EUROPEAN ECO FORUM

IMPLEMENTING RIO PRINCIPLES IN EUROPE

PARTICIPATION AND PRECAUTION

October 2001

This report has been produced in co-operation with the European ECO Forum's Public Participation Campaigns Committee (PPCC).

Contributors:
Karin DANIELYAN, Association for Sustainable Human Development,Armenia
Evgeniy I. SHIROKOV, Belarusian Habitats Centre and International Academy of Ecology, Belarus
Julia TROMBITSKAYA, BIOTICA Ecological Society, Republic of Moldova
Irina TUSTANOVSKAYA, Eco-Pravo Lviv, Ukraine
Olga RAZBASH, Regional Public Center " For Human Rights and Environmental Defense", Russia
Alexander KODJABASHEV, Demeter, Bulgaria
Jerzy JENDROSKA, Environmental Law Center, Poland
Sándor FÜLÖP, Environmental Management and Law Association, Hungary
Gyula BÁNDI, Environmental Management and Law Association and Pázmány
Péter Catholic University, Hungary
Fe SANCHIS MORENO, TERRA Environmental Policy Centre, Spain
Joost RUTTEMAN, Zuid-Hollandse Milieufederatie, The Netherlands
Mary TAYLOR, Friends of the Earth, England

Layout: **Juris MARTINS, Mara SILINA** (European Environmental Bureau)
Editing and co-ordination: **Mary TAYLOR** (Friends of the Earth)

We are very grateful for the kind financial support of the United Nations Environmental Programme Regional Office for Europe.

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"Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of Principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of 'environmental democracy' so far undertaken under the auspices of the United Nations."

Kofi A. Annan, Secretary-General of the United Nations

The Rio Declaration on Environment and Development (1992)

Principle 10: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

INTRODUCTION AND OVERVIEW [1]

The broad ambitions of the Rio Declaration on Environment and Development are still an inspiration, guiding us towards the goal of sustainable development. Almost ten years after their drafting, Principles 10 (public participation) and 15 (precautionary approach) give us a focus for our efforts to achieve environmental democracy and better protection of our environment. But words are not enough of course, and it is time to look at how these principles have been translated into action.

Our primary aim with this project is to help governments continue to move from a declaration of principles, through adoption of the necessary legislation safeguarding these aims, to actual practical implementation in a way that reaches all of civil society. By casting the eyes of an invited group of NGO experts over experiences of Principles 10 and 15 in a number of European countries, we hope to present valuable insight into this process. In their battles for information and environmental protection, many environmental NGOs have direct experience of the successes and limitations of our democracies and are at the cutting edge of the debates. Our contribution documents their observations.

The project focuses on two separate principles of the Rio Declaration, the implementation of which requires rather different vision and method. While Principle 10 may be taken as a solid basis for further implementing regulations - such as the 1998 Aarhus "Public Participation" Convention[2] - providing direct participatory rights together with procedural elements, Principle 15 is, at least currently, a much more theoretical approach. The precautionary principle lacks exact definition and requires a look at the evolving philosophy and at the changing attitudes needed for implementation. Thus the divisions of the reports between the two principles have a somewhat different flavour - a more concrete set of targets for pubic participation is available as a yard-stick while even the end target of the precautionary principle may be unclear almost by definition - avoidance of some "uncertain" threat.

European countries have a diversity of histories and traditions, ranging from the long traditions of openness in Scandinavian countries[3] to a number of common issues thread their way through the reports, and this summary will try to highlight these, ending with a number of specific recommendations. The report covers a number of countries in three regions of Europe: the NIS region (Belorus, the Russian Federation, Ukraine Moldova, Armenia, Turkmenistan and Uzbekistan), Central and Eastern Europe (Bulgaria, Hungary and Poland), and Western Europe (the Netherlands, Spain and the United Kingdom).

The country reports may be taken as promising signs of better understanding of the need to develop environmental legislation, nationally and internationally. The situation regarding the implementation of the two Rio principles is not very much different in the three regions, at least as far as the legal basis is concerned. For Principle 10, legal regulations are often in place while in practice, implementation is highly dependent upon the behaviour of public administrations and the judiciary and indeed also upon the consciousness and willingness of the public. As far as implementation of the precautionary principle goes, this is less straightforward in practice, but there is impetus in Europe to develop workable mechanisms and a common understanding.

We hope that the report gives a useful view of the progress made and of the problems still encountered in implementation of both principles. It is very much about legislative and procedural matters: a look at the consequences for decision-making and environmental protection itself has to wait for another time and place.

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[1] This section has been prepared by Professor Gyula Bandi, Pázmány Péter Catholic University, Dr Sandor Fulop, EMLA, Hungary, and Mary Taylor, Friends of the Earth, England

[2] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 1998)

[3] For example, see Denmark and Norway chapters of "Doors to Democracy" (Regional Environmental Centre, Hungary, 1998).

I. PRINCIPLE 10 - THE PUBLIC PARTICIPATION PRINCIPLE

THE UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (THE AARHUS CONVENTION)

It is of course impossible to look at public participation in decision-making without considering the 1998 UNECE Aarhus Convention, built on the Sofia Guidelines adopted by Ministers in 1995 as a consequence of Principle 10. As noted by the head of the UN, Kofi Annan, so far the Convention is the most significant piece of international legislation to help fulfil Principle 10 of the Rio Declaration. There are a number of weaknesses in the Convention - such as the possibility to exclude public participation in decisions on releases of genetically modified organisms (GMOs) - nevertheless, it is likely that all countries will improve their public participation provisions in some ways by ratifying and - crucially - implementing the Convention. At writing, it is not yet in force (to happen October 30 2001), so the full impact of the Convention on practical implementation of Principle 10 remains to be seen. Seventeen countries have so far ratified, and a further 28 are signatories. Exceptions include the Russian Federation, Uzbekistan and Turkey[4].

It is not possible to review fully the Convention in the space of this document, and in any case maybe that would be a premature step given that it is not yet in force. However, its influence is already being felt as countries ratify and its provisions form a backdrop to much of the discussion of Principle 10 in this document.

