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**“Key Challenges to ensure environmental security and sustainable development
in the OSCE area: land degradation, soil contamination and water management”**

**Keynote address
Session II**

**THE AARHUS CONVENTION AS A TOOL FOR IMPROVING
ENVIRONMENTAL GOVERNANCE IN THE SPHERE OF
LAND DEGRADATION AND SOIL CONTAMINATION**

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It is a great pleasure and honour to participate in this important meeting of the OSCE Economic and Environmental Forum. I would like to begin by speaking about the issue of environmental governance, and specifically the role of the public in environmental governance, in general terms. I will argue that good governance implies decision-making procedures that are transparent, accountable and participatory. I will then briefly describe how the emergence of the Aarhus Convention has contributed to enhancing the role of civil society in environmental governance, looking in turn at its three main ‘pillars’ and how they relate to the themes of soil contamination and land degradation. Finally, I would like to reflect on the importance of effective implementation before making some concluding remarks.

The role of the public in good governance

The theme of this module is environmental governance, in particular as it affects land degradation and soil contamination. There are many aspects to environmental governance but the questions that I will focus on today concern the role of the public in environmental governance.

It is widely recognised that it will be difficult to make meaningful progress towards more sustainable forms of development without the involvement of the public. Even if governments play a pivotal role and perhaps bear the greatest responsibility for finding solutions, governments alone cannot solve the environmental problems of our time. The engagement of a wide range of stakeholders, including the public, is a prerequisite for achieving real results.

As a minimum, it is important to engage the public because of their role as consumers in causing environmental damage: the public (which includes you and me) who take advantage of low-budget airlines to fly in ever greater numbers on foreign holidays, who buy a new car as soon as they can afford one, who are struggling to bring their

lifestyles up to the standards that are beamed into their sitting rooms. From this perspective, it is important to involve the public because it is their (= our) behaviour that needs to change. They (= we) need to fly less, use less energy, produce less waste, and so on. Involving the public to a greater extent in governance will increase the influence that the decision-making process has on their behaviour. However, while this perspective points towards raising awareness among the public, which is important, it does not necessarily imply their engagement as a partner in the process.

In the past couple of decades, there has been an increasing recognition that the public should have a greater role in environmental decision-making processes. This tendency is founded on a combination of idealistic and pragmatic arguments:

- On the one hand, that members of the public should have a possibility to have input to decisions that affect their lives (beyond the possibility to vote in an election once every few years) is seen as a **democratic right**. According to this view, participatory democracy is seen as a necessary component of a healthy modern democracy - a component that supplements and supports, but does not supplant, representative democracy.

- On the other hand, it is seen as desirable that the public have greater involvement in environmental governance for the reason that public involvement tends to **improve the quality** of environmental governance. This is a pragmatic argument that stands independent of the question of rights. When decision-making processes must stand the test of public scrutiny, they must live up to a higher standard. Weak or defective proposals will be criticised by the public and may be strengthened in the light of that criticism, resulting in a better outcome. Successful engagement of the public is likely to increase public support for (or reduce public opposition to) the implementation of the resulting decisions.

Certain procedural environmental rights – rights to information, rights to participation and rights of access to justice - have been identified as key to securing a greater role for the public in environmental governance. The main driving force behind the strengthening of those rights throughout Europe and Central Asia in recent years has been the Aarhus Convention.

The Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in 1998 in the Danish city of Aarhus and entered into force in 2001. Building on Principle 10 of the 1992 Rio Declaration on Environment and Development, it is widely regarded as the world's leading international instrument on citizens' environmental rights. The former UN Secretary General Kofi Annan described the Aarhus Convention as the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.

The Aarhus Convention has changed, and is changing, the legal landscape in our region as far as procedural environmental rights are concerned. Following Germany's ratification last week, there are now 40 Parties to the Convention, stretching from Norway to Cyprus and from Kazakhstan to Portugal. The European Community is a Party to the Convention in its own right. As a result, it has not only strengthened its directives dealing with access to information and public participation to bring them

into line with the Convention, but it has also adopted a regulation applying the Convention's provisions to the EU institutions themselves.

