

REGIONAL AFFAIRS

ASEAN

Future of the Haze Agreement – Is the Glass Half Empty or Half Full? –

by Md. Saiful Karim*

Introduction

In 1997–98, the ASEAN (Association of Southeast Asian Nations) region suffered an unprecedented health and environmental catastrophe due to choking haze created by a massive forest fire in Indonesia. It is estimated that the total losses from the fire could be US\$5–6 billion after taking into account the loss of trees and other natural resources as well as the long-term impact on human health. This unprecedented anthropogenic disaster not only created a severe health and environmental hazard but also raised a question mark about the credibility and effectiveness of the ASEAN regional grouping. Against this background, ASEAN took a number of regional initiatives to try and solve the problem and finally adopted a new treaty for regional cooperation to combat forest fire and haze in 2002. This paper assesses the future success of this agreement from the perspectives of the legal, institutional and geopolitical reality of the region. Since numerous studies have examined state responsibility for transboundary environmental harm under international law and its implications on the ASEAN haze problem,¹ this article will not touch upon that general debate nor the remedies that are possibly available to victim states. Rather, it will focus on the ASEAN regional legal and institutional initiatives to combat the haze pollution and compare them with a similar European regional agreement.

Regarding the following analysis, it is important to recognise the uncertainty arising from Indonesia's status (presently a non-party to the Agreement).² A primary indication of the future effectiveness of this agreement can be drawn from an analysis of the principles involved in this agreement, bearing in mind the inherent difficulty of enforcing norms in the international environmental legal system as a whole, and the geopolitical reality of the region.

South-east Asian Forest Fires

It is a common phenomenon in the developing world that corrupt "vested interests" have sometimes plundered the natural resources needed by States for rebuilding and development. Corruption, poverty, human rights abuses and destruction of natural resources are often indivisibly interlinked.³ High-level corruption not only creates envi-

ronmental vulnerability within a State, but may also lead to broader transboundary environmental disasters. A glaring example of this is the south-east Asian haze problem originating in Indonesia.

Indonesia is amazingly affluent with a vast biologically diverse tropical forest but unfortunately, the rate of deforestation is also extremely high. More than three and a half decades of poor forest governance have led to the dwindling of forest resources and horrific environmental problems across the archipelago. Even the legal reforms of the post-Suharto era have failed to reverse the situation.



Courtesy: UNEP-WCMC

Moreover, the decision to grant sub-national regions autonomy has led to unrestrained exploitation of forest resources with many potentially destructive effects on Indonesian forests.

The present Indonesian government, led by President Susilo Bambang Yudhoyono, is trying to introduce a tough legal framework. In 2005, to stop unauthorised logging, President Yudhoyono instructed 18 government institutions to work jointly. But this instruction seems to be ineffective as newspapers are still regularly reporting incidents of illegal logging.⁴

The forest fire and haze problem first became of prime interest to the environmental lawyers in the region after 1997–1998. The Indonesian forest fire was one of the main news items in 1997 and 1998. Its widespread adverse impact on the countries of the ASEAN region became a major concern of the global community.⁵ The resulting release of sulphides, nitrous oxides and ash, coupled with industrial pollution, created a choking haze which raised the Air Pollution Index to an unprecedented level.⁶

* Md. Saiful Karim, LLB Hons., LLM (Chittagong) is a lawyer with the Bangladesh Environmental Lawyers Association (BELA). He is presently a research scholar in the Faculty of Law at the National University of Singapore (NUS).

Forest (and other) fires have occurred in the ASEAN region since the Pleistocene Age. In recent years, the El Niño-Southern Oscillation (ENSO)⁷ has played the role of catalyst in many forest fires, but the facts suggest that almost all large-scale forest fires in the ASEAN region over the last twenty years are the result of anthropogenic intervention.⁸ Some of those with vested interests blame lightning strikes, asserting that the haze problem is not a man-made disaster.⁹

Indonesia has yet to take any effective measures; hence, the threat of haze has remained at the same level since initial discussions. For example although not as bad as the 1997–98 catastrophe, in 2005, Malaysia experienced another severe haze problem, which led to serious negative impacts on environment and people. Schools in Kuala Lumpur and surrounding districts were “ordered to close, and people have been advised to stay indoors and wear masks if they venture out”.¹⁰

In April 2006, Indonesian President, Susilo Bambang Yudhoyono himself said he was “ashamed” that his country had exported such a hazard to its neighbours and ordered officials to take pre-emptive action. Indonesia’s own Antara news agency quoted him as saying: “Let us declare a war against haze”. Despite President Susilo’s war against haze, the Indonesian authorities admitted in August that only negligible progress had been made in dealing with those responsible for the fire.¹¹ In October 2006, Singapore again faced serious haze pollution as acrid smoke spread across south-east Asia, from widespread forest fires in Indonesia.¹² The situation continues virtually unchanged.

ASEAN Initiatives

As south-east Asian forest fires (and subsequent haze problems) are largely man-made, they could be controlled by changing human behaviour. On the basis of this underlying philosophy, between 1992 and 1997, ASEAN initiated a number of regional initiatives for combating forest fire and haze¹³ including *inter alia* the Bandung Conference 1992, and the establishment of a Haze Technical Task Force (HTTF) in 1995 to implement the 1995 ASEAN Co-operation Plan on Transboundary Pollution. But these initiatives clearly failed and so the ASEAN region faced a major haze incident in 1997–1998. As a preliminary response to the incident, Indonesia and Malaysia signed a memorandum of understanding on December 1997 and at the ASEAN Ministerial Meeting on Haze held in Singapore from 22–23 December 1997, they adopted the Regional Haze Action Plan.¹⁴ Lacking authority to create a formally binding obligation among the countries, the Agreement was non-binding in nature and failed to bring any hope of improvement for the people of the region.

This situation forced the ten ASEAN member states to conclude a landmark regional Agreement on Transboundary Haze Pollution in June 2002.¹⁵ The Agreement came into force on November 25, 2003 after being ratified by Singapore, Malaysia, Myanmar, Brunei, Viet Nam, Thailand and the Lao People’s Democratic Republic, but not Indonesia.

Salient Features of the ASEAN Haze Agreement

The ASEAN Haze Agreement defines haze pollution as:

smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment”¹⁶ and transboundary haze pollution as “haze pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one Member State and which is transported into the area under the jurisdiction of another Member State.”¹⁷

It seeks to institutionalise and enhance existing measures within the framework of the above-described Haze Action Plan and to offer legal support that may assist regional and international assistance in efficiently addressing the transboundary haze catastrophe.¹⁸ It begins by reaffirming the Parties’ commitment to the previous non-legally binding instruments, and affirming the Parties’ willingness to further strengthen international cooperation to develop national policies, and to coordinate national action for preventing and monitoring transboundary haze pollution through exchange of information, consultation, research and monitoring. The Parties also indicate strong willingness to undertake individual and joint action to solve the problem by applying environmentally sound policies, practices and technologies and to strengthen national and regional capabilities.¹⁹

Objectives and Principles

The agreement’s main objective is prevention, mitigation and monitoring of transboundary haze pollution through concerted national efforts and intensified regional and international cooperation in the overall context of sustainable development.²⁰ In fulfilling this objective, parties will be guided by the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other States or of areas beyond the limits of national jurisdiction. Principles of cooperation; precautionary measures; ecologically sound and sustainable management of natural resources; participation of stakeholders are duly recognised as guiding principles for attaining the objectives of the agreement.²¹ But some legal experts are of the opinion that all these principles have been deliberately framed in non-mandatory language and may not be able to create legally binding norms.²²

