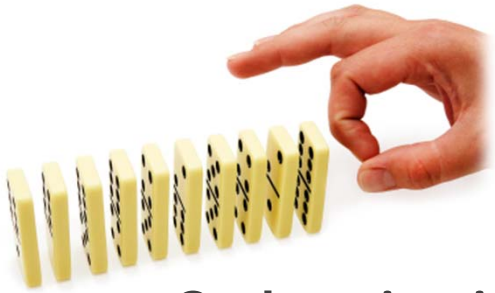
COMPLIANCE REVIEW REGIME

- ▶ Non-confrontational, non-judicial and consultative nature
- ▶ Independent members
- ▶ Non-binding decisions

Functions of the Compliance Committee

- Consideration of any submission, referral or communication
- Preparation at the request of MOP of a report on compliance with or implementation of provisions of the Convention
- Monitoring, assessing and facilitating the implementation of and compliance with the reporting requirements





TRIGGERS OF COMPLIANCE REVIEW

- ▶ Submission by a Party about compliance by another Party
- ▶ Submission by a Party about its own compliance
- ▶ Referral by the Secretariat
- ▶ Communications by members of the public

PUBLIC PARTICIPATION: GENERAL PRINCIPLES





BASIC CONCEPTS

PUBLIC

- One or more
- Natural and legal persons
- Including NGOs

PUBLIC CONCERNED

- ▶ Affected or likely to be affected, **including foreign public**;
- ▶ Having an interest in, the environmental decision-making;
- ▶ non-governmental organizations,
 - ▶ promoting environmental protection
 - ▶ meeting any requirements under national law

ACCC/C/2004/03 (Ukraine)



PUBLIC CONCERNED

INTERPRETATION BY THE COMMITTEE

C/8
Armenia

The communicants are NGOs that fall under the definition of “the public” as set out in article 2 para. 4, of the Convention. The Committee considers that all the communicants being registered NGOs and having expressed an interest in the decision-making process, fall within the definition of “the public concerned”.

C/3
Ukraine

The communicant is a non-governmental organization working in the field of environmental protection and falls under the definition of the public concerned (art. 2, paras. 4 and 5). Foreign or international non-governmental environmental organizations that have similarly expressed an interest in or concern about the procedure would generally fall under these definitions.

C/43
Armenia

[...] whether or not an NGO promotes environmental protection can be ascertained in a variety of ways, including but not limited to, the provisions of its statutes and its activities. Parties may set requirements under national law, but such requirements should not be inconsistent with the principles of the Convention.

THE LEVEL OF PUBLIC INVOLVEMENT WHAT SHOULD BE DECISIVE?

- ▶ Expected outcome
- ▶ The scope of the project or plan, program, policy
- ▶ Who and to what extent will be affected
- ▶ Whether the matters settled are on national, regional or local level



MINIMUM REQUIREMENTS

- ▶ Effective notice
- ▶ Adequate information
- ▶ Proper procedures
- ▶ Taking account of the outcome of public participation



BROADER CONCEPT OF PUBLIC PARTICIPATION UNDER AARHUS CONVENTION

While public participation is in fact a mandatory part of environmental assessment, an environmental assessment is not a mandatory part of a public participation procedure under the Aarhus Convention, as the Convention covers a broader scope.

**PEOPLE'S
PARTICIPATION
IN
GOVERNANCE**

PUBLIC PARTICIPATION IN THE PROCESS OF DECISION-MAKING ON CERTAIN TYPES OF ACTIVITIES



212

NOTIFICATION OF THE PUBLIC

In its findings on communication ACCC/C/2004/03 (Ukraine), the Compliance Committee noted that “generally speaking, there are no provisions or guidance in or under article 6, paragraph 2, on how to involve the public in another country in relevant decision-making, and that such guidance seems to be needed, in particular, in cases where there is no requirement to conduct a transboundary EIA and the matter is therefore outside the scope of the Espoo Convention.”





CRITERIA FOR NOTICE CONTINUING OBLIGATION

Adequate

- Sufficient information
- Certain level of detail is required

Timely

- At an early stage
- As and when available

Effective

- Targeted outreach
- ACCC/C/2006/16 (Lithuania)

REASONABLE TIME FRAMES

- ▶ Sufficient time for different stages
- ▶ Sufficient time to get acquainted with the documentation
- ▶ Sufficient time to seek for additional information from the public authorities
- ▶ Sufficient time to prepare and submit comments.

Important to note:

- ▶ The nature, complexity and size of the proposed activity
- ▶ Time of the year (e.g. major holiday periods) - [ACCC/C/2008/24 \(Spain\)](#)



EARLY PUBLIC PARTICIPATION



- ▶ When all options are open and effective participation can take place
- ▶ Does not prevent a public authority from taking a position or determining a preliminary opinion as to a possible decision about the proposed activity
- ▶ Still in the information gathering and processing stage
- ▶ Several stages and parallel processes for large activities
- ▶ In complex decision-making public participation should take place at each stage where a (primary or secondary) decision by a public authority may potentially have a significant effect on the environment.