Key propositions

Public involvement in decision-making has a number of benefits: improving the quality of a decision by considering a number of perspectives, increasing transparency of government, adding legitimacy to a decision, and also helping with the implementation of the decision itself. If a decision is generally understood and achieved with a greater degree of consensus, despite what are often difficult or controversial issues, it is far more likely to be enacted successfully.

A number of premises emerge from the reports, and are summarised below. The concepts behind public participation need to be articulated and understood throughout society, helping to underpin any successful and truly democratic implementation of public participation.

- Recognition of *the dual aim of the public participation regime* - bringing both aims of environmental protection and aims of social justice to bear upon the quality of environmental decision-making, both in its implementation and in its outcome. Equal opportunity of involvement in decision-making is essential - if only a few with greater resources can use the system, then decisions may well favour vested interests rather than society and future generations as a whole.
- *A broad definition of environmental information* must be put into place. Our stewardship of the environment must be reflected in all areas of decision-making, including economic and strategic matters. A narrow definition can ultimately discredit the whole decision-making system, sowing cynicism and distrust as conflicting decisions supporting opposing goals become apparent.
- A robust system of public participation needs *guarantees of rights, equality of access to information and of participation opportunities, and of access to justice.* Without guarantees that can be seen to work in practice, the credibility of any system will be quickly undermined.
- *Positive attitudes towards implementation are crucial:* for example, public administration and civil servants may need encouragement to accept new principles, ideas and procedures. This may be done with the help of guidance documents, training programmes, etc.
- *Capacity building is an indispensable element* of any public participation system, requiring conscious efforts with respect to education, awareness, debate, improved efficiency, collection and dissemination of information and the establishment of a socially inclusive process.

Common constraints

Access to information

There is a considerable amount of legal framework in place in all countries, although less so in NIS countries where much work remains to be done. And in the existing legislation, there are many flaws evident which restrict access to information. Exemptions can be misused by the authorities all too easily, and response times could often be improved, both in legislation and in practice. The Aarhus

[4] Readers may also wish to note that Slovakia is not signatory, but has said it will accede.

Convention provides a minimum target in this respect which can be improved on, for example, as in the Netherlands. Lack of response can also be problematic, as in Spain, where - perversely - no response is interpreted as a positive reply, yet no information (and the requester can only assume that it exists) passes hands at that point.

The exact definition of (or the understanding of) the definition of environmental information requires improvement and problems with the definitions make for serious obstacles and disputes in many countries. This is not necessarily a question of legislation, although explicit and expanded definitions can help, but also training and education of civil servants is needed.

Environment administrations better understand the need for access, while other administrative sectors are far less prepared to disclose information. This is often a question of education, but also related to the understanding of the definition of environmental information.

The tendency to prioritise business secrecy and privacy also limits access to information. This should always be weighed against the public interest, with a presumption in favour of disclosure.

In some countries (the UK for example), the transfer of traditionally public functions (or sometimes simply data storage as has happened in Poland and the Netherlands) to the private sector has caused the removal of environmental information from the public domain. Special care needs to be given to legislation to safeguard against this "loss" of information.

The shortage of available environmental information is a core problem in less wealthy countries. The Bulgarian report also notes inconsistencies in methodologies, and a lack of co-ordination is noted in the Spanish report, leading to data sets which cannot be compared. Monitoring systems need extending, improving and standardising. Also the exchange of information between different offices and databases is essential. It is generally not a question of legislation, but requires resources for up-to-date facilities and training, both for the monitoring programmes themselves, and for improving communications and data-sharing between offices. International programmes have helped in the NIS countries.

A major constraint in connection with environmental information includes the lack of integrated data systems. For example, sets of monitoring data may be disparate and not consider all environmental media or wastes. This may require legislative efforts, such as the setting up of a multi-media pollution register[5].

The advantages (speed, organisation of data, active dissemination) of electronic forms of communication are increasingly recognised, but many countries are constrained by their limited resources. The improvement of communications tools is needed - for example, creating websites and systems for update, improving electronic mail systems, and even creating data catalogues which can be shared by authorities as well as used by the public.

As is pointed out in the Hungarian and Polish reports, there tends to be much less (available) information at the local level than at the central level. Yet the public may be far more interesed in locally relevant information. Novel ways of collecting and presenting data to encourage more wide-spread interest should be developed.

Participation in decision-making

Again, much of the legal framework is present in the countries studied, although much revolves around environmental impact assessments of specific projects, and there is far less participation in policy development or legislative areas. The Aarhus Convention itself reflects this: detailed procedures for public participation are laid out for specific activities (Article 6), but with diminishing obligations with respect in development of plans, programmes, policies and legislation (Articles 7 and 8).

Occasionally, specific processes (for example, pesticide registration in the Netherlands) exclude public comment. In Bulgaria, there is a lack of clear rules for public participation in many administrative areas which causes problems for both the general public and for business.

Public authorities do not always welcome the participation of the public and give less support than is needed. Appointing officers responsible for public participation can hugely help the situation. Training and education of civil servants is also crucial, but other means and methods can also be improved: for example, explanations of procedures or the internet accessibility of documents, etc.

The public and NGOs themselves often need further motivation to participate - capacity building, proper and relevant information at the right time, confidence that the authorities are really taking their comments into account, and also education have a role to play here. Lack of attention to promoting public participation (as noted by the European Commission for example) leads to problems. Cynicism about the lack of weight given to public opinions and environmental protection can lead to public protests outside of the official processes, often at a late stage, or even to a "direct action" movement, such as that in the UK.

Access to justice

Access to justice is improving, but serious constraints remain. Since access to justice is absolutely fundamental to any real guarantees of citizens' rights, limitations in this area undermine any system of public participation.

The question of standing is of course crucial, and there seems to be a slowly improving recognition of

[5] Considering air, water and land. A pollution register is a publicly accessible set of data about pollutants, often organised by source (e.g. name of company and location), substance and quantity released to air, water and land or as waste in a certain period (often one year). Such a register is often referred to as a Pollutant Release and Transfer Register (PRTR).

individuals' and NGOs rights of access to justice, both in defence of the environment and to challenge refusals to release information or improper public participation procedures. But even once the barriers of standing have been cleared, many obstacles remain.

