**Annex I**

the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and ITS Protocol on Pollutant Release and Transfer Registers AS TOOLs FOR empowering the public to protect biodiversity

 **Briefing note**

Prepared by the ECE secretariat of the Aarhus Convention and the Protocol on PRTRs

**Introduction**

1. Biodiversity is a crucial integral part of the environment whose favourable state is fundamentally important for ensuring human well-being, health and sustainable development. The biodiversity is under increasing threat not only as a consequence of the changing climate, but also as a result of growing populations, industrialization, urbanization and agriculture. The existed threats to biodiversity negatively affect the environment but also rights of the public[[1]](#footnote-1), in particular local communities and indigenous people. Its conservation and protection is equally important not only for present but also future generations. Biodiversity protection linked not only with right to favourable and healthy environment but also right to life, right to property and right to adequate living standards.
2. Good and inclusive governance and decision-making at all levels, increasing transparency, data collection and sharing and effective remedies to ensure proper law enforcement and compliance can provide an effective response to mitigate biodiversity loss and protect ecosystems and their services. Enabling individuals, NGOs, local communities and other stakeholders to support this response through guaranteeing their rights to access to information, participate in decision-making and access to justice proved to be effective way to address biodiversity-related matters.
3. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, in short Aarhus Convention, recognizes the right to a healthy environment and guarantees the interlinked rights of access to information, public participation and access to justice in a single international treaty. It imposes corresponding obligations on public authorities which are broadly defined in the Convention so as to cover governmental bodies from all sectors and at all levels and bodies performing public administrative functions. The definition of “public authority” also covers the institutions of regional economic integration organizations which become Party to the Convention (e.g. the institutions of the European Union). Bodies acting in a judicial or legislative capacity are excluded.
4. Adopted in 1998, the Aarhus Convention is an unprecedented instrument of international environmental law, representing a significant step forward both for the protection of the environment, including biodiversity, and implementing human rights standards. As the only existing legally binding instrument to implement Principle 10 of the Rio Declaration, it has drawn global attention and has inspired the development of similar processes and instruments in other regions.
5. With forty six States and the European Union now Parties to the Convention, the Convention “remains the most ambitious venture in the field of environmental democracy under the auspices of the United Nations”[[2]](#footnote-2) and is widely accepted as the leading example of the implementation of Principle 10 of the Rio Declaration on Environment and Development.[[3]](#footnote-3) It is also open to accession by non-ECE countries, subject to approval by the Meeting of the Parties.
6. Importantly, article 10 of the Convention established reporting requirements for the Parties in order to continually review the implementation of the Convention. Decision 1/7 the Meeting of the Parties established the Compliance mechanism that has to be of a “non confrontational, non-judicial and consultative” nature and allow for “appropriate public involvement”. The Aarhus compliance mechanism is unprecedented among multilateral environmental agreements in the extent to which it gives the public, including NGOs, a role in triggering a review of a Party’s compliance. Until now, the Compliance Committee established under the mechanism has dealt with approximately 140 communications from NGOs and individuals and two submissions from two governments. The Convention’s compliance and reporting mechanisms, both of which provide a role for the public, have yielded valuable information on the extent and nature of the challenges in implementation.
7. The Convention has the Kiev Protocol on Pollutant Release and Transfer Registers which entered into force in 2009. It established a new legally binding international benchmark for reporting on emissions of pollutants from a wide range of potentially harmful activities. The Convention’s provisions of access to information, participation and legal redress are mirrored in its Protocol. The Protocol, has currently 36 Parties, is open for accession to all UN Member States and regional economic integration organizations.