ACTIVE ROLE OF THE APPLICANT

- ▶ Increasing the efficiency of public participation by encouraging a prospective applicant to take certain steps before applying for a permit
- ▶ The applicant shoulders some of the responsibility of communicating with the public
- ▶ Misunderstanding resolved and conflicts minimized
- ▶ Direct communication between the applicant and the public lessens the figurative distance that information has to travel



PROVIDING INFORMATION TO THE PUBLIC

- ▶ Access upon request where so required under national law
- ▶ Free of charge
- ▶ As soon as the information becomes available
- ▶ All information relevant to decision-making
- ▶ Not limited to environmental information
- ▶ Information in whatever form
- ▶ Disclosure of some information might be refused in accordance with the relevant provisions stipulated in the Aarhus Convention



SUBMISSION OF COMMENTS

- ▶ The right to submit comments is not limited to the public concerned
- ▶ Public comments should be allowed to be submitted in writing or, as appropriate, at a public hearing or enquiry with the applicant - [ACCC/C/2012/71 Czech Republic](#)
- ▶ Possibility to submit feedback should be open during the entire commenting period
- ▶ Any comments, information, analyses or opinions
- ▶ Particular format or content is not required
- ▶ Comments are not required to be reasoned - [ACCC/C/2006/16 \(Lithuania\)](#)



DUE ACCOUNT OF THE OUTCOME OF THE PUBLIC PARTICIPATION

- ▶ Not limited to public participation concerning the environmental aspects of the proposed activity, but applies to the whole outcome involving broader scope
- ▶ Ultimate responsibility to ensure that the decision is based on all the information available to it, including all comments received
- ▶ Responsibility for the public authority to provide reasoning as to why a particular comment has been rejected on substantive grounds
- ▶ No requirement for the public authority to accept the substance of all comments - [ACCC/C/2008/29 \(Poland\)](#)

“The requirement of article 6, paragraph 8, that public authorities take due account of the outcome of public participation, does not amount to the right of the public to veto the decision.”



HIGHLIGHTS IN THE MAASTRICHT RECOMMENDATIONS

- ▶ The obligations stemming from the Convention are not dependent on the obligations stemming from other international instruments.
- ▶ If the legal framework seeks to delegate any administrative tasks related to a public participation procedure to persons or bodies other than the competent public authority, it should be borne in mind that the ultimate responsibility for ensuring the public participation procedure complies with the requirements of the Convention will still rest with the competent authority.
- ▶ [ACCC/C/2012/71 Czech Republic](#)



PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES



THE SCOPE - A SLIGHTLY HIGHER STANDARD

SEA
Protocol

"... which are likely to have significant environmental, including health, effects"

STRONGEST OBLIGATIONS ONLY IN TERMS OF PLANS AND PROGRAMMES

SEA
Directive

"... which are likely to have significant effects on the environment"

PLANS AND PROGRAMMES ONLY

Aarhus

"... plans, programmes and policies relating to the environment"

POLICIES INCLUDED

REGULATORY REGIME UNDER THE AARUHS CONVENTION: WHAT IS DIFFERENT?



Flexibility

- ▶ The obligations of authorities and the rights of the public are somewhat less clearly defined
- ▶ More flexibility in finding appropriate solutions for public participation in this category of decision-making

Mandatory conditions

- ▶ Reasonable time frames
- ▶ Early public participation
- ▶ Due account of the outcome of public participation



HOW TO IDENTIFY THE DECISION? ART. 6 OR 7?



CONDITIONS

- ▶ Determined on contextual basis;
- ▶ Functions of the particular decision;
- ▶ Legal effects of the particular decision;
- ▶ Label under national law is not decisive.

CASE LAW

ACCC/C/2006/16 (Lithuania)

Under Lithuanian law, such decisions (*detailed plans*) have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention.

ART. 6 OR 7?

Art. 6 if:

- ▶ An individual decision issued by a public authority;
- ▶ Usually upon an individual application by an applicant for a permitting decision;
- ▶ Permitting a particular activity (development project) to be undertaken by the applicant;
- ▶ In a specific place and under specific conditions;
- ▶ Usually following the general requirements set by the plans or programmes setting the framework for certain types of activities.

Art. 7 if:

- ▶ Plan or Programme has the legal nature of a general act (adopted legislative or executive branch);
- ▶ Initiated by a public authority;
- ▶ Usually in a binding way the framework for specific activities (development projects) is set out;
- ▶ Not sufficient for any individual activity to be undertaken .



THANK YOU FOR ATTENTION

CONTACTS

E-mail: h.hakhverdyan@ysu.am

URL: www.elrc.ysu.am

Phone: +374 55 991419

Address:

#1, Alex Manoogian str., 0025,
Yerevan, Republic of Armenia