The costs of going to court are simply unaffordable much of the time for NGOs or the public, although there are some good examples, as in the Netherlands with respect to administrative court procedures (where the government is the defendant), where fees are minimal and re-gained if the applicant is successful. On the other hand, in Spain, challenges to developers are very difficult because of the imposition of "bonds" for compensation to those whose project is halted, and in the UK, the loser has to pay the costs to the winner, with no cap on the possible amount.

The time taken for court procedures is also a serious disincentive to challenging decisions in court. The Spanish report notes an example of a court review procedure taking six years - by which time the information may have lost its value of course.

And courts often find environmental issues unfamiliar territory - a lack of scientific or technical expertise inhibits full understanding of the scope of a challenge. The Netherlands however has some more specialised courts which review both legal merits and technical matters, engaging experts at their own expense when necessary. On the other hand, judicial review may also be limited to a review of the process, rather than the substance of the matter and quality of decision-making.

The NIS countries also face particular difficulties including corruption and a serious lack of understanding of environmental rights by the courts. There have also been deeply disturbing cases of harassment of individuals.

PUBLIC PARTICIPATION AT INTERNATIONAL LEVEL

One particular aspect that deserves highlighting is the ground-breaking way that the Aarhus Convention was negotiated - with public participation. NGOs sat alongside governments and contributed on an almost equal footing with national delegations. The positive contribution made by NGOs was recognised in the Ministerial Declaration[6] which stated that the Ministers inter alia:

"Commend the international organisations and non-governmental organisations, in particular environmental organisations, for their active and constructive participation in the development of the Convention and recommend that they should be allowed to participate in the same spirit in the Meeting of the Signatories and its activities to the e xtent possible…."

Since then, NGOs have continued to work in the ongoing processes under the Convention, contributing to the further development of particular aspects, such as pollution inventories, electronic information and access to justice. This sets an example for other negotiations and institutions.

Recommendations

International level

- **The principle of public participation in environmental decision-making should be re-affirmed and opportunities taken to strengthen it.**
- **Further regional agreements (beyond the UNECE area) on public participation should be developed.**
- **International support for training and capacity-building programmes at regional and national levels is needed.**
- **Public awareness campaigns to encourage citizens to exercise their rights would help to increase the confidence of everyone in proper implementation, both officials and citizens.**
- **Countries which persecute or harass individuals attempting to exercise their rights to public participation should be condemned internationally.**
- **International agreements granting citizens the right to know about hazardous substances should continue to be supported and developed.**
- **Special attention should be given to ensuring public participation in decision-making on releases and uses of GMOs.**
- **Procedures and mechanisms to support access to justice need further development; and should be supported through analysis of implementation, training and capacity-building programmes.**
- **Use of electronic communications systems and development of the necessary infrastructure should be encouraged and supported.**
- **International organisations should also incorporate public participation principles in their decision-making processes.**
- **Monitoring of implementation efforts should continue and contribute to an understanding of 'best practice'.**

[6] Fourth Ministerial Conference "Environment for Europe", Aarhus, 1998

National level

- **Nations should aim at stronger and more explicit legal provisions for public participation, incorporating practical arrangements that provide the public with clear, understandable and enforceable procedures.**
- **Ensure detailed legal provisions and procedural rules which ensure that public rights are recognised at all levels of administration.**
- **Create specific offices and posts with responsibilities for advancing public participation (ombudsman, environmental officers, public participation officers, consultative bodies, etc.).**
- **Protect 'whistle-blowers' or individuals persecuted for exercising their rights, including through legislation, developing compensation schemes and creating liability for officials who persecute or harass such individuals.**
- **Develop national legislation supporting access to information on hazardous substances.**
- **Develop national legislation supporting public participation in GMO decision-making.**
- **Develop public awareness and educational programmes.**
- **Provide training and capacity-building programmes for various sectors (e.g., NGOs, judiciary, authorities).**
- **Increase the provision of locally relevant information to further encourage public interest in environmental decision-making.**
- **Ensure that all bodies, not just "environment authorities", making decisions that affect the environment understand their responsibilities to recognise public participation principles.**
- **Ensure that the definition of environmental information is understood and interpreted broadly, including not only information on pollution and biodiversity, but also on GMOs, waste, health and safety, energy, noise, radiation, administrative measures, environmental agreements, policies, legislation, plans and programmes, conditions of human life, landscape, cultural sites and built structures, and relevant financial information.**
- **Build programmes that will provide information that is up-to-date, comprehensible, accurate and comparable.**
- **Privatisation programmes, or the storage of information with private sector companies, should not interfere with the basic right of access to information relevant to public participation in decision-making.**
- **Subject potential refusals to disclose to a test of public interest: place the burden of proof of harm on the withholder, and weigh the harm against the public interest.**
- **Improve public participation in the development of plans, programmes, policies and legislation. Public participation in strategic environmental assessment should be assured, both for national schemes and transboundary issues.**
- **Ensure affordable access to justice through removing cost barriers and providing the necessary financial support to members of the public, legal services providers, and NGOs who wish to exercise their rights or help others to do so.**
- **Ensure timely and effective access to justice - for example through the creation of an office such as an ombudsman which can review the substance as well as the procedure of a case and make legally binding decisions.**

II. PRINCIPLE 15 - THE PRECAUTIONARY PRINCIPLE

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

As compared with Principle 10, it is apparent that Principle 15 needs much more development as a concept and as a practical tool. Language talking about precaution has been introduced into many international instruments, starting well before the 1992 Rio conference, but it is not at all clear how it should be used in practice at a national level. Indeed, there are political tensions, including at an international level, surrounding use of the precautionary principle, and yet, mistakes that have been made in the past leading to phenomena such as ozone depletion or "mad cow" disease in the UK are reminding everyone very forcibly that there is much to lose if we fail.

It is also clear that where precautionary measures may be put into place, they may still be insufficient. If the precautionary approach were really being put into practice across Europe, we might expect more optimism about developments in European environmental policies. Yet the Second Assessment on Europe's Environment[7] shows only three environmental problems where policy has developed positively (ozone depletion, acidification and technological and natural hazards); leaving nine areas where policy development is either lacking or insufficient to deal with the full problem - including climate change and chemicals, even though it is fair to say that some precautionary measures have been adopted. We particularly mention these two policy areas (even though of partly global nature) since scientific uncertainty is frequently referred to in debates on these subjects.