General Obligations

In pursuing its objective, the Agreement calls on Parties to cooperate in developing and implementing measures to prevent and monitor transboundary haze pollution. Each country also commits to responding promptly to a request for relevant information or consultations sought by an affected State or States, when any transboundary

haze pollution originates within its territory. Parties have also agreed to take legislative, administrative and other measures to implement their obligations under this Agreement. The Agreement includes no provision for sanctions or penalties if any party fails to comply with these general obligations, suggesting that States may ultimately treat these general obligations as non-binding.²³

Monitoring, Assessment, Prevention and Response

The agreement details a mechanism for Monitoring, Assessment, Prevention and Response for incidents of transboundary haze pollution. The agreement also established an ASEAN Coordinating Centre (at the ASEAN Secretariat in Jakarta) for the purpose of facilitating cooperation and coordination. Parties agreed to designate one or more national focal points, take measures to monitor and take appropriate measures for initiating and establishing proper mechanisms for assessing risks to human health or the environment through the ASEAN Centre. Each party shall take appropriate preventive action which includes *inter alia* developing and implementing legislative and other regulatory measures, developing anti-forest-fire policies and legislative action against open burning. The Agreement also calls upon the parties to develop proper strategies for preparedness, national emergency response, joint emergency response and provisions for assistance.²⁴

The Agreement states that the ASEAN Centre can only take the initiative on the request of a national authority.²⁵ Previous experience suggests that, in practice, this provision may make its authority virtually ineffective. In 1997–1998, Indonesian authorities initially tried to hide the forest fire incident, only agreeing to joint action after repeated requests from Singapore and Malaysia. As a result of its weak mandate, despite its location in Indonesia, the centre currently plays no direct role in Indonesian efforts to combat the forest fires.²⁶

Technical Cooperation and Scientific Research

Technical cooperation is specifically addressed in the Agreement, directed at measures for preparedness and mitigation of the risks to human health and the environment arising from land and/or forest fires or haze pollution arising from fires. Parties commit to expanding technical cooperation in several fields which include *inter alia*: resource mobilisation; standardisation of the reporting format of data and information; exchange of relevant information, expertise, technology, techniques and know-how; arrangements for relevant training, education and awareness-raising campaigns; techniques for controlled burning; and strengthening and enhancing technical capacity. Parties also commit to promoting and, whenever possible, supporting scientific and technical research programmes related to the root causes and consequences of transboundary haze pollution and the means, methods, techniques and equipment for land and/or forest fire management, including fire fighting. All these provisions may give some hope to the people of the ASEAN region for a just and equitable environmental regime in south-east Asia. The success of these provisions largely depends on

the participation of all countries of the region, including Indonesia.²⁷

Institutional and Procedural Arrangements

The agreement establishes a conference of parties which is supposed to meet once a year. The main duties and responsibilities of the Conference of Parties include:

- continuous review and evaluation of the implementation of this agreement;
- considering reports and other information which may be submitted by a party directly or through the secretariat;
- consider and adopt protocols of this agreement;
- consider and adopt any amendment to this agreement and its annexes;
- establish subsidiary bodies for the implementation of this agreement;
- consider and undertake any additional action for the achievement of the objectives of this agreement.

The ASEAN secretariat has been specifically designated to serve as the secretariat of the agreement. The agreement has established a fund – the ASEAN Transboundary Haze Pollution Control Fund – into which the Parties (and other sources such as relevant international organisations, in particular regional financial institutions and the international donor community) may make voluntary contributions.²⁸

Parties commit to reporting to the Secretariat on the measures taken for the implementation of this Agreement in such a form and at such intervals as determined by the Conference of the Parties. Another important aspect is that the provisions of this Agreement shall in no way affect the rights and obligations of any party with regard to any existing treaty, convention or agreement to which they are parties. Finally, the agreement expressly states that no reservations are possible, and calls for any dispute between parties as to the interpretation or application of or compliance with the Agreement or any protocol to be settled amicably by consultation or negotiation.²⁹

Shortcomings of the Agreement

Major concerns have been identified, as a result of the absence of sanctions for non-compliance of the agreements, weak dispute-resolution systems and non-concessions of state sovereignty. In particular, the Convention's restriction of dispute resolution to include only consultation and negotiation fails to provide any remedy for suffering parties if the consultation and negotiation process fails.³⁰

This reflects, in some ways, traditional ASEAN hypersensitivity to creating state responsibility and stringent enforceable legal obligations.³¹ In one way, it may close the door on an international arbitral or judicial system, but it does not prevent States from seeking arbitral and judicial dispute resolution by other means, given that this Agreement specifically states that it shall in no way affect the rights and obligations of any party with regard to any existing treaty, convention or agreement to which they are parties.³²

Another criticism that could be raised is that the Agreement failed to introduce any positive obligation to impose penalties or failed to incorporate provision for sanctions. This is not necessarily a great obstacle to the future effectiveness of the Agreement. In this regard, it is worth quoting from the judgment of the Permanent Court of International Justice in the Chorzow Factory case:

*It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8 (1927) (PCIJ), Ser. A, No. 9, 21) ... the court had already said that reparation was the indispensable complement of failure to apply a convention, and there is no necessity for this to be stated in the convention itself.*³³

It is very unlikely that an offending state will agree to be sued in any judicial or arbitral body. So the best way to implement the agreement will be using alternative means and if possible market-based or flexible financial mechanisms.

LRTAP Convention: An Encouraging Example for ASEAN

The 1979 Geneva Convention on Long-Range Transboundary Air Pollution (LRTAP)³⁴ established within the framework of the United Nations Economic Commission for Europe (UNECE) is the most cited regional convention for transboundary air pollution. To date, it has 51 parties including the member States of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe.³⁵ The Convention established a regional framework to protect man and the environment against air pollution and includes a general obligation on parties to “endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary pollution”.³⁶ The convention defined long-range transboundary air pollution as: “[A]ir pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources”.³⁷

The LRTAP Convention may be criticised for its soft commitment. Nevertheless it has detailed provisions relating to air quality management, research, development, exchange of information, and technical cooperation for research. Negotiation or any other method of dispute settlement acceptable to the parties to the dispute has been recognised as a method of dispute resolution in the convention. The convention does not provide for any compulsory mechanism of dispute resolution. This convention could be a good example for ASEAN nations because it operates successfully in Europe without a compulsory dispute-resolution mechanism. The LRTAP Convention also established a “Cooperative Programme for the Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe” (EMEP), which introduces duties relating to monitoring sulphur dioxide and related substances; basing the monitoring programme on the

framework of both national and international programmes; establishing a framework for a cooperative environmental monitoring programme; and exchanging and periodically updating national data.³⁸ The LRTAP Convention has opened a forum for subsequent adoption of eight protocols establishing more detailed commitments in relation to particular substances. As Philippe Sands pointed out “[i]t has also served as model for subsequent treaties adopted at the global level to address climate change and ozone depletion, and provides a precedent for other regions in their efforts to address acid rain and related transboundary atmospheric problems”.³⁹

ASEAN nations can learn from the experience of this Convention. Over the years, this convention has proved that in order to bring all the necessary players onto the field, kicking off initially with somewhat soft legal commitments can in the long run be successful in the game of establishing an effective legal framework for conservation of the environment. As pointed out by A.V. Lowe “[t]he LRTAP experience shows realism rearing its head. It is, within limits, better to accommodate the particular needs of certain States and have them inside the regime than to adopt a strict approach which will result in them not joining the regime”.⁴⁰ As the provisions of the ASEAN Haze Agreement are more or less similar to this Convention, this experience suggests that one may be cautiously hopeful for the Agreement’s future. Obviously success of the Agreement is largely dependent on Indonesian participation.