**Right to biodiversity-related information**

1. The first pillar of the Aarhus Convention guarantees public access to environmental information. Public access to information remains key enabler of greater governmental transparency and accountability, effective public participation and access to justice that is crucial for addressing the biodiversity-related matters. Various stakeholders might have interest to different types of biodiversity-related information. While the Aarhus Convention requires ensuring that public authorities collect and update environmental information, there is also an increasing attention to the new sources of environmental information, which are collected and shared by the public.
2. The Convention has not defined the scope of environmental information in an exhaustive manner. Information on the state of biodiversity and factors having (or being likely to have) an impact on it are considered as environmental information in accordance with article 2, para. 3, of the Convention. For example, the findings and recommendations with regard to communication ACCC/C/2011/63[[4]](#footnote-4) underlined: “The broad understanding of ‘environment’ under the Convention is drawn from the broad definition of ‘environmental information’ under article 2, paragraph 3, which also extends to ‘biodiversity and its components, including genetically modified organisms’. The fact that components of biodiversity have been removed from their habitat does not necessarily mean that they lose their property as biodiversity components” (para 54). In the same findings, it is further clarified: “Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also ‘laws relating to the environment’, because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment” (para. 55).
3. The information pillar of the Convention covers both the 'passive' or reactive form of access to information, i.e. the obligation on public authorities to respond to public requests for information, and the 'active' form dealing with other obligations relating to providing environmental information, such as collection, update, public dissemination and so on.
4. While passive form of access to information upon request still applies, the current trend under the Convention shifted towards more active dissemination of environmental information and the use of electronic information tools. For example, to facilitate the implementation of the obligations of the Aarhus Convention on active dissemination of environmental information, the practice of active dissemination of environmental information in relation to the Birds and Habitats Directives was analysed in the study carried out by the European Commission.[[5]](#footnote-5)
5. Public access to biodiversity-related information might be restricted in accordance with article 4, paras. 3 and 4, of the Aarhus Convention. For example, a request for environmental information may be refused if the disclosure would adversely affect the environment to which the information relates, such as the breeding sites of rare species. The grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment. The practice regarding the application of this exemption was discussed at the fourth meeting of the Task Force on Access to Information [(Geneva, 8-10 December 2015)](http://www.unece.org/env/pp/aarhus/tfai4.html%22%20%5Ct%20%22_blank%22%20%5Co%20%22Opens%20internal%20link%20in%20new%20window)[[6]](#footnote-6).
6. The Convention’s Protocol on Pollutant Release and Transfer Registers also aims to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs).

**Public participation in biodiversity-related decision-making**

1. The second pillar of the Convention guarantees public participation in decision-making on activities that may have significant effect on the environment and during the preparation of plans, programmes, policies and legislation relating to the environment, including biodiversity matter. If the public is able to participate in decision-making related to the environment form the outset, it is likely that the final outcome of a project or policy or legislative change will be more acceptable to them, more sustainable and less harmful to the environment. It also means that hidden or unexpected aspects of a proposed activity or adverse impact on vulnerable groups can be uncovered early, helping to avoid costly mistakes.
2. For example, the decision-making on the establishment of the wind farms as a part of renewable energy strategies raised public concerns regarding endangering biodiversity, especially (migrant) birds and their impact on the landscape. Lack of public access to all relevant information or ineffective public participation gave rise to the communication by the members of the public to the Aarhus Convention Compliance Committee.[[7]](#footnote-7).
3. The public has also raised concerns regarding its participation during the preparation of executive regulations and legislation that may have a significant effect on the environment (e.g. with regard to the Forestry legislation[[8]](#footnote-8)).

**Access to justice regarding biodiversity-related matters**

1. The Convention’s third pillar grants members of the public a right to access to justice in environmental matters. This can be effective tool not only to ensure timely and effective access to information and public participation in decision-making procedure but also compliance and enforcement of law relating to nature conservation and biodiversity. In particular, article 9, para 3, of the Convention, requires to ensure that members of the public have access to administrative or judicial review procedure to challenge acts or omissions by private persons which contravene provisions of domestic law relating to the environment, including the protection of wildlife species and/or trade in endangered species (see also para. 9 above).

|  |
| --- |
| 1. The human rights law is fundamentally important when it comes to the effective legal protection in environmental matters that forming the core of a rule of law. Several landmark court cases on biodiversity-related matters were initiated by non-governmental organizations promoting environmental protection.
2. One of the most prominent cases in this subject is known as *the Slovak Brown Bear* case. In this case, the Court of Justice of the European Union decided that the domestic law of the Member States, concerning *locus standi* has to be interpreted to the fullest extent possible and in order to bring administrative or judicial proceedings in accordance with the objectives of article 9, para. 3, of the Aarhus Convention, i.e. in a way that it enables NGOs promoting environmental protection to challenge before a court an environmental decision taken following administrative proceedings.[[9]](#footnote-9)
3. In the light of this interpretation, the Swedish Supreme Administrative Court decided in 2015 that a provision in Swedish national procedural law, which provides the members of the public with the access to administrative review procedure to challenge public authorities’ decisions permitting hunting, but does not allow the public’s access to judicial review, is in breach with the principle of legal protection in the European Union law and the obligation under article 9, para. 3 of the Convention and must therefore be put aside by the national courts.[[10]](#footnote-10)
 |