In some quarters, the "precautionary principle" is very much pitted against the "sound science" approach, as if the two were completely incompatible. However, we would strongly argue that the two approaches are not so polarised. Science inevitably has limits to its knowledge (and uncertainties may be quantifiable or even unquantifiable), and in any case it should not dictate policy - policies must have a legal and social / political dimension, as well as a scientific and technological dimension. In our view, the precautionary principle regards the available scientific evidence as part of the considerations in decision-making, but as explicitly as possible recognises the limits to the available scientific evidence while taking account of the other dimensions to the problem.

The explicit recognition of the uses of the precautionary principle in the sphere of human health is to be welcomed. The Declaration of the Third Ministerial Conference on Environment and Health (London, 1999) re-affirmed their commitment to the principle, and called for a working group on guidelines on risk communication, where the need *"to rigorously apply the precautionary principle in assessing risks and to adopt a more preventive, pro-active approach to hazards"* was noted. A futher example is the Stockholm Convention on Persistent Organic Pollutants, which mentions the precautionary principle and health and environment in its objective (see box).

THE UNCERTAINTIES OF RISK ASSESSMENTS

A recent paper[8] gathered together a number of different risk assessments which had estimated the external environmental cost of new coal power. The data showed that over 20 different risk assessments over a number of years gave results varying by over 4 orders of magnitude. Even making a distinction between risk assessments which considered global warming and those that did not, variations were still around 3 orders of magnitude.

Neither is the precautionary approach about "zero risk", as its proponents are sometimes accused. It is about trying to gauge, in as honest and open a way as possible, the possible threats and then developing an appropriate response. There are a large variety of actions that could be taken - for example, moratoriums or bans may be temporary, pending further research; a substance might be substituted by a less hazardous substance; financial incentives might be offered to encourage particular techniques considered to be less threatening.

[7] European Environment Agency (1998). Europe's Environment: The Second Assessment - An Overview. EEA, Copenhagen.
[8] Stirling, A. (1999). On Science and Precaution in the Management of Technological Risk. *Final report of a project for the EC Forward Studies Unit under the auspices of the ESTO Network.*

POSSIBLE LEGAL PROVISIONS FOR A PRECAUTIONARY APPROACH

Stirling (1999, 2001[9]) has suggested a number of incremental steps that could support implementation of a precautionary approach, covering, for example, financial instruments (such as strict liability regimes), capacity building (e.g. emergency planning), transparency and public participation (to ensure peer review, independence of assessors etc). A number of possible legal provisions were proposed:

- Adopt 'safe minimum standards' (back-stop safeguards based on strictest health or environmental models)
- Recognise principle that 'lack of evidence of harm is not the same as evidence of lack of harm'
- Impose a 'reverse onus' of proof in favour of human health and the environment
- Require prior informed consent to all potentially hazardous activities by individual states
- Establish personal legal responsibility of individual decision makers
- Base regulation on 'reverse listing' (under which only specified activities are permitted)
- Use 'evidentiary presumptions' (eg: persistence, toxicity and bioaccumulation as proxies for unacceptable impact)
- Standardise international action by imposing on all treaty parties the measures of the most precautionary party
- Adoption of mandatory time-tabled 'forcing targets' (derived by 'back-casting' bans or phase-out schedules).

Conclusions

From the reports we can draw a number of conclusions.

- All countries surveyed have signed up to a number of international instruments which invoke a precautionary approach. Examples include the climate change Convention, the Montreal protocol on ozone-depleting substances, the Cartagena Protocol on Biosafety (see box).
- Countries and regions do not have a harmonised view of the interpretation and implementation of Principle 15. One author even refers to rather "haphazard" implementation, and tensions over trade issues are apparent. Countries have incorporated language into domestic legislation and/or policy, but sometimes, as in Hungary, the word "precaution" is used in an everyday sense covering any safety measure.
- The precautionary principle is not in line with the traditional way of thinking, requiring a broader view and a more holistic approach.
- As is shown by the UK article, it can be very difficult to think "outside the box". It is much easier to look at what is known scientifically than to articulate the uncertainties or unknown risks.
- Environmental impact assessment is one of the few tools that might contribute to a precautionary approach that is common across the countries currently.
- Inclusion of the precautionary approach in human health issues is to be welcomed.

Recommendations

Further development of the precautionary principle will require efforts to:

- **Re-affirm the importance of the precautionary principle;**
- **Develop further clarity and shared understanding about the concept (forthcoming Ministerial meetings (Kiev 2003 or Budapest 2004) could be suitable platforms at international level);**
- **Recognise the precautionary approach as a process, requiring a variety of measures rather than application at a single decision-making point;**
- **Explicitly recognise the further (non-scientific) dimensions of a precautionary approach: ethical, political, socio-economic, and the responsibility to future generations;**
- **Emphasise the importance of transparency and public participation, particularly given the need to recognise, explain and discuss scientific uncertainty and lack of knowledge;**
- **Develop processes and mechanisms to implement the precautionary principle, including:**
  - **– explicit recognition of the limitations of scientific understanding of any activity (including in risk assessment)**
  - **– ensuring use of independent experts**
  - **– reversing the burden of proof, with a presumption in favour of health and the environment**
  - **– employing minimum safe standards as a 'safety net'**
  - **– aiming for continuous improvement**
  - **– the reduction of hazards**
  - **– using the substitution principle (substituting safer products or activities);**
- **Encourage exchange of information and experience in this area;**
- **Apply the precautionary principle to health and environment policy and decision-making particularly in the following areas:**
  - **– water policy**
  - **– food safety issues and GMOs**
  - **– agriculture**
  - **– chemicals control**
  - **– the energy sector.**

[9] Stirling, A. (1999). On Science and Precaution in the Management of Technological Risk. Final report of a project for the EC Forward Studies Unit under the auspices of the ESTO Network; and Stirling, A. (2001). In 'Reinterpreting the Precautionary Principle'. Ed: O'Riordan, Cameron and Jordan. Cameron May, London. ISBN 1 874698 23 6.

SOME EXTRACTS FROM INTERNATIONAL LAW

United Nations Framework Convention on Climate Change (1992) (Article 3.3):

"The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties."

The Cartagena Protocol on Biosafety (2000) (Article 1):

"In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements."