Susilo’s War Against Haze Without Weapons!

Some predictive analysis of the potential success of the Agreement might be useful, if in future Indonesia ratifies it. It is important to note the on-the-ground reality in Indonesia – a geographically and culturally diverse archipelagic country, with about 13,500 islands and a population of nearly 224 million divided into about 300 ethnic factions. As one of the richest areas of biodiversity in the world, its forests host a vast variety of commercially significant and in some cases endangered flora and fauna. The rapid economic growth which was the policy of Indonesia’s “new order” government led by President Suharto since the mid 1960s has led to severe environmental degradation, threatening the sustainability of the country’s forest resources.⁴¹

Even the decline of the corrupt Suharto-led government failed to solve the legal and institutional deficiencies in forestry sector. This has severely limited the Indonesian government’s capacity to fight potential forest fire and haze incidents. Indonesia is passing through a transitional period of democratic reform and administrative transformation. This, coupled with the adverse socio-economic effects of the 1997–1998 crisis, has created a fragile and unstable situation.⁴²

Environmental governance institutions in Indonesia are weak and fragmented. The Indonesian government established the Office of the State Minister for the Environment and enacted the Environmental Management Act, 1982 which was replaced in 1997 by the Law on the Management of the Living Environment,⁴³ which must also be

read in the context of the Forestry Act, 1999 and associated regulations and decrees. From the very beginning, the Office of the State Minister for the Environment was a weak institution compared to other ministries and none of these laws have been implemented effectively. The Indonesian Ministries of Forestry and Agriculture have usually been more interested in using forest resources and making revenue than in protecting the forest and biodiversity therein.⁴⁴

In 1990, the Indonesian Government established a non-ministerial Environmental Impact Management Agency (locally known as BAPEDAL). The BAPEDAL was entrusted with the duty of effective implementation of the country's environmental laws.⁴⁵ The Indonesian Ministry of Forestry banned burning of forest to clear land, under a decree promulgated in 1995. The new 1999 Forestry Law

managers rather than the corporate entities reaping the benefits of violation of key forest laws.⁴⁶

In 2002, as part of the decentralisation process, the role of the BAPEDAL was amalgamated into the inherently weak Office of the State Minister for the Environment. Environmental NGOs objected to this reform, which they claimed would result in the "loss of the power to issue permits, to make legally binding regulations and opinions, to control and carry out investigations on environmental offences at a national level". The powers and responsibility for environmental conservation were transferred to the local government agencies known as BAPEDALDA.⁴⁷ This created management anarchy in the forestry sector as two officials of the Ministry of Forestry pointed out:

Act No. 22 of 1999 (local government) and Act No. 25 of 1999 (financial balance between central and local



Kuala Lumpur

Courtesy: Wikipedia

reiterated the 1995 burning ban and provided rigorous sanctions against the unscrupulous and those with vested interests who violate the burning ban.

Apart from these laws, the Indonesian government enacted a number of laws relating to the environment and forests, of which Government Regulation PP No. 4/2001 is worth noting. Regulation PP No. 4/2001 noted the adverse effects and damages due to transboundary air pollution. Addressing the uncertainties at the time from the restructuring for regional autonomy, it handed over operational responsibility for fire management to regional authorities but kept the key duty of fire surveillance in the hands of central government authorities. Although Regulation PP No. 4/2001 introduced Indonesia's most wide-ranging fire prevention legal framework, enforcement of this law against unscrupulous corporate enterprises has been largely unsuccessful. Prosecution has focused on local

*government) requires decentralization in most aspects of governance. A transformation from centralized to decentralized governance is not an easy move given decentralization may be interpreted differently by different parties. In forestry sector some local governments have interpreted decentralization as total freedom to do whatever they want with the forest resources in their region. Such a misinterpretation obviously endangers the very existence of the forest resources.*⁴⁸

Although Indonesia has enacted a number of laws addressing forest fire and haze, enforcement of those laws are very weak due to a combination of lack of resources, lack of institutional capacity, lack of good governance and widespread corruption. Indonesia's present government, led by President Susilo Bambang Yudhoyono, is, however, trying to introduce a tougher regulatory regime

for the prevention of forest fires and transboundary haze pollution. As noted above, the President himself feels ashamed that his country is exporting this hazard to its neighbours. Indonesian Government officials have said that “Indonesia’s delay in ratifying the ASEAN Haze Agreement does not represent either a refusal or a strategic negotiating hold-out”.⁴⁹

The war which President Susilo has declared against haze cannot be fought without weapons. A vibrant and operational ASEAN Haze Agreement could be the best weapon for this war against haze. It may herald a new era of cooperation among ASEAN nations for a just and equitable environmental order in south-east Asia. Indonesia’s best option would be to ratify the ASEAN Haze Agreement and thereafter to coordinate haze reduction efforts with the help of its neighbours – to curb the root causes of forest fire and haze. Of course, mere ratification will not be sufficient to meet the requirements of the Agreement; a coordinated reform of forestry, agricultural, environmental and regional autonomy laws will also be needed.

The ASEAN Way, Revisited: Present Geopolitical Realities

Before this upsetting haze problem, ASEAN had gained a reputation as one of the most vibrant regional organisations for its outstanding contributions to political and economic development. Many researchers see this achievement as a direct outcome of cooperation for building stable relations among nations popularly known as the “ASEAN way”.⁵⁰ The ASEAN way emphasised three basic norms: firstly, non-interference in other states’ affairs, secondly, consensus and non-binding plans to treaties and legalistic rules, and finally using national institutions and actions, rather than creating a strong central bureaucracy.⁵¹ But due to increasing external and internal factors, ASEAN is gradually moving towards more legalised regional economic integration and hence ASEAN countries are relinquishing the orthodox concept of state sovereignty. Unlike rule-based economic integration, ASEAN nations are not ready to create an effective rule-based environmental regime in south-east Asia.⁵²

In the pre-haze era, ASEAN’s environmental instruments were largely dominated by non-binding declarations and action plans or programmes. However, there was one exception: the 1985 Agreement on the Conservation of Nature and Natural Resources. In this agreement, sustainable development was adopted as a goal and several ambitious joint and individual state actions were envisaged, and wide-ranging policy targets were provided which have not, as yet, entered into force.⁵³ The Indonesian haze not only brought unprecedented misery to the environment and people of south-east Asia but also showed the flaw of the widely practised “pollute first, clean up later” approach. Although ASEAN achievement in economic development is remarkable, its environmental protection commitment is dubious. ASEAN nations responded to the global environmental protection movement with several reservations which may be summarised by a comment from former Malaysian Prime Minister, Dr Mahathir Mohamad. He observed:

*[N]ow the developed countries have sacrificed their own forests in the race for higher standards of living, they want to preserve other countries’ rain forests – citing a global heritage – which could indirectly keep countries like Malaysia from achieving the same levels of development.*⁵⁴

Since then, however, there has been a downward trend in economic growth in some parts of ASEAN. This downward trend of the region’s economy also played a catalytic role in the haze problem. As Judith Mayer pointed out:

*The collapse of currencies and banking in Indonesia and Thailand in 1997 sent the region’s economy into a tailspin. At the same time, El Niño caused one of the worst droughts of the century across Southeast Asia. Indonesia’s increasingly sophisticated environmental movement assigned blame for the fires of 1997–1998 to environmental abuses rooted in collusion, corruption, and nepotism in Indonesian government and the timber and plantation businesses it supported. These charges became a major focus of civil society movements that brought down the 32-year, Suharto-led New Order government in May 1998.*⁵⁵

The geopolitical reality at present is that other ASEAN nations, led by Singapore and Malaysia, have had to initiate regional action to prevent haze pollution, focusing on helping Indonesia rather than blaming it for the situation. While President Suharto publicly regretted the haze pollution, his government accepted only moral, rather than legal, responsibility for the transboundary haze.⁵⁶

The enforcement deficiency found in international legal systems is another catalyst of this approach. An insightful look at the ASEAN Haze agreement will reveal that each and every sentence of this agreement reflects the inevitable geopolitical reality that cooperation rather than blame is the best path to positive results. However, the success of the ASEAN Haze Agreement is almost entirely dependent on whether it will be successful in bringing Indonesia on board.