1. Another case was brought by BirdLife Switzerland before the Swiss Supreme Court against an appeal of shootings of some protected birds that had not required in practice issuing by public authorities a formal ruling on the matter. Referring to article 9, para. 3, of the Aarhus Convention, the Supreme Court decided that a decision of public authorities which could impact on nature protection concerns cannot be taken in the form of simple internal instructions, but must be issued as a formal ruling. The qualification of such decision as a formal ruling also cannot depend on a quantity criterion (i.e. measure concerns less than 10% of the local species population). As a consequence, NGOs promoting environmental protection have standing to appeal those decisions.[[11]](#footnote-11)

**GMOs and Biological Diversity[[12]](#footnote-12)**

1. Twenty-seven (27) ratifications by the Parties which were Parties to the Convention at the time of adoption of the GMO amendment (27 May 2005) are needed to trigger the amendment's entry into force. At the moment only 24 of those Parties have ratified the GMO amendment, among which the European Union in February 2008.
2. To support the ratification and implementation of the GMOs Access to information and public participation in decision-making with respect to release into the environment or placing on the market genetically modified organisms (GMO) represent another area that links human rights and biodiversity.
3. At its first session (Lucca, Italy, 21-23 October 2002), the Meeting of the Parties to the Convention adopted the Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms..[[13]](#footnote-13)
4. Followed by intense discussions on the significance of further progress on this matter, the Meeting of the Parties at its second session (Almaty, Kazakhstan, 2005), adopted the so called GMO Amendment to the Aarhus Convention with a new Article 6 bis and Annex I bis on genetically modified organisms.
5. As of September 2016, the GMO Amendment has not entered into force yet. amendment to the Aarhus Convention and the Cartagena Protocol to the Convention on Biodiversity, a checklist of key measures to assist Parties in ratifying and implementing them in the context of living modified and genetically modified organisms (LMOs/GMOs)[[14]](#footnote-14) and a note that describes different tools and resources for the provision of technical assistance to support their both implementation[[15]](#footnote-15) has been developed jointly by the secretariats of both treaties.

**Public participation in biodiversity-related international forums[[16]](#footnote-16)**

1. Article 3, para. 7, of the Aarhus Convention requires Parties to promote the application of the principles of this Convention in international decision-making processes and within the framework of international organizations in matters relating to the environment, including those related to biodiversity.
2. To facilitate the implementation of this provision, the Convention’s Parties adopted the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums.[[17]](#footnote-17) The Almaty Guidelines, for example, are applicable to the processes of the Convention on Biological Diversity and its protocols, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention), the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), United Nations Framework Convention on Climate Change, Intergovernmental Negotiating Committee for a Legally Binding Agreement on Forests in Europe and others. To facilitate the work in this area, the checklist of measures to be borne in mind when developing a national action plan to systematically promote the principles of the Convention in all international forums dealing with matters relating to the environment has been prepared under the auspices of the Aarhus Convention[[18]](#footnote-18) .
3. The regular exchange of information on best practices and challenges regarding promotion of the principles of the Aarhus Convention in relevant international processes takes place under the auspices of the Working Group of the Parties to the Aarhus Convention.