Stockholm Convention on Persistent Organic Pollutants (2001):

Preamble: "…Acknowledging that precaution underlies the concerns of all the Parties and is embedded within this Convention…"
Article 1: "Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants."

COUNTRY REPORTS

CENTRAL AND EASTERN EUROPE:

- **– BULGARIA**
- **– HUNGARY**
- **– POLAND**

NEWLY INDEPENDENT STATES (NIS):

- **– ARMENIA**
- **– BELARUS**
- **– MOLDOVA**
- **– RUSSIAN FEDERATION**
- **– TURKMENISTAN**
- **– UKRAINE**
- **– UZBEKISTAN**

WESTERN EUROPE:

- **– THE EUROPEAN UNION AND THE UNITED KINGDOM**
- **– THE NETHERLANDS**
- **– SPAIN**

BULGARIA

Alexander Kodjabashev, Demeter, Sofia.

I. PRINCIPLE 10

In the last four years Bulgaria has made considerable changes to its environmental legislation. A large number of new standards and rules were adopted in environmental law because the Government was trying to harmonise with the European Union legislation. Meanwhile some new, higher environmental standards were adopted in Europe and elsewhere (including. the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters). Thus the public and particularly the environmental NGO community asked the Government to transpose these higher standards into the Bulgarian legislation.

The Bulgarian Government has signed the Aarhus Convention, but does not want to start the procedure for its ratification. The official position of the Bulgarian Government is that it is too early to ratify the Convention because the consequences of its implementation are unexplored[10]. The Government had declared that part of the Aarhus Convention would be transposed in the draft Environmental Protection Act (EPA). But when this draft was ready it became clear that the transposition was only partial. For example, the definition of "environmental information" was incomplete (see below). Genetically modified organisms (GMOs) and Pollutant Release and Transfer Registers (PRTRs)[11] were not mentioned in the draft EPA at all. And on top of this was the worrying fact that the Ministry of Environment and Waters (MOEW) did not want to discuss the reasons why the transposition of the Aarhus Convention was incomplete.

It is also notable that the existing rules were not always implemented correctly, giving another reason for criticising the Government (and the courts). The following analysis will be developed within the framework of these two types of controversial issues.

Existence of meaningful environmental data

The Bulgarian Government has made substantial efforts towards the provision of sufficient and meaningful environmental data. These efforts have been caused by the wish of the society to start the accession procedure to become a member of the EU. This has resulted in some positive steps:

- An important effort has been put into effective and reasonable management of the existing data. Since 2000 Bulgaria has an agreement with the European Environmental Agency for Cupertino.
- The Executive Agency for Environment is trying to introduce the European schemes for collection and management of the environmental information.
- An Environmental Data Catalogue is under preparation.
- In the last four years almost all European Union legislation for sampling and analysis of the acquired data has been transposed.

Constraint 1: There are some fields where the available environmental information at central level is not sufficient for assessment of the quality of the environment – e.g. ground-level ozone pollution.

The Executive Agency for the Environment (EAE) and the Regional Inspectorates for Environment and Waters (RIEW) are equipped with modern technology for measuring existing pollution and nuisances. The technology was provided in the last 7-8 years and has enabled collection of a considerable amount of environmental data by central government. However the harmonisation of the Bulgarian law with the EU legislation has set new legal requirements for the collection and provision of information, which are more difficult to achieve. The authorities cannot fulfil all these currently – the authorities need more modern equipment in order to implement some of the EU monitoring requirements.

Recommended remedy: Openness and transparency of all programmes for implementation of the requirements of the EU legislation could help improve this situation. The idea is to prevent inadequate decisions when the administration specifies its priorities from a number of competing goals and when it buys new equipment. Many of the programmes related to accession to the EU are financed by the European Union and so the administration should not be able to object that the implementation of these programmes is confidential.

Constraint 2: Sometimes the available environmental data is collected by methods (sampling and analysis) that are not standard in the European Union. There is no officially approved methodology for assessment of the obtained data. Biometrical methods for analysis of the water and air pollution are also non-standardised and are not accepted by the administration.

This causes difficulties when one needs to compare the results of different analyses. This question has been

[10] ECOPOLIS No 5, May 2001

[11] A Pollutant Release and Transfer Register is essentially a publicly accessible database of releases (emissions) and transfers (such as in waste transferred to another site) of specific chemicals, reported on an annual basis. Major industries are typically included, but the system can also incorporate data from so-called diffuse sources such as traffic.

discussed during the sessions of the High Expert Ecological Council by the Minister of Environment and Waters[12]. The different methods for analysis lead to different results and conclusions causing problems in assessing the alternatives in environmental decision-making.

Recommended remedy: As mentioned above (Constraint 1), there needs to be: a) adoption of officially approved methodology for assessment of the obtained environmental data; b) official approval of the biometrical methods for assessment; c) a study and official opinion from the MOEW on the correlation between the data obtained by different methods to improve confidence in the collected data.

Constraint 3: The Government is unwilling to create a basis for development of a PRTR system - a vital tool for collecting information on hazardous substances and their releases and transfers and which would very much improve Bulgaria's performance of access to information obligations[13].

A POLLUTANT RELEASE AND TRANSFER REGISTER (PRTR) FOR BULGARIA?

At their annual conference in 2000, the environmental NGOs agreed a declaration to the Minister of Environment and Waters. In this declaration the NGO community expressed an explicit wish for creation of a PRTR system. The Minister answered that "in the near future a publicly accessible register of the polluters in Bulgaria will be created"[14] . However this intention has not been developed further or given any legal teeth. Knowing that the detail of a PRTR system is important, the NGO community would like to see explicit legal provisions that will ultimately build a true PRTR system.

Recommended remedy: More public pressure for creating a PRTR system is needed. Public participation in the development of the system should also help achieve a more comprehensive system with a wider range of data and number of companies.

Active dissemination of environmental information

Most of the methods used for active provision of information already existed 7-8 years ago. In the last one to two years the main achievement of the MOEW has been the creation of a web site with environmental information. The information in the site is being continually extended.

Constraint 4: The analytical part of the annual report on the state of environment does not reflect alternative views of the non governmental sector. At several meetings NGO representatives have stressed that the analytical part of the state of the environment report consists of statements which are controversial and biased.