To establish a just and equitable environmental order in the ASEAN region, ASEAN nations must make the ASEAN Haze Agreement work. If instead it suffers the same fate as the 1985 agreement, that will be a real disaster for the credibility of the ASEAN system (economic integration and the process of building an ASEAN security community) as a whole as well as for the future potential to address the haze problem. As Simon S.C. Tay observed:

*If this agreement falls at this last hurdle and is not effectively implemented, this will reflect badly on ASEAN. The question of credibility for Indonesia and ASEAN goes beyond environmental issues. Questions will arise about both the economic integration and dynamism of the region and the prospects for building a community of peace and security.*⁵⁷

Concluding Remarks

Although it is not an ideal instrument, there are many grounds to be optimistic over the future of the ASEAN Haze Agreement. But this optimism is obviously con-

ditional on whether Indonesia is persuaded to join the Agreement.

The Agreement obviously has the potential to influence south-east Asian countries to make an organised effort to combat haze pollution. If all the necessary players join in, this Agreement will not only influence regional and national implementation of international environmental norms but also shine a regional spotlight on the issue which in turn will boost national efforts in the same direction. Indonesia's civil society may be further mobilised to fight against the vested-interest holders who are perpetuating this man-made disaster.

In particular, my optimism focuses on the ASEAN Haze Pollution Control Fund, which reflects the progressive "carrot and stick" approach and also reflects the willingness of the ASEAN nations to endorse the regional use of the emerging international law principle of common but differentiated responsibilities. The Agreement also calls for technical cooperation and scientific research which may help the ASEAN nations in finding a long-term solution to the problem. The problem is by its nature regional, and cooperation at the regional level is undeniably the most viable way to solve the problem.⁵⁸

Notes

- 1 See generally Tan, A.K.J., 1999, "Forest Fire of Indonesia: State Responsibility and International Law", *The International and Comparative Law Quarterly* 48(4): 826–855; Sornarajah, M., 1997, "The Haze Over South East Asia", *Singapore J. International & Comparative Law* 1: 639–40; Robinson, N.A., 2001, "Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law", *Pace Environmental Law Review* 18(2): 459–504; Tan, A.K.J., 2006, "The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia", *New York University Environmental Law Journal* 13(3): 647–722; Tay, S.S.C., 1999, "Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development", *Georgetown International Environmental Law Review* 11(2): 241–300; Tay, S.S.C., 1998, "South East Asian Forest Fires: Haze Over ASEAN and International Environment Law", *Review of European Community and International Environmental Law* 7(2): 202–208; Tay, S.S.C., 1998, "South East Asian Fires and Haze: Law, Responsibility and Cooperation", *LAWASIA Journal*: 39–51.
- 2 Indonesia has not ratified the Agreement, and it is very difficult to predict if it will become party to this agreement in the near future. See Tan, 2006, *supra* note 1, 647 especially at 647–649.
- 3 Karim, M.S., 2005, "UN Convention against corruption: A gallant move for corruption-free world", *The Daily Star*, Dhaka, March 6.
- 4 Manurung, E.G.T., (undated), "Continuing Problems Remain Unresolved", *Jakarta Post*, available at <http://www.thejakartapost.com/Outlook2006/eco09b.asp>.
- 5 Murdiyarto, D., 1998, "Transboundary Haze Pollution in Southeast Asia", (19 September), available at http://www.fire.unifreiburg.de/iffn/country/id/id_15.htm. See generally Murdiyarto, D., Lebel, L., Gintings, A.N., Tampubolon, S.M.H., Heil, A. and Wasson, M., 2004, "Policy responses to complex environmental problems: insights from a science-policy activity on transboundary haze from vegetation fires in Southeast Asia", *Agriculture, Ecosystems and Environment* 104(1): 47–56.
- 6 Butler, R.A., (undated), "The Asian Forest Fires of 1997–1998", available at http://rainforests.mongabay.com/08indo_fires.htm.
- 7 A cyclical climatological phenomenon.
- 8 Association of Southeast Asian Nations and Asian Development Bank, (undated), "The Problem: Region-Wide Fires and Haze", available at http://www.fire.unifreiburg.de/se_asia/projects/asean.html. According to a report published by Forest Fire Prevention and Control Project many of the forest fires in Indonesia are started due to anthropogenic causes.
- 9 Anderson, I.P. and Bowen, M.R., 2000, "Fire Zones and the Threat to the Wetlands of Sumatra, Indonesia", (November), http://www.sffmp.or.id/sffmp/file/publication/report/Firezone_and_the_threat_to_the_wetlands_of_Sumatra.PDF.
- 10 BBC News, 2005, "Malaysia haze triggers emergency", (August 11) available at <http://news.bbc.co.uk/1/hi/asia-pacific/4140660.stm>.
- 11 Tay, S.S.C., 2006, "ASEAN must mind the credibility gap", *The Straits Times*, 14 October.