The Convention is not only a tool to stimulate improved environmental protection; it is also a tool to promote democratisation, which in turn may enhance security. This gives it a special relevance to the work of OSCE.

Behind the Convention lies an understanding that the public can and must play a central role in safeguarding the environment for the sake of present and future generations. But to play that role, members of the public need to have certain rights guaranteed.

The right to information

First, the right to information: the Aarhus Convention seeks to promote greater public access to information by laying down a set of procedures whereby environmental information held by public authorities must be made available to any member of the public upon request.

'Environmental information' is defined broadly so as to include "the state of elements of the environment, such as air and atmosphere, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements." So information on soil contamination and land degradation clearly falls within the definition.

The definition also covers information on "factors [...], activities or measures [...] affecting or likely to affect the elements of the environment". This would include information on projects, plans, programmes, policies or legislation that affect or are likely to affect levels of soil contamination or the extent of land degradation.

Finally, the definition covers "the state of human health and safety, conditions of human life, cultural sites and built structures," inasmuch as they are or may be affected by the state of elements of the environment or by the aforementioned factors, activities or measures. Thus if soil contamination due to military or industrial pollution (e.g. uranium tailings) has resulted in elevated levels of disease or death in a given region, then it may be argued, using the Convention, that the epidemiological data showing such health impacts should be in the public domain (presumably in an anonymised form to protect the identity of any of the individuals involved).

The fact that information falls within the Convention's definition of environmental information does not automatically mean that it must be disclosed to the public. There are a number of exemptions, e.g. related to national defence, public security, commercial confidentiality, personal data and so on. However, these exemptions are to be interpreted in a restrictive manner and taking account of the public interest in disclosure. Furthermore, and crucially, there must be an appeals procedure in place allowing a person to challenge a failure to comply with his or her request for information.

The Convention also imposes various obligations on public authorities requiring them to gather, manage and disseminate information in a transparent way. These include an

obligation on Parties to ensure that in the event of any imminent threat to human health or the environment, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately to members of the public who may be affected. This would include situations where an emergency gives rise to a threat of soil contamination or land degradation. This is what manifestly did *not* happen following the Chernobyl disaster of 1986. Indeed, Chernobyl was an important source of inspiration for the Convention, referred to on many occasions during its negotiation between 1996 and 1998.

One of the ‘active’ information obligations under the Convention, the obligation on Parties to progressively establish pollution inventories, has been separately elaborated and developed into a Protocol to the Convention. The Protocol on Pollutant Release and Transfer Registers, which was adopted in Kiev in May 2003 at the Fifth Ministerial ‘Environment for Europe’ Conference, is expected to enter into force within the next year or so. It will require its Parties to establish national registers containing information on releases (emissions) to air, water and soil of certain major pollutants from certain types of potentially polluting activity. The registers will be maintained through mandatory annual reporting by the relevant facilities and must be publicly accessible through the Internet free of charge. While the registers are not required to contain information on soil contamination or land degradation per se, the information on releases and transfers of pollutants that they do contain can be relevant to identifying potential causes of such contamination or degradation. For example, the obligation to report on transfers of hazardous waste should make it less easy for large quantities of waste to simply disappear out of the system and end up contaminating the environment.¹

The right to participate

The second ‘pillar’ of the Convention concerns the right to participate. Guaranteeing this right involves creating structured procedures whereby information and opinions put forward by the public can be taken into account in the decision-making process. It does not (or not normally) mean that the public becomes the decision-maker; it certainly does not imply a usurping of the authority of parliaments or the executive branch of government. But it does imply an active and responsive consultation process.

The Convention sets out relatively detailed public participation procedures to be applied in the case of decision-making on specific activities (projects) – detailed, at least, for an international treaty. These include a requirement to notify the public concerned with a minimum set of information about the proposed project; opportunities for the public to participate at an early stage, and with reasonable timeframes; a right for members of the public to submit comments and a corresponding duty of the public authority to take those comments into account; and prompt public notification of the decision and the reasons and considerations on which it is based.