Recommended remedy: Professionals from non governmental organisations – professors at the University, NGO specialists, business representatives should be invited to author analytical sections of the State of the Environment report.

Passive access of environmental information

The passive access to environmental information is at the core of the right to information. Compared to the situation several years ago, the administration has made substantial progress in providing environmental information on request.

- In the last 2-3 years there are no major problems with access to environmental information at the main authority – the MOEW. The officials in the MOEW respond to probably every request for information.
- There are no reported cases when the administration has imposed unreasonable charges for access to environmental information.
- The MOEW has organised several public discussions on legislation for access to information. These discussions have helped to create a greater awareness of the importance of passive access to environmental information.

Constraint 5: There is very little information available about the information that the authorities possess.

The so called "environmental data catalogues" exist in a number of Western European countries. These catalogues inform the public about what kind of information is available by the authorities. An environmental data catalogue in Bulgaria is under preparation now. Last year (2000) the MOEW was offered a draft data catalogue which included a large amount of data about the available information. The proposal provided that an important part of the available information should be put in this environmental data catalogue. For example in that catalogue would be included the full list of the issued permits with information about the person who has got the permit and the location of the polluting facility. The proposal was rejected, even though many specialists pointed out that such detail could actually decrease the number of demands for environmental information.

Recommended remedy: The Government should prepare an environmental data catalogue which contains a significant part of the available information. It should be prepared in consultation with as many specialists as possible and should be submitted for public discussion.

Constraint 6: The Government asserts that it will transpose as many as possible provisions of the Aarhus Convention into the internal legislation. However the new draft of the Environmental Protection Act (EPA) does not contain a substantial part of the definition of "environmental information" (Article 2.3. of the Aarhus Convention).

[12] This information has been provided in conversation with Mr. Andrei Kovatchev, NGO representative in the High Expert Ecological Council.

[13] Provisions for a PRTR were not included in the draft Environment Protection Act, which was put forward into the Parliament by the Government and was voted at first reading before the parliamentary elections (June 2001).

[14] ECOPOLIS No 5, May 2001

CONFIDENTIAL INFORMATION?

The draft Environmental Protection Act omits mention in the definition of "environmental information" the phrase "and cost-benefit and other economic analysis and assumptions used in environmental decision-making" (Article 2.3.(b)). The letter (c) of Article 2.3 ("the state of human health and safety…") of the Aarhus Convention was not transposed either. Last year a group of NGOs organised a meeting to discuss the draft EPA. The government officials could not explain the reasons for this partial transposition of Article 2.3. Later in 2000, the annual conference of the environmental NGOs included this issue in its declaration and asked the Government to remedy the deficiencies in transposition of Article 2.3. The Minister for Environment and Waters responded that "the cost-benefit and other economic analysis and assumptions used in environmental decision-making" represent information that is excluded as confidential commercial and industrial information.[15]

Recommended remedy: The Government should correctly transpose Article 2.3. of the Aarhus Convention, particularly since the draft EPA provides for the exceptions in Article 4. The NGO community should continue to push for the correct transposition of Article 2.3.

Constraint 7: The administration is not prepared to implement the exceptions for commercial and trade confidentiality, which exist both in the European legislation and in the Aarhus Convention.

The issue of commercial and trade confidentiality focuses the interests of at least two groups of persons – the competing companies which strive to learn more about the competitor's activities and the public who are interested to know about competitors' polluting activities. The administration has the difficult task to solve the conflicts between the business and the public and between the companies. The lack of rules for definition of what is commercial and trade confidential information is an additional hindrance in the administration's activity.

NGO experts proposed to the Government an original way out of this situation. A proposed consultative body set up by the Ministry of Environment and Waters should give an opinion on any controversial refusal of access to information. The opinion of this consultative body would not replace the administrative or judicial review of the refusal. But the opinion would be attached to the file, and would aim to help the court in case of judicial appeal. As proposed, the consultative body would be composed of two representatives of each sector - the NGO community, the business sector and the administration. But the Ministry did not accept the proposal.

Recommended remedy: Speedy adoption of a legal definition of what is industrial and trade confidential information, along with guidance on implementation could be of help. An alternative would be adoption of a mechanism, similar to the proposed consultancy body, which would be able to help the administration in implementing the existing rules.

Constraint 8: The MOEW and the RIEW provide environmental information in response to citizen requests rather correctly. But the other central authorities – the Ministry of Agriculture and Forests, the Ministry of Health, the Ministry of Regional Development and Planning, the Agency for Energy Efficiency and the local authorities do not always implement the existing rules for access to information.

The MOEW has more experience in providing environmental information than the other agencies. A recent discussion revealed that there are problems even when the agencies of the executive power exchange information between them. It is necessary to improve the information provision practices in all other state agencies and in the local authorities.

Recommended remedy: The establishment and promotion of educational programmes (with large NGO participation) for officials in the other agencies is needed. The aim of these educational programmes would be to make the officials familiar with the requirements of the law for access to information, to help them understand the background and philosophy of access to information provisions, and to help set up systems to respond to the expectations of NGOs and the public.

Access to Justice

Constraint 9: The judicial review of refusals to submit environmental information is very slow.

The average judicial procedure of appeal of refusal to submit environmental information takes between nine and sixteen months. Very often at the time of the final decision the reason for the applicant (complainant) to obtain the information has even disappeared. For example, a decision may have been taken before the information was received.

Recommended remedy: Rules should be adopted providing shorter deadlines for dealing with appeals against refusals to submit environmental information. This would be similar to the rules for dealing with appeals in election procedures – when the decision of the Court should be issued before the date of the elections. It may also be appropriate to suspend decision-making in some circumstances until the information has been received, or the review procedures are finished if a refusal comes into dispute.

Public participation

In the last 3-4 years the Parliament has voted in several laws in the environmental protection field providing for different forms of public participation.

- One positive example for provisions about public participation is the Water Act (State Gazette No

[15] ECOPOLIS, No 5, May 2001

67 / 1999). The public is informed at an early stage about an application for a water use permit. The public has right to object to the application or to propose conditions under which the permit should be issued. Finally the citizens and the NGOs have the right to appeal the administrative decisions.