**Conclusions**

1. To sum up, the Aarhus Convention is characterized by the following features relevant to the implementation of human rights obligations in biodiversity-related matters:
2. It requires Parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to health and well-being. These rights underlie the various procedural requirements and corresponding obligations of public authorities;
3. It establishes minimum standards to be achieved but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice. The Convention prohibits discrimination on the basis of citizenship, nationality or domicile against persons seeking to exercise their rights under the Convention;
4. It contains a general requirement on Parties to promote the application of its principles within the framework of international bodies and processes in matters relating to the environment, including biodiversity.
1. In accordance with article 2, para. 3, of the Aarhus Convention, the public means one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organizations or groups. [↑](#footnote-ref-1)
2. See foreword by the Secretary-General of the United Nations, “The Aarhus Convention: An Implementation Guide”, United Nations publications, 2014. [↑](#footnote-ref-2)
3. See for example Birnie and Boyle, International Law and the Environment, 2001, p. 262. [↑](#footnote-ref-3)
4. See the findings of the Aarhus Convention Compliance Committee on communication ACCC/C/2011/63 available from <http://www.unece.org/env/pp/cc/com.html> (document ECE/MP.PP/C.1/2014/3, paras. 54 and 55). [↑](#footnote-ref-4)
5. Available from <http://ec.europa.eu/environment/aarhus/studies.htm> (under access to information section). [↑](#footnote-ref-5)
6. More information is available from <http://www.unece.org/env/pp/aarhus/tfai4.html#/> [↑](#footnote-ref-6)
7. See communication ACCC/C/2010/54, regarding the Irish renewable energy programme: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_20.05.2016.pdf>, (p. 499-514), communication ACCC/C/2012/68, regarding the implementation of the renewable energy programme in Scotland and two specific projects: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_20.05.2016.pdf>, p. 569-612, Communication ACCC/C/2012/76:<http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Compilation_of_Findings/Compilation_of_CC_findings_20.05.2016.pdf>, p. 656-672. [↑](#footnote-ref-7)
8. See communication ACCC/C/2015/120 regarding public participation in the draft Forest Act available from <http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014120-slovakia.html> [↑](#footnote-ref-8)
9. See summary of this case of the Court of Justice of the European Union C-240/9 regarding the reference for a preliminary ruling from the Supreme Court of the Slovak Republic with respect to the case LZ VLK vs. Ministry of Environment at <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/ECJ_C240-09_LZ_WLK/Summary_EU_ECJ_C240-09_LZ_WLK.pdf> [↑](#footnote-ref-9)
10. See summary of the case of the Supreme Administrative Court of Sweden (HFD 2015 ref 79) at: <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/SWEDEN/SE_HFD_2015_xx_AppealBan/SE_HFD_2015_xx_AppealsBan.pdf> ; see also a presentation delivered at the ninth meeting of the Aarhus Convention Task Force on Access to Justice: <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF9-2016/statements_and_presentations/9TFAJ_2a_2_A2JAppealBen_Darpo_Sweden.pdf> [↑](#footnote-ref-10)
11. More information about the case is available from the presentation delivered at the ninth meeting of the Task Force on Access to Justice available from <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF9-2016/statements_and_presentations/9TFAJ_3_2_ScopeofReview_Sollberger_Switzerland.pdf> [↑](#footnote-ref-11)
12. More information on the application of the Aarhus Convention in GMOs-related measures is available from <http://www.unece.org/env/pp/gmos.html> [↑](#footnote-ref-12)
13. Available from <http://www.unece.org/env/pp/mop1docum.statements.html#/> (See decision I/4) [↑](#footnote-ref-13)
14. See document available from <http://www.unece.org/fileadmin/DAM/env/pp/gmo/GMO-Checklist-AarhusConvention-CartagenaProtocol.pdf> [↑](#footnote-ref-14)
15. See document available from <http://www.unece.org/fileadmin/DAM/env/pp/gmo/Note_Tools_and_Resources-GMO-LMO-AarhusConvention-CartagenaProtocol.pdf> [↑](#footnote-ref-15)
16. More information on promoting principles of the Aarhus Convention in international decision-making processes and within the framework of international organizations is available from <http://www.unece.org/env/pp/ppif.html> [↑](#footnote-ref-16)
17. Decision II/4 on the Application of the Convention in International Forums (ECE/MP.PP/2005/2/Add.5) <http://www.unece.org/env/pp/mop2/mop2.doc.html#/> [↑](#footnote-ref-17)
18. See document available from <http://www.unece.org/fileadmin/DAM/env/pp/ppif/Checklist_of_measures_for_national_action_plan_on_PPIF_final-March_2015-En.pdf> [↑](#footnote-ref-18)