

UNFCCC and the Aarhus Convention

An Analysis of Existing Rules

Legal Analysis

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General

Principle 10 of the 1992 Rio Declaration states:

*Environmental issues are best handled with **participation of all concerned citizens**, at the relevant level. At the national level, each individual shall have appropriate **access to information** concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to **participate in decision-making processes**. States shall facilitate and encourage public awareness and participation by making information widely available. **Effective access to judicial and administrative proceedings**, including redress and remedy, shall be provided.*

This provision anticipates the three “pillars” of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) which is in force since the year 2001. The Aarhus Convention is a special type of international agreement. It “*goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness.*”¹

It is considered by scientists, beyond reasonable doubt, that human activity is the reason for the currently observed change of our world climate. The United Nations Framework Convention on Climate Change (UNFCCC) is the major international legal instrument which “*sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change*”².

Not all Parties to the UNFCCC (currently 195 parties) are also Parties to Aarhus Convention. The obligations arising from the Aarhus Convention are legally binding for currently 44 Parties. The requirements, which are set up concern mostly national law and practice. However, the Aarhus Convention also makes reference to public participation in international forums, such as the UNFCCC, in its Art 3 (7): “*Each Party shall 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.*” This provision is formulated as soft law and does not oblige the parties to carry out specific activities. However, based on this provision, guidelines have been established which will be discussed in the following.

1 <http://live.unece.org/env/pp/introduction.html> (10 August 2011).

2 http://unfccc.int/essential_background/convention/items/2627.php (18 August 2011)

The Almaty Guidelines

The 2005 Almaty Guidelines³ (AG) were issued in 2005 based on Art 3 par 7 of the Aarhus Convention. They provide recommendations and offer guidance for state behaviour as regards public participation in international forums relating to the environment. The term “international forums” comprises, amongst others, the negotiation and implementation of international agreements relevant for the environment, inter-state conferences dealing with the environment and decision-making processes in international organisations on issues with an environmental relevance (see AG par. 4). The Almaty Guidelines contain general considerations on the necessity and the needs of public participation in international forums but also concrete recommendations on access to environmental information and public participation in environmental decision-making procedures. Access to justice (review procedures) is not covered by the guidelines.

As a starting point the guidelines state that access to information, public participation and access to justice are fundamental elements of good governance and that thereby the quality of decision-making and implementation of decisions can be enhanced (AG par. 11 and 12). Decision-making processes should be kept open for the public and measures should be taken to guarantee fair and equal participation opportunities in a transparent and non-discriminatory way. Additionally participation should be facilitated for those most directly affected and might not have the means for participation (see AG par. 11-15).

As regards access to environmental information the most important recommendations are the following (see AG par. 19-27):

1. Parties (to the Aarhus Convention) should encourage international forums to develop and make available to the public a clear and transparent set of policies and procedures on access to the environmental information in order to facilitate access by the public.
2. Environmental information contained in official documents should be made available to the public.
3. Appropriate technical means should be used to make information available without costs.
4. Environmental information should be provided proactively, including, as appropriate, in the official languages of the concerned international forum.
5. Access to environmental information developed and held in international forums should be provided free of charge to members of the public without having to state an interest.
6. Requests for environmental information should only be refused on the basis of specific grounds for refusal which should be interpreted restrictively.

The guidelines recommend that public participation should be allowed at all relevant stages of decision-making processes and should only be excluded according to transparent and clearly stated standards (see AG par. 29). Efforts should be made to proactively seek the participation of all actors (AG par. 28). Further recommendations are (see AG par. 30-39):

3 **DECISION II/4 PROMOTING THE APPLICATION OF THE PRINCIPLES OF THE AARHUS CONVENTION IN INTERNATIONAL FORUMS** adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005

1. Public participation should take place already at an early stage, possibly already during the preparation of decisions.
2. Public participation can be ensured in different forms. These forms include observer status; advisory bodies open to relevant stakeholders, webcasting of events and general calls for comments.
3. Public participation at meetings in international forums should include the entitlement to have access to all relevant documents as well as to circulate written statements and to speak at meetings.
4. Reasonable time frames for the different stages, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively during the decision-making process.
5. Opportunities for public participation should be provided when options are still open and effective public influence can be exerted.
6. The public should be informed in due time of the opportunities, procedures and criteria for public participation as well as of the availability of information and documents.
7. Due account should be taken of the outcome of public participation when taking decisions.
8. Efforts should be made to apply innovative, cost-efficient and practical approaches as well as to find practical solutions, for instance as regards financial support for travel and accommodation costs for participants.

In general, the Almaty Guidelines promote an open and transparent approach regarding access to environmental information and public participation in international forums. The following chapter will analyze the relevant rules (and to a certain degree also practice) within the UNFCCC in the light of the Aarhus Convention and of the Almaty Guidelines.