- Other good examples for public participation are several laws adopted recently – the Law on Medical Plants (State Gazette No 29 / 2000), and the Hunting and Game Protection Act (State Gazette No 78 / 2000). These laws provide for participation of representatives of the public in consultative bodies that have been created by the laws.
- The Protected Areas Act (State Gazette 133 / 1998) provides that the public may start the procedure for declaring a zone a protected area. At several stages of the procedure the law provides for public discussions. The public also has the right to prepare plans for management of protected areas.

EXAMPLES OF EFFECTIVE PUBLIC PARTICIPATION

- Four NGO representatives took part in the work of the High Expert Ecological Council, a consultation body that prepares the EIA decisions of the Minister of Environment and Waters.
- For more than one year the MOEW has provided and disseminated electronically the draft EIA decisions of the Minister of Environment and Waters.

A BAD EXAMPLE OF PUBLIC PARTICIPATION

The state of public participation in the planning procedures may be given as a bad example. The EPA provides for an EIA procedure with public discussion for the national and the regional plans and development programmes (EPA, Article 20, para. 2). In reality this rule is not implemented. Two of the most striking examples have been the National Energy Strategy prepared by the Government; and the General Schemes for Water Management, prepared in 2000 by the MOEW. The National Energy Strategy was prepared without an EIA study or EIA procedure – according to some officials it was not a programme but a strategy and therefore the EIA procedure was not mandatory. Concerning the General Schemes for Water Management the explanation was more simple – that this was a "provisory document", not a plan. However, under this "provisory document" are plans for a great deal of activities, and it is not at all clear when a "real plan" for Water Management will be prepared.

Constraint 10: For many of the administrative procedures there are no clear rules defining whether the citizens have the right to participate or not.

Many of the laws adopted before 1998 (e.g., the Limitation of the Harmful Effect of Waste on the Environment Act[16]) do not provide specific rules for public participation. This creates uncertainty about the possibilities for citizens to intervene in the administrative procedures. The lack of such rules is also uncomfortable for the business sector, because an appeal to the Court may happen a long time after the issue of an administrative decision.

Recommended remedy: Specific standards for public participation should be created in the existing laws. These standards should correspond at least to the standards for public participation of the Aarhus Convention.

Capacity building

Capacity building is a very important question, especially in the context of Bulgarian efforts for accession to the EU.

- Several studies were financed by the EU to investigate the needs for further capacity building in the MOEW and its agencies.
- An Environmental Strategy has been prepared. It includes some very interesting and helpful conclusions and concrete steps for capacity building.

Constraint 11: The great bulk of new legislation leaves officials unaware of some of the existing rules and the public unaware of most of the existing rules. The administration does not necessarily apply the rules in the same manner to different applicants.

The administration has a natural feeling of discomfort when the public "meddles" in its affairs. The discomfort increases when the administration applies different standards to different applicants. The discomfort increases immensely when the double standards are publicly discussed.

Recommended remedy: First - the rules (procedural and substantial) which aim to protect the public interest should be specified. Second - educational programmes for the officials and the public should be developed. The aim of those programmes should be to improve the level of understanding and of implementation of the existing rules.

II. PRINCIPLE 15

In Bulgarian law there is no general rule proclaiming the precautionary principle in the meaning of Principle 15.

There are several texts where the word "precaution" is used (e.g., the Limitation of the Harmful Effect of Waste on the Environment Act , the Clean Air Act and others). In these acts the precautionary principle is not developed. The word "precautionary" is used in its everyday meaning and not in the meaning of Principle 15.

There are some procedures where one can perceive some of the characteristics of the precautionary principle (the EIA procedure under the Environment Protection Act, the risk

[16] Recently the Supreme Administrative Court recognized the right of a group of citizens to appeal a permit for transportation of waste, issued one year ago (see ruling No 4333 / 14.06.2001 about administrative case No 3777 / 2001 Supreme Administrative Court, 5-member instance / non published /)

assessment procedure under the Law on the Protection from the Harmful Effect of Chemical Substances, Preparations and Products (LPHECSPP)[17]. The LPHECSPP will enter into force in February 2002 and the regulations for its implementation (including the regulation on risk assessment) are under preparation. The characteristics of the precautionary principle have been tested in court only within the EIA procedure and without explicit reference to the principle itself. In court some NGOs have made attempts to seek investigation into alternatives to the proposed activity. Another trend in the NGO efforts is to convince the court that an EIA report needs additional expertise in assessing the nature of the damages and the irreversibility of the damages. These efforts have been of no use. Bulgarian courts have not investigated the proposed alternatives.

Finally there is a recently published Law on the Seeds (LS)[18] which makes very interesting reference to the Cartagena Protocol on Biosafety. The Cartagena Protocol on Biosafety was ratified by the Bulgarian Parliament[19], but the Protocol itself has not entered in force. The reference to the Cartagena Protocol in the LS stipulates that the existing Regulation for dissemination of genetically modified higher plants, created via recombinant DNA technology, still can be applied as far as it does not contradict the Cartagena Protocol, thus embracing an element of a precautionary approach and risk assessment.

On a more general note, it is probably fair to say that there is an increasing understanding of the interactions between the various elements of the environment and the legal tools for management of this interaction. This is a good prerequisite for implementation of the precautionary principle in the future.

Constraint 12: The EIA procedure provides for risk assessment of the proposed activity and risk assessment of eventual accidental pollution[20]. These parts of the EIA report are often neglected. Efforts to contest the content of such EIA reports in court remain vain because the courts do not usually agree to hear expert opinions which may challenge the content of the EIA report.

The problem has two sides: the quality of the EIA reports (which may be a problem of any risk assessment under any law); and the lack of possibilities for contesting the content of the EIA report. The quality of the EIA report depends on the way the experts (the authors of the report) are chosen and paid – in Bulgaria they are chosen and paid by the investor. The NGO community regards this as thoroughly inappropriate because the quality of the EIA reports thus depends on the market and not on the professional qualities and the impartiality of the expert.
On the other hand the administration rarely prescribes for improvement of an EIA report. In theory, a report can be sent back to the investor with prescriptions for improvement, but if this happens twice, the licence of the expert author will be withdrawn. In fact the administration does not exercise its rights and in ten years after the adoption of the EPA, there has been only one case reported of an expert whose licence was withdrawn. The other side of the problem is an access to justice problem. Usually the court has the right to seek and investigate the facts independently from the investigation made by the administrative authority. In EIA cases however the courts usually admit that the facts and the assertions in the EIA report are incontestable. In such a way the courts often cannot control the implementation of the legal standards by the administration.