¹ The Bishkek preparatory conference was told that the general prosecutor in Ukraine was investigating 4,000 cases of dumping hazardous waste.

The types of activity to which the entire set of public participation procedures apply, set out in annex I of the Convention, include several which may result in soil contamination or land degradation, such as mining activities, chemical storage and processing and waste management.

Less detailed obligations apply with respect to decision-making on plans, programmes, policies and legislation but while the provisions are less prescriptive, they are nonetheless significant and the scope is broader, covering any plans, programmes or policies “relating to the environment” and legislation “that may have a significant effect on the environment”. Thus, public participation opportunities should be provided in the preparation of plans, programmes, policies and legislation on agriculture, mining, forestry or water management, to name but a few areas that have implications for soil quality.

The right of access to justice

Finally, there is the right of access to justice. This involves, as a minimum, the right of members of the public to lodge an appeal in situations where their rights to information and participation are violated. The Convention requires its Parties to establish administrative and/or judicial review procedures to this end. But access to justice in a fuller sense means more than this; it means the right of members of the public to challenge violations of environmental law in general, whether these violations are by public authorities or by private enterprises. The Convention also provides for such a right, though it gives some discretion to Parties to establish criteria for standing which may in practice limit the range of individuals or organizations having access to the review procedures.

Where they have such access, individuals and NGOs can support the enforcement of the law either by directly taking a case against a polluting company or by taking a case against a public authority that is failing to enforce the law (where that failure itself constitutes a violation of national law). Sometimes a State agency fails in its enforcement duties because it simply does not have the resources to monitor every breach of an environmental law. Or it may happen because of collusion between the polluting company and the enforcement agency (the poacher befriending the gamekeeper). Either way, while it is the courts that will decide on the interpretation of the law, the public can help to bring about better enforcement.

Implementation

With any international treaty that is more than just a reflection of the status quo, implementation is always a challenge. The more ambitious the instrument is, the greater the challenge of implementation will be. Once the dust has settled on the negotiations, it becomes important to devise measures to support effective implementation.

A number of environmental treaties have introduced compliance review mechanisms to address situations where Parties fail to comply with a treaty's provisions. The compliance mechanism developed under the Aarhus Convention is unusual among such mechanisms in that (in line with the spirit of the Convention) it allows for any member of the public to trigger the review process by simply writing to the

Compliance Committee. Environmental organisations also have the possibility to nominate members to the Committee – though only the Parties elect the members, and once elected, the members serve in a personal capacity and do not represent any government or organization. To date, the Committee has received 18 ‘cases’ as a result of communications from members of the public, some of which it has dealt with, others of which are ongoing. Several of these cases have concerned issues related to soil contamination and land degradation, such as mining, radioactive waste, toxic waste and landfill.

Capacity building is also of crucial importance in facilitating effective implementation. In this regard, I would like to reiterate UNECE’s appreciation of OSCE’s support for capacity building aimed at improving the implementation of the Convention, in particular through the establishment of Aarhus centres in several countries. OSCE’s support for various joint capacity building workshops, for example in Central Asia and in the South Caucasus, has been invaluable. We look forward to continuing and deepening this cooperation in the future.

Conclusion

It was eight years ago, in May 1999, that I last had the privilege of addressing this Forum. At that time, the Aarhus Convention was a mere infant, a toddler, not even a year old. Since then, it has passed through childhood and adolescence and now, as we prepare for the third meeting of the Parties in 2008, we could say that it is in the early stages of adulthood.

The Parties to the Aarhus Convention comprise some of Europe’s oldest democracies (Sweden first introduced a Freedom of Information law in 1766) as well as some of its newest. Almost all of these, from both East and West, have faced challenges in implementing the Convention. But facing those challenges is what democracy is about. It is about governments engaging in an open dialogue with their citizens, and listening and responding to their views; sometimes it involves public authorities willingly and deliberately exposing themselves to criticism for their actions and inactions. That is not always a comfortable experience for public officials, but it is an essential one in any society that is to call itself a true democracy.