Access to Information and Public Participation in the UNFCCC system

Public, and in particular NGO, participation under the UNFCCC have a long tradition. From the beginning on NGOs were involved or at least closely following the negotiations over the UNFCCC and the following Conferences of the Parties (CoPs)⁴. While the first CoP in Berlin in 1995 was attended by 177 NGOs, in Kyoto, Japan, in 1997 it was already 243. The increase can most probably be attributed to the historic nature of the Kyoto conference⁵. Currently three types⁶ of non-governmental “constituencies” are present at UNFCCC negotiations and events: environmental NGOs, business and industry actors and local authorities/municipal government.

4 See: Yamin, Farhana, Wasserstein, Tania; NGO participation in the Framework Convention on Climate Change, FIELD 1999, <http://www.field.org.uk/files/99.21%20Yamin%20&%20Wasserstein.pdf>, 16 August 2011. p. 5.

5 Ibid. P. 5.

6 Ibid. P. 6.

Guidelines and Rules of Procedure

The UNFCCC makes direct reference to public participation and access to information. In addition Guidelines for the participation of NGOs at meetings of the bodies of the UNFCCC⁷ have been published. The most current public version of the guidelines dates back to 2003, currently a revision process is ongoing. Also there are Draft Rules of Procedure⁸ which have not yet been adopted, even though the UNFCCC factually operates under them⁹. Both the Guidelines as well as the Draft Rules of Procedure do not contain a very extensive elaboration of public participation and access to information rights. Rather they limit themselves to mentioning the possibility for participation of non-government actors as observers in CoP sessions or other proceedings without voting rights and subject to notification of the secretariat.

Looking at the draft Rules of Procedure, only Rule 7 makes reference to participation of the public. Rule 7 par 1 of the Draft Rules of Procedure mirrors Art 7 par 6 UNFCCC (see below) and states that NGO observers may be admitted to the sessions of the CoP unless one third of the Parties present object. This provision however only concerns the CoP. In other sessions observers may only take part upon invitation of the President of the CoP and only in sessions which are of direct concern to the body or agency the observers represent. This is a reflection of Rule 30, which states as a general rule that meetings at the CoP are to be held in public while other meetings are to be held in private.

As regards the UNFCCC Guidelines on NGO participation they are very short and contain rather a code of conduct than a list of rights. Letter A covers the practical issues of access and requirements (prior registration, badges, verification of identity and age limits). Letter B deals with etiquette and safety (for example duty to comply with instructions of from UN officials and security staff, prohibition to harass or threaten, free movement of participants within venues, proper treatment of flags and symbols). As regards participation the Guidelines under letter C refer to the Draft Rules of Procedure's rules 7 and 30 and allow for closed meetings referring to the Draft Rules and the Decision 18/CP.4. Finally letter D deals with the distribution of non-UN-official information materials.

Both the guidelines as well as of the Draft Rules of Procedure are by far not as ambitious or comprehensive as those of the Aarhus Convention and the Almaty Guidelines, leaving a large space for the discretion of the UNFCCC bodies to decide over participation possibilities in general and in concrete cases.

Public Participation and Access to Information provisions in the UNFCCC

The UNFCCC itself contains provisions directly addressing issues of public participation. The first can be found under the heading "Commitments". Art 4 par 1 (i) obliges the Parties to the UNFCCC to promote and cooperate in education, training and public awareness raising

7 Available under: http://unfccc.int/files/parties_and_observers/ngo/application/pdf/coc_guide.pdf. 17 August 2011.

8 FCCC/CP/1996/2, available under: <http://unfccc.int/resource/docs/cop2/02.pdf>. 16 August 2011.

9 Wilson, Winfield J., "Legal foundations for NGO participation in climate treaty negotiations." Sustainable Development Law and Policy, Spring 2010, 54, 69.

related to climate change and to encourage the widest participation in this process. NGOs are mentioned explicitly as stakeholders in this context.

The second provision (Art 6 a) also relates to education, training and public awareness raising and states that the Parties to the Convention shall, amongst others

(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:

*(i) the development and implementation of **educational and public awareness programmes** on climate change and its effects;*

*(ii) public **access to information** on climate change and its effects;*

*(iii) public **participation in addressing climate change and its effects** and developing adequate responses;(...)*

This article contains various linkages to the Aarhus Convention. First the environmental education and awareness aspect is covered by Aarhus Art 3.3 which states that “*Each Party shall promote environmental education and environmental awareness among the public (...).*” Public access to (environmental) information is governed by Aarhus Articles 4 (right to access to information for the public) and 5 (collection and dissemination of information). The latter Article is complemented by the UNECE Kiev Protocol on Pollutant Release and Transfer Registers (PRTRs). The UNFCCC provision on public participation touches upon Aarhus Articles 6 (public participation in decision-making on specific activities), 7 (public participation in decision-making on plans, programmes and policies relating to the environment) and 8 (public participation during the preparation of executive regulations or generally applicable legally binding normative instruments).

The third reference to Aarhus rights is contained in Art 7 par 6 UNFCCC. The Article states the following:

(...) Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

The Article concerns the right of members of the public to take part in a session of the CoP as an observer. Reference is made to the Rules of Procedure. As mentioned above, these only exist as a draft document which is however highly relevant for UNFCCC practice.