- 12 AsiaOne, 2006, "Singapore Records Worst Pollution Reading in 10 Years", (7 October), available at http://news.asiaone.com/a1news/20061007_story1_3.html.
- 13 See generally Jones, D.S., 2006, "ASEAN and transboundary haze pollution in Southeast Asia", *Asia Europe Journal* 4(3): 431–446.
- 14 See Association of Southeast Asian Nations and Asian Development Bank, *supra* note 8.
- 15 ASEAN Agreement on Transboundary Haze Pollution (Kuala Lumpur, 10 June 2002).
- 16 *Ibid.*, Article 1.
- 17 *Ibid.*
- 18 ASEAN, (undated), "Environment", available at <http://www.aseansec.org/8914.htm>.
- 19 See ASEAN Haze Agreement, *supra* note 15, Preamble.
- 20 *Ibid.*, Article 2.
- 21 *Ibid.*, Article 3.
- 22 See Tan, 2006, *supra* note 1, at 662.
- 23 See Tan, 2006, *supra* note 1, at 663–664; and see ASEAN Haze Agreement, *supra* note 15, Article 4.
- 24 *Ibid.*, Part II.
- 25 *Ibid.*, Article 5.
- 26 See Tan, *supra* note 1, at 666–667.
- 27 See ASEAN Haze Agreement, *supra* note 15, Part III.
- 28 *Ibid.*, Part IV.
- 29 *Ibid.*, Part V.
- 30 *Ibid.*, Article 27; and Tan, 2006, *supra* note 1, at 663–665.
- 31 See generally Cotton, J., 1999, "The "Haze" over Southeast Asia: Challenging the ASEAN Mode of Regional Engagement", *Pacific Affairs* 72(3): 331–351.
- 32 See ASEAN Haze Agreement, *supra* note 15, Article 26; and Tan, 2006, *supra* note 1, at 659–665.
- 33 Sands, P., 2003, *Principles of International Environmental Law*, (Cambridge University Press), at 873.
- 34 Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979), available at http://www.unece.org/env/lrtap/lrtap_h1.htm.
- 35 UNECE, "Status of ratification of the 1979 Geneva Convention on Long-range Transboundary Air Pollution", (as at 28 August 2008), available at http://www.unece.org/env/lrtap/status/lrtap_st.htm, last accessed on 13 November 2008.
- 36 See LRTAP Convention, *supra* note 34, Article 2.
- 37 *Ibid.*, Article 1.
- 38 See LRTAP Convention, *supra* note 34, Articles 8 and 9.
- 39 See Sands, *supra* note 33, at 326.
- 40 Lowe, A.V., 2007, *International Law*, (Oxford University Press), at 260.
- 41 International Development Law Organization (IDLO), 2006, "Indonesia's Biodiversity", *Development Law Update* 6, available at <http://www.idlo.int/DLRC/dlu/dlu6.pdf>.
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- 44 See Tan, 2006, *supra* note 1, at 673–674.
- 45 IDLO, 2006, "Indonesia's Environmental Legal Framework", *Development Law Update* 6, available at <http://www.idlo.int/DLRC/dlu/dlu6.pdf>.
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- 47 See IDLO, *supra* note 45.
- 48 See Siswanto and Wardojo, *supra* note 42, at 143.
- 49 See Mayer, *supra* note 46, at 215.
- 50 See Tay, 1999, *supra* note 1, especially at 255.
- 51 See generally Kheng-Lian, K. and Robinson, N.A., 2002, "Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the 'ASEAN Way'", *Singapore Journal of International & Comparative Law* 6(2), at 640.
- 52 See generally Mulqueeny, K.K., 2004, "Regionalism, Economic Integration in ASEAN: What Space for Environmental Sustainability?", *Asia Pacific Journal of Environmental Law* 8(1&2), at 5.
- 53 Usui, Y., 2006, "An Evolving Path of Regionalism: The Construction of an Environmental Acquis in the EEC and ASEAN", (15 July) available at http://www.ne.jp/asahi/usui/yoichiro/Paper_2006_Crep.pdf.
- 54 Quoted in Tay, 1999, *supra* note 1, at 253.
- 55 See Mayer, *supra* note 46, at 204.
- 56 Rosenberg, D., 1999, "Environmental pollution around the South China Sea: Developing a regional response to a regional problem", (25 February) <http://coombs.anu.edu.au/Depts/RSPAS/RMAP/rosenberg.htm>.
- 57 See Tay, *supra* note 11.
- 58 I would like to thank Associate Professor Simon S.C. Tay, Associate Professor Dr Abdullah Al Faruque, Associate Professor Dr Ridwanul Hoque and Benjamin Vincents for their helpful comments on earlier drafts of the paper. However, all errors and omissions remain the sole responsibility of the author, and the views expressed here are his own and do not necessarily represent those of any institution or organisation with which he is associated.



Aarhus Convention

Conventional International Law and EU Environmental Law – Interactions and Tensions –

by Marc Pallemarts*

On 25 June 2008, it was exactly ten years ago that the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was signed by representatives of 35 States and the European Community at a pan-European ministerial conference in the Danish city of Aarhus. The Aarhus Convention entered into force on 30 October 2001, and now has 41 Contracting Parties in Europe, Central Asia and the Caucasus region. It represents the most comprehensive and ambitious effort to establish international legal standards in the field of environmental rights to date, and has had a considerable impact on national systems of environmental law and administrative practices in many countries of Europe and beyond, as well as at the level of the institutions of the European Union and even in other international organisations and fora.

To mark the anniversary, the University of Amsterdam's Centre for Environmental Law organised an international conference entitled "The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law", bringing together 54 participants from 15 European countries, including leading experts and junior researchers from many universities, judges, barristers, civil servants and other practitioners, NGO representatives, representatives of the European Commission and the Convention's Secretariat, as well as several members of the Aarhus Convention Compliance Committee. The participants discussed implementation issues, synergies and conflicts across the three "pillars" of the Aarhus Convention and examined the broader legal and institutional implications of the Convention for the development of both EU law and international environmental law.

The Aarhus Convention and EU Law

The ultimate aim of the Aarhus Convention is to increase the openness and democratic legitimacy of public policies on environmental protection, and to develop a sense of responsibility among citizens by giving them the means to obtain information, to assert their interests by participating in the decision-making process, to monitor the decisions of public authorities and to take legal action to protect their environment. Its provisions are structured in three so-called "pillars", covering access to environmental information, public participation in selected environmental decision-making procedures and access to justice. Its elaboration was prompted by earlier developments in EC environmental law, such as the 1985

Directive on environmental impact assessment (Directive 85/337/EEC) and the 1990 Directive on freedom of access to environmental information (Directive 90/313/EEC). Since its adoption and signature in June 1998, the Aarhus Convention has clearly influenced the further development of EU environmental law and even contributed to the ongoing debate on the transparency and accountability of EU institutions, as well as to a number of wide-ranging reforms in European governance, such as the adoption of Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents.

In order to implement the Convention, the EU has adopted a series of new legislative acts and revised several existing ones since 2003. Directive 2003/4/EC of 28 January 2003 on public access to environmental information replaced the earlier Directive 90/313/EEC and expanded citizens' rights of access to environmental information held by public authorities in the Member States. Directive 2003/35/EC of 26 May 2003 provided for public participation in respect of the drawing up of certain plans and programmes relating to the environment in Member States and strengthened the provisions on public participation in Directives 85/337/EEC on environmental impact assessment and 96/61/EC on integrated pollution prevention and control. The 2003 Kiev Protocol to the Aarhus Convention on Pollutant Release and Transfer Registers led to the adoption by the European Parliament and Council, on 18 January 2006, of Regulation 166/2006/EC establishing the European Pollutant Release and Transfer Register, even before the entry into force of the Protocol itself. Finally, Regulation 1367/2006/EC, adopted on 6 September 2006, deals with the application of the procedural rights guaranteed by the Aarhus Convention at the level of EU institutions and bodies. It organises a new public participation procedure which shall apply whenever these institutions and bodies prepare, modify or review plans and programmes likely to have significant effects on the environment, and provides for a special internal review procedure whereby NGOs meeting certain criteria can request the European Commission or any other Community body to reconsider any administrative act adopted, or to adopt such an act that has been omitted, where it was legally required to act.

The interaction between the Aarhus Convention and Community law has not always been unproblematic. Tensions have recently arisen between normative developments within the framework of the Convention and the internal legislation and policies of the EU. For instance, a Commission proposal for a Directive on access to justice in environmental matters, aiming to harmonise national

* Professor of European environmental law, Centre for Environmental Law, University of Amsterdam.

legislation on the subject in the Member States in the spirit of the Convention, remains stalled in the Council of the EU since 2004, despite the European Parliament's support for such legislation. From 2001–2005, the European Commission and a group of Member States opposed proposals to amend the Aarhus Convention in order to provide for public participation in decision making on the placing on the market and deliberate release into the environment of GMOs, on the grounds that these would interfere with existing EU legislation on the subject (Directives 2001/18/EC and Regulation 1829/2003) and conflict with the "softer" approach to public participation laid down in the global Cartagena Protocol on Biosafety, to which the EU is firmly committed. Nevertheless, an amendment to add a new article and annex to the Convention providing for minimum standards of public participation in decision making on this subject, proposed by Moldova, was eventually adopted by the second Meeting of the Parties to the Convention in May 2005, with the EU and its Member States joining in the consensus. The amendment was ratified by the European Community in February 2008, and has since been approved by 17 Parties to the Convention, including 14 Member States of the EU, Norway and Moldova.