Recommended remedy: The problem with the quality of the EIA report can be solved partially by changing the system for choosing and paying the experts, entailing a change in the law. A further solution may be to charge a fee to the investor for preparation of the EIA report, but the report is prepared by an independent team of experts. A team could be nominated by the Minister of Environment and Waters, or drawn at random from a pool, or could be an independent consultancy, the work of which would be absolutely transparent for the public.

The second problem can be solved by proper implementation of the law – the public should insist that the courts have the right to order an investigation of the facts and conclusions in an EIA if any of the parties claims that the EIA report is incorrect.

Constraint 13: In the existing legislation which provides either for risk assessment or for any economic assessment of a proposed activity, there is no reference to "cost effective measures to prevent environmental degradation".

Recommended remedy: Economic analysis of the proposed industrial activities is totally neglected by the authorities. Therefore the law should oblige the proponents of an activity to do such an analysis, especially looking at possible measures to prevent environmental degradation. The authorities should be obliged to look at the analysis and assess its correctness. The process should include public participation which may reveal interesting (and eventually controversial) sides of the economic analysis prepared by the investor. All these ideas should be incorporated into legislation where the precautionary principle should have an important role, particularly in the areas of EIA, chemicals control and GMOs.

[17] Published in State Gazette No 10/04.02.2000
[18] Published in State Gazette No 86/20.10.2000
[19] The ratification law was published in State Gazette No 65/2000
[20] See Annex No 2 to Art .13, line 1, p.2 of Regulation No 4 for EIA, paragraphs No 4.3, 4.7 and 8.1.

PUBLIC OR PRIVATE INTEREST?

In Bulgaria, the Secretary of the authority which issues the permit for release into the environment of genetically modified higher plants should be an "habilitated (accredited) scientist in the field of genetic engineering" (Article 3, line 4, of the Regulation for dissemination of genetically modified higher plants created via recombinant DNA technology[21]). In 2000 this Secretary was Professor Atanas Atanassov, director of a scientific institute dealing with genetic engineering. In February 2000 a newspaper revealed that the institute, at the head of which is Atanassov, has contracts with the multi-national company Monsanto, at the time a company with huge commercial interests in promoting gene technologies[22]. Prof.Atanassov did not deny the fact. However, the Minister of Agriculture and the Ministry staff did not recognise a possible conflict of interest in this case and the affair was forgotten.

Constraint 14: The Government has been slow to transpose European legislation on GMOs. There were already two attempts to prepare a law on GMOs, but providing for low standards of both risk assessment and public participation in GMO management. The actual regulation of these issues provides for a risk assessment in the case of deliberate release of genetically modified higher plants, but there is no detailed format for this risk assessment and the final decision is taken by a body whose members are not checked for current or eventual conflicts of interest.

Recommended remedy: Quick and correct transposition of the EU standards for risk assessment and public participation in case of deliberate release of GMOs and of placing on the market of products which contain or consist of GMOs.

[21] State Gazette No 70/1996

[22] Capital weekly 29.01.2000-04.02.2000 cited by a report prepared by ANPED and Regional movement "EcoSouthWest" - "Bulgaria - corporate field of Europe for genetically modified food and agriculture".

HUNGARY

Sándor Fülöp, Executive Director, Environmental Management and Law Association, Budapest

The following examples do not imply that in Hungary, there exist only negative scenarios and problems with public participation. However, given the brief space of our statement, we would like to call attention to such areas where urgent action is needed.

One important point to note is that although Hungary has ratified the Aarhus Convention, the government believes that no changes are needed. The NGOs keep challenging this standpoint. Although Article 7 of the Hungarian Constitution stipulates that all the ratified international conventions are a direct part of our legal system, the place of such conventions in the hierarchy of the laws cannot be clarified. As a result of this, even the lowest level ministry decree tends to overwhelm the text of the convention.

I. PRINCIPLE 10

Existence of meaningful environmental data

Constraint 1: There is no complete network for collection of regional and local level environmental data.

The public are certainly interested in environmental and related public health data concerning their places of residence and surroundings. However the country cannot afford a complete monitoring network for all meaningful environmental parameters. For instance, only the largest rivers are regularly monitored while medium and smaller rivers and other water flows are not. The situation is the same in connection with air quality monitoring.

Recommended remedy: public participation in monitoring.

A feeling of ownership amongst the local people can be used for developing local environmental monitoring programs. Environmental authorities and large national environmental NGOs should give basic training and equipment to active local groups (environmental and other grassroots organisations), in order to make them a useful source of local environmental information Such programs could also have significant positive economic ramifications.

A LOCAL MONITORING PROJECT

The Environmental Management and Law Association (EMLA) Foundation for Students developed a local GIS program alongside the Rákos creek in Pest County, Hungary. Twelve students from several universities visited the site regularly. With technical help from EMLA, developed a geographic information system on the biological and chemical status of the entire water flow and also collected all the data from the illegal waste dumping which could endanger the creek. The students also collected some existing economic and social data and summarised it in their GIS map. Local municipalities and citizens' groups can use this free information source for many purposes.

Constraint 2: There is no unified environmental database in the country.

The collection of environmental data is done sporadically, without using consistent methodologies or a centralised database. This results in difficulties in environmental planning and causes superfluous efforts by companies which are obliged to issue reports on water and air pollution, hazardous waste production and treatment etc. in several ways with different frequency and methodology.

Recommended remedy: A strong commitment to the establishment of a Pollutant Release and Transfer Register (PRTR) system is needed.

A unified environmental data collection system, using the methodology offered by OECD and other international organisations[23], would help our environmental administration to control the pollution in the regions and the emissions of certain polluters much more effectively. Simpler data collection and processing obligations could be more efficient for companies. The public would also gain a lot, since the PRTR system increases transparency and could oblige the companies to maintain direct information connections with the local communities in the vicinity of their factories.

[23] OECD (1996). Pollutant Release and Transfer Registers (PRTRs): A Tool for Environmental Policy and Sustainable Development - Guidance Manual for Governments. OECD GD/(96)32. OECD, Paris