One further provision has some relevance as regards the linkages between the UNFCCC and the Aarhus Convention. Art 8 par 2 (e) UNFCCC describes the obligation of the UNFCCC secretariat to “*ensure the necessary coordination with the secretariats of other relevant international bodies*”. This could concern also the Aarhus Convention’s secretariat, which is open to cooperation with secretariats and other bodies of international conventions with the aim of promoting the principles of the Aarhus Convention.

The Aarhus principles and the Almaty Guidelines under the UNFCCC: Room for improvement

The Aarhus Convention itself does not provide for strong and in particular also binding provisions regarding public participation in international forums. Only Art 3 par 7 concretely deals with this issue. Based on this article the Almaty Guidelines have been issued, however they also do not contain any binding requirements.

This analysis shows that there is still a long way to go for the UNFCCC if it wishes to approximate the standards, which are enshrined in the Aarhus Convention and reflected in the Almaty Guidelines. Even though there is no obligation arising from the Almaty Guidelines for the Parties to the Aarhus Convention, they are however bound by Art 3 par 7 of the Convention and therefore *“shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations”*.

Access to environmental information

This is a critical issue in the light of the Almaty Guidelines. While the Guidelines promote an open and proactive approach the UNFCCC system remains rather closed and passive. Public access to information about climate change and its effects is mentioned explicitly in the UNFCCC. However, the right to access to the working documents and the documents produced at sessions taking place under the UNFCCC cannot be found in any relevant provision, also not in the Draft Rules of Procedure or in the Guidelines on NGO participation. It cannot be considered in line with the Almaty Guidelines that there is little to no proactive dissemination of information used and produced at the sessions and meetings of the CoP and of other UNFCCC bodies. Even though new methods for the dissemination of information have been tested and are used in some cases, there is still no overarching framework for dissemination.

Public participation

Also public participation under the UNFCCC has to be considered a critical issue in the light of the Aarhus Convention's Almaty Guidelines. Even though there is the possibility to become an observer for members of NGOs, this status is not so easy to obtain. According to the rules of procedure following criteria have to be fulfilled in order to be admitted as an observer to the CoP:

- qualification of the organisation wishing to participate in matters covered by the convention
- advance information about wish to participate to secretariat
- no objection by one third of the Parties.

As regards sessions concerning other matters the criteria are stricter. Only upon invitation of the President of the CoP may observers be admitted and only to sessions in matters of direct concern to the body or agency they represent.

This cannot be considered an open and transparent approach as foreseen in the Almaty Guidelines. The situation in practice is worse as regards informal meetings and working groups. Often no NGO observers are admitted to this type of meetings.

Recommendations

General

Generally it is necessary to create an overarching and binding framework for access to information and public participation under the UNFCCC. The revision of the UNFCCC Guidelines for the Participation of Representatives of NGOs would be the first logical step in this context. It is necessary to clarify who gets access to what and when. The process of revision should include meaningful participation by members of the public. An exchange of information and experiences with the Aarhus Convention's secretariat would allow for a fruitful cooperation in this context. All relevant development should also be inserted into the rules of procedure; however their amendment has proven to be quite difficult and tedious in the past.

Access to information

Timely access to all information, at least the information falling under the definition of "environmental information" as determined by the Aarhus Convention's Art 2 par 3, should be guaranteed. At sessions of the CoP and other meetings of bodies of the UNFCCC also information relevant for the ongoing discussion or negotiation should be provided early in electronic and, where appropriate, also in paper form. Generally more effort should be made to enhance public access to information, not only about climate change but also about the ongoing discussions and negotiations without having to state an interest.

Access to information should be realized proactively as regards its form, and its language as well. There is a need to point out an office or a contact person responsible for promoting access to information and for providing environmental information requested (AG 22). Concretely, the regulation on access to information should also be laid down under the UNFCCC.

Public participation

Generally speaking closed meetings should be the exception and not the rule. If a closed session is held this fact should be communicated in advance along with the exceptional circumstances justifying this step. Participation of the public should be regulated in a transparent way allowing for the broadest possible participation in all types of sessions, meetings and working groups. As appropriate to the nature of the forum, this regulation should include an exhaustive list of reasons and exceptional circumstances for excluding the public. The Parties to the UNFCCC should arrange for participation of NGO observers as part of their delegations.

For practical reasons the numbers of observers might be limited, however it is necessary to guarantee the presence of certain minimum amount of members of the public. Speaking slots should be provided for members of the public before and during negotiation sessions.

Currently these are limited to the very beginning and the end of CoP where they often do not receive the full attention of the participants.

New methods for public participation should be explored. Computer/Internet-based consultation systems can facilitate participation by allowing a larger number of members of the public to state their opinion at low cost.

Financial support for public participation should be considered by the UNFCCC secretariat as well as by the Parties to the Convention in order to reduce inequalities as regards personal and financial capacities of the various groups of stakeholders. In particular the participation of civil society groups from developing countries should be fostered.

Access to Justice

A last area for recommendations concerns the “third pillar” of the Aarhus Convention. Although the Almaty Guidelines do not refer to this issue, to promote transparency, to enhance awareness and supportive participation of the public, access to review procedures against decisions interfering with the rights on access to information and participation should be made available under the UNFCCC.

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