Courtesy: Uwe Tabatt

was, however, not as important. Regulation 1049/2001 is on several important points inconsistent with the Aarhus requirements. Most recently, the Commission has issued a proposal for revising the 2001 Regulation, a proposal which promptly attracted criticism for being a step backwards.

The second pillar of the Aarhus Convention, public participation, was discussed by several speakers. Professor Jerzy Jendroska, from the University of Opole in Poland and also a Member of the Aarhus Convention Compliance Committee, examined the provisions of EU law which fall within the ambit of Convention Articles 6 and 7 against the background of the case-law of the Compliance Committee. He highlighted a number of key legal aspects of the Convention's provisions on early public participation and the pro-active notification of, and provision of information to, the public. He noted implementation problems in EU Member States and that the specificity of the Community legal order often makes it difficult to determine whether responsibility for these shortcomings can be ascribed to EU legislation itself or rather lies with national legislative and executive authorities within the Member States.

The question of participatory rights in GMO decision making was examined by the author, who explained how this question had been a persistent area of tension between the Convention and EU law ever since the late 1990s. When the Aarhus Convention was being negotiated, the European Commission was in the midst of a process of review of the first generation of EU Directives on GMOs and was wary that Aarhus provisions on GMOs might pre-empt this process. As a result, the Convention initially did not include binding provisions on this matter, but, as a compromise, non-binding guidelines were adopted by its first Meeting of the Parties in 2002. A second round of negotiations took place between 2003 and 2005, as not only NGOs, but also a number of governments of Aarhus Parties outside the EU demanded that the Convention be amended to include public participation requirements for certain regulatory decisions with respect to GMOs. These negotiations were hampered by disagreement within the EU and the lack of a clear EU common position, but eventually the EU's resistance to change was overcome and an amendment adopted by the second Meeting of the Parties in May 2005.

In her paper, Dr Daniela Obradovic, a Senior Researcher at the Amsterdam Centre for International Law of the University of Amsterdam, highlighted the disparities between conditions for carrying out European and Member State-level consultations with civic groups for the purpose of fulfilling EU environmental impact assessment standards. European law does not adopt a coherent and holistic approach in prescribing the requirements for conducting European and national-level consultations on environmental issues with interest groups, as the eligibility criteria

Some Highlights from the Conference Proceedings

The Amsterdam conference was opened by Dr Eva Kruzikova, Director of the Environment and Internal Market Team in the Legal Service of the European Commission, and a former member of the Aarhus Convention Compliance Committee, and Willem Kakebeke, former Director of International Affairs in the Dutch Ministry of Housing, Physical Planning and Environment (VROM) who chaired the UNECE working group of experts in which the Aarhus Convention was negotiated between 1996 and 1998.

Ralph Hallo, former President of the European Environmental Bureau (EEB), addressed the access to information pillar of the Convention and its influence on EU law. He began by recalling that not only was EU law influenced by the Aarhus Convention, but also influenced the Convention – in particular with regard to its provisions on access to environmental information. He noted that experience with Directive 90/313/EEC strongly influenced the Convention's first pillar and the Aarhus negotiations more generally. In turn, the Convention's first pillar then had a strong impact on the European Commission's proposal for revision of Directive 90/313/EEC, which not only incorporated the improvements introduced by the Convention but went further and proposed new provisions not found in the Convention. Some of these additional improvements ultimately found their way into the new Directive 2003/4/EC. Ralph Hallo also discussed the impact of the Convention on the EU's general access to documents rules which

to be met by interest groups intending to participate in consultations prescribed by EU legislation significantly differ in regard to the level of environmental decision making. She called for streamlining the EU requirements for consulting interest groups at the European and national levels on environmental issues and presented recommendations for achieving this goal.

The third pillar of the Convention, Article 9 on access to justice, remains by far the most controversial. Professor Jonas Ebbesson, of the University of Stockholm and a Member of the Aarhus Convention Compliance Committee, discussed the implementation of the access to justice requirements of the Convention at the national level and reflected on the question whether, ultimately, wider access to environmental justice would result from the Convention itself or from future developments in EU law, taking into account the pending Commission proposal for a directive on access to justice in environmental matters. Dr Veerle Heyvaert, Lecturer in European environmental law at the London School of Economics, analysed the implications of the Aarhus Convention for access to justice at the level of the EU. Her presentation addressed the implementation of the Convention's provisions in relation to European Community acts, focusing on the impact of Regulation 1367/2006 on existing rules and restrictions on the contestability of binding acts by private actors. As to the availability of judicial review, the Aarhus Convention and its corresponding EU Regulation are one of the many "irritants" that have challenged the European courts' position on non-privileged access to justice over the past 20 years. This irritation now inevitably results in entrenchment rather than reform. Therefore, and until Treaty reforms amend the content of Article 230(4) EC, it is arguably more productive to look at Regulation 1367/2006 as a building block towards the development of a non-judicial, administrative culture of access to justice. However, Dr Heyvaert posited that it is in this regard, more than in its inability to "fix" the judicial review deficit, that the Regulation proves very disappointing, as it fails to elaborate any framework or set of standards for internal review to guarantee that the review offered will meet the guarantees of adequacy, effectiveness and equity that are stipulated in the Aarhus Convention.

Professor Attila Tanzi of the University of Bologna considered the interplay between Community law and international law procedures in controlling compliance with the Aarhus Convention. Following its approval by the EC, the Aarhus Convention has become an integral part of the Community legal order, rendering its implementation at the domestic level justiciable by the European Court of Justice (ECJ). This speaker explored some selected issues arising from this situation and its relation to the compliance regime established under the Convention, making the case that the direct applicability of the Convention as a piece of Community law is significant for the purpose of enhancing compliance with it. Moreover his presentation discussed the issue of the responsibility of the EC, also for the conduct of its Member States, *vis-à-vis* the Compliance Committee of the Convention. Finally, Professor Tanzi examined the legal basis and policy aspects of the possi-

bility of promoting a positive "jurisprudential" interaction between the Committee and the ECJ in the interpretation of the Convention.


The presentation by Dr Stephen Stec, Head of the Environmental Law Programme of the Regional Environmental Center for Central and Eastern Europe (REC), focused on the relationship between EU Enlargement, Neighbourhood Policy and environmental democracy. Only some of the current candidate countries and countries of the Western Balkans (which have or will have a Stabilisation and Association Agreement with the EU) are parties to the Aarhus Convention. To the extent that the EU relationship promotes the adjustment of national legislation to the portion of the *acquis* influenced by Aarhus, they effectively spread Aarhus principles to these countries. However, the task of adjusting legislation for purposes of accession is a daunting one. Historically the early accession process has given priority to investment-heavy directives. The relative position of the Aarhus-related directives was analysed, and a comparison of the EU Neighbourhood Policy, as a security instrument, with the EU Enlargement Policy as a means of spreading environmental democracy was made. All European EU neighbours (Armenia, Belarus, Georgia, Moldova, Ukraine) are parties to the Aarhus Convention, but the EU Neighbourhood Policy is not aimed particularly at future membership but has as a main goal the extension of European values as a means of increasing the security of the EU on its borders. Assisting in adjusting legislation is a part of this process.

National implementation of the Aarhus Convention in selected EU Member States was discussed by a panel of experts chaired by Professor Richard Macrory, University College London. The panellists included Francesco La Camera, Scientific Director of the Osservatorio Regionale Siciliano per l'Ambiente (ORSA) in Palermo, Dr Michel Delnoy, a member of the Liège Bar and Associate Professor at the Université de Liège-HEC, Phon van den Biesen, a member of the Amsterdam Bar, Dr Martin Führ, Professor of public law at the University of Applied Sciences in Darmstadt, and Mara Silina, Coordinator, Public Participation Campaign, EEB. Mara Silina summarised the results of a recent survey of Aarhus implementation in EU Member States published by the EEB. Professor Macrory explained that, while in relation to access to environmental justice, UK Courts have for many decades adopted a very liberal approach to standing in public law cases, the most serious obstacle to access to justice is that when it comes to costs, the judiciary have long followed the same approach in both private and public law cases – the so-called "costs in the cause rule". This means that the legal costs of the winning party are paid by the other side, and acts as a significant deterrent to bringing an action, particularly on new or untested pieces of law. Francesco La Camera argued that the main obstacles to the effectiveness of the Aarhus Convention are in the vision of the neo-classical economy, as prevailing in European democracies, with the continuous research of economic growth as the means and end of all human activities. Phon van den Biesen drew the conference's attention to some regressive tendencies with respect to access to

environmental justice in the Netherlands, while Professors Führ and Delnoy both discussed some specific issues of the Convention's implementation in their respective countries, Germany and Belgium.

In his concluding remarks, Jeremy Wates, Secretary to the Convention, an official of the Environment, Housing and Land Management Division of UNECE, reflected on the future of the Aarhus Convention. Two weeks before the Amsterdam conference, at the third Meeting of the Parties held in Riga, Latvia, the Parties attempted to answer this question by adopting a strategic plan setting out their main priorities up to the fifth Meeting of the Parties. Jeremy Wates discussed the key points of the strategic plan, and concluded that while the progress achieved to date gives some grounds for satisfaction, there is no room for complacency if the full vision and mission of the strategic

plan are to be realised. The issues that lie at the core of the Convention, and in particular the way in which the Convention seeks to ensure the accountability of government, will remain topical for the foreseeable future.

This short summary of the proceedings can obviously not do justice to all the presentations made and fruitful discussions held at the conference. This account is not intended to be comprehensive, but only to give readers a first impression of the full range and scope of issues debated. Full proceedings of the conference, with the speakers' papers and a number of additional contributions by invited authors, will be published next year (in the form of a volume edited by the undersigned) by Europa Law Publishing in Groningen. For further details of this forthcoming publication, readers are referred to the publisher's website (www.europalawpublishing.com). 

Aarhus Convention / MOP-3

No Reason to Celebrate

by Carol Hatton and Franziska Mischek*

The Aarhus Convention is a unique multilateral agreement. NGOs are entitled to speak as often as representatives of governments and participate actively in the negotiation processes. And justifiably so: they are representing the public interest in environmental protection – for whom the rights on access to information, public participation and access to justice in environmental matters were established. Celebrating the 10th anniversary of the signature of the Convention, in June 2008, the progressive spirit of the Convention was often praised; but from the NGO point of view the Convention is already in stalemate, with impenetrable international negotiations and poor implementation in many countries.

Attitudes are changing within the parties to the Convention – the “high hopes” shared by many have been tempered and the balance of power has shifted. Nowadays, 26 of the 40 parties to the Convention¹ are members of the European Union – always the majority view in decisions of the Convention bodies. The European parties are further obliged to reconcile their positions and to find a common vote if possible. All of these negotiations take place in camera and without consultation with NGOs. At the third MOP, the EU, under the Slovenian Presidency of the

European council, strongly resisted pressure to compromise with other parties and NGOs until the final day.

In negotiating a long-term strategic plan, the parties attempted to set a framework for the future development of the Convention. A number of issues were controversial – including agreement to develop further the explicit components of the Convention, such as the broadening of the right on access to information about products held by private entities and the general right on access to justice for environmental organisations. In both cases, NGOs were over-ruled and had to accept wording that rules out changes to the text of the Convention, amendments or further progress. One widely acknowledged success on the part of the NGOs was the agreement to establish a task force on Public Participation before the next MOP. NGOs believe that this will enhance the implementation of the second pillar of the Aarhus Convention and bring more balance to the Convention pillars. But it was a hard-fought battle as the Parties clearly fear further attempts to create binding regulations in relation to public participation in environmental matters.

The Governments of the European Union withdrew from most discussions about the further development of the Convention, maintaining that the emphasis should be on the implementation of the existing provisions of the Convention, particularly in the eastern European and central Asian countries (EECA countries). The only measures they appeared willing to support were those concerned with capacity-building processes in the EECA countries – seemingly forgetting that implementation in the European

* Franziska Mischek holds a degree in environmental sciences and works for the Independent Institute for Environmental Concerns (UfU) in Berlin, Germany. She is project manager for Aarhus-Convention rights and coordinates cooperation with NGOs from eastern European countries.

Carol Hatton holds a Masters degree in nature conservation and is a solicitor for WWF-UK. She is also a member of the Coalition for Access to Justice for the Environment (CAJE), a grouping of six environmental NGOs, which is primarily concerned with improving access to justice for individuals and NGOs in the UK.

Union is not yet viewed as satisfactory (see the German and UK case studies below). A study commissioned by the European Commission and published in September 2007 revealed considerable shortcomings in the implementation of the Access to Justice pillar in the European Member States.² Despite variable progress, proposals for measures which would improve access to justice across the territory of the EU, such as a proposed EC Directive on Access to Justice, remain stalled.

For the Convention Secretariat, probably the most pressing item for discussion at the MOP was the financing of the Convention. Up until now, all parties have contributed to the budget on a voluntary basis. In the period leading up to the MOP, a proposal to regularise the financing through a system based on that used by the United Nations was discussed. However, this would have created additional burdens for some parties – especially Germany and the United Kingdom – as it was based on the GDP. These two parties made it clear that the proposal was unacceptable to them in the pre-negotiations in the European Union. The ensuing compromise was to extend the interim position – thus prolonging financial uncertainties for the Secretariat.

The positions of the European Union exposed the fact that “public participation” is no longer *en vogue*. But a Convention that wants to keep up with globalisation has to meet the challenges of this new framework. Historical hardliners in the negotiations inside the European Union are Germany and the UK. However, an examination of the implementation of the Convention in these countries reveals considerable shortcomings.

Implementation in Member States – the examples of Germany and the UK

Germany

In Germany, there are 27 different laws governing access to information,³ of which 16 regulate environmental information.⁴ This causes more confusion than transparency.

With regard to implementation of the Public Participation pillar of the Convention, the phrase “one step forward, two steps back” might best apply. The German Law on Public Participation contains new wording that has important impacts on the practical work of environmental NGOs: in the old wording, the information about planning procedures was to be handled according to the customs of the particular location. In many regions, the interpretation of this phrase meant that plans were sent to NGOs for them to consider and comment on them. With the new clarification, planning information has to be published in the Official Gazette, on the internet or in a local newspaper. In addition, NGOs must be alerted to all proposed developments but have lost their privileged situation compared to those people directly affected by the plans. This privilege was justified by their voluntary engagement and the contribution of valuable local and ecological knowledge, leading to better solutions. In reality, the new regulations in Germany preclude NGOs from participation. NGOs in territorial states cannot follow up all the sources of plans, nor can they afford to visit the administrative bodies in the regions

and collect information about the plans. Infrastructure projects are further regulated by a recently renewed Special Act⁵ which limits public participation measures. The time for public participation has been cut from eight to six weeks. Public debate about plans is now at the discretion of the administrative body – it is also allowed to restrict the public debate to a certain category of people or to a certain period of time. Thus, the implementation of the second pillar of Aarhus did not bring progress for public participation in the country – on the contrary!

Environmental organisations were even more disappointed with the implementation of the third pillar of the Convention – Access to Justice. A violation of environmental law can only be challenged by an NGO in court



Courtesy: Aarhusmop3/Google

when the law precludes or affects the rights of individuals as opposed to purely having environmental effects. So the laws on which a claim can be based are restricted to those protecting third parties. The organisations do not have to prove that their own rights are violated, but they have to demonstrate that the rights of virtual third parties could be violated. Objective environmental law thus cannot be claimed in court. Recent judgements also show a stricter handling of access to justice in Germany: NGOs have to provide detailed information about habitats and species which may be affected, within the short time period allowed for public participation – failure to do so may cause the legal challenge to fail, because it is hard to prove that the information could not be obtained until after the closing deadline of the participation process.

Although the publicity machine of the German Government could lead one to draw a different conclusion, transparency and public participation in environmental matters are not valued in Germany. The German implementation shows how little the government and the administration are convinced of the positive impacts of public participation. It is only a 1:1 implementation of the European *acquis communautaire*, which cut back good practices long established in Germany. This general mistrust of public participation also explains Germany’s position at the MOP. Their indifference towards the Convention is illustrated by them not participating actively in any of the Convention bodies. NGOs have long hoped that Germany would take a pioneering role – after the MOP, and the results of the survey of environmental NGOs regarding German implementation,⁶ this hope has been dashed. ➔

UK

The implementation of the Access to Information pillar of the Convention is now broadly satisfactory in the UK. The basis upon which information can be sought is clear and the procedures for appeal are in place – if, at times, painfully slow. However, there are worrying concerns regarding the implementation of the remaining two pillars of the Convention. Provisions within the Planning Bill, if it receives Royal Assent, will significantly reduce the opportunities for members of the public and NGOs to engage in the planning system – particularly at the strategic stage when proposals are agreed in principle. And, of course, once the principle is established, it is not a question of “whether” but purely questions of “when” and “where” large infrastructure proposals will be built in the UK.

However, it is the third pillar of the Convention – Access to Justice – with which WWF and the UK Government are currently locked in battle. In the UK, legal costs “follow the event”. This means that, unless an unsuccessful applicant is publicly funded, they will have to cover their own legal fees plus (at least a proportion) of the costs of the defendant. Additionally, there is always the threat that they may have to cover the costs of an interested third party. As a result of this, the full cost of legal action in the UK regularly exceeds tens (if not hundreds) of thousands of Euros.

There is now a catalogue of reports and commentaries in the UK to demonstrate that the normal rules on costs render legal action prohibitively expensive for the vast majority of individuals and organisations. Recent developments in case-law have raised awareness about costs but have done little to improve the situation. The leading case in this area is *R (Corner House Research) v Secretary of State for Trade and Industry* (“*Corner House*”),⁷ in which the Court of Appeal sets out a number of conditions under which the Courts might grant a claimant a Protective Costs Order (PCO), which seeks to limit or extinguish an applicant’s liability for costs. However, *Corner House* was not an environmental case and the conditions associated with it were not developed with the Aarhus Convention in mind.

Corner House requires that the issues raised by the case are of general public importance and that the public interest requires that those issues should be resolved. In a recent case, the affected population was that of West Hertfordshire – some 500,000 people – and yet the Court of Appeal decided there was no “general public importance”. The Court of Appeal also noted that if those acting for the applicant were doing so *pro bono*, this would be likely to enhance the merits of the application for a PCO. However well-intentioned it may be, *pro bono* assistance cannot provide a meaningful contribution to access to environmental justice in the long term. Perhaps the basis for the judiciary’s caution is that the Court of Appeal confirmed that PCOs should only be granted in “...the most exceptional circumstances” as it is clear that the judiciary are interpreting the *Corner House* conditions very narrowly.

A recent report published by a Working Group on Access to Environmental Justice under the Chairmanship of a High Court judge⁸ recommended that conditions relating to the requirement of “general public importance”

and “no private interest” should not apply in Aarhus cases. Furthermore, the report concluded that the normal requirement that a claimant must provide a cross-undertaking in damages should no longer apply in an Aarhus case where the injunction is necessary to prevent significant environmental damage taking place before the full case is heard. In such cases, the court must ensure that the full case is heard as quickly as possible.

Despite almost overwhelming evidence, the UK Government maintains that it complies with the Convention. The UK’s role in the plenary sessions of the MOP could best be described as “low-profile”, however, it is understood that it took a leading role in the EU negotiations taking place behind closed doors. Any attempt to meet with the Government in the period leading up to, and including the MOP, was met with resistance. A coalition of leading environmental organisations in the UK, including WWF, is now forced to consider making a submission to the Aarhus Convention Compliance Committee in respect of the UK position on costs and injunctive relief.

Conclusions

It is clear that challenges with regard to all three pillars of the Convention persist in both Germany and the UK. However, we are particularly concerned that the Commission’s study on access to justice in 25 Member States reveals that both Germany and the UK are amongst the bottom five countries (along with Malta, Austria and Hungary) and that NGOs in both countries are considering making submissions to the Aarhus Convention Compliance Committee. In Germany, the situation is unsatisfactory primarily on the basis of legal standing – while in the UK, costs and injunctive relief are identified as major areas of concern. It is therefore surprising that both Germany and the UK take such an active lead in frustrating the future progress of the Convention behind closed doors. We sincerely hope that these two powerful Member States will, in future, adopt a more positive and supportive role in furthering the aims of the Convention – with particular emphasis on the establishment of the Public Participation Task Force and the ongoing work of the Access to Justice Task Force. If not, the future of this groundbreaking and pivotal international Convention looks turbulent indeed.

Notes

- 1 Ireland has not ratified the Convention yet.
- 2 Milieu (2007). *Summary Report on the inventory of EU Member States’ measures on access to justice in environmental matters*, available at: http://ec.europa.eu/environment/aarhus/study_access.htm.
- 3 The federal Freedom of Information Act; the federal Act on Access to Environmental Information; the federal Consumer Protection Information Law (*Verbraucherschutzinformationsgesetz*); nine state Freedom of Information Acts; and 15 state laws on Access to Environmental Information.
- 4 Each federal state had to enact a special law on access to environmental information; Berlin included environmental information in its Freedom of Information Act.
- 5 Act on acceleration of infrastructure planning procedures (*Infrastrukturplanungsbeschleunigungsgesetz*).
- 6 Position paper edited by UfU (in German only): http://www.ufu.de/media/content/files/Fachgebiete/Umweltrecht/Positionspapier_10jahre_aarhus.pdf.
- 7 Mar 2005, EWCA Civ 192.
- 8 Working Group on Access to Environmental Justice. (2008). “Ensuring access to environmental justice in England and Wales”, available at: http://www.wwf.org.uk/search_results.cfm?uNewsID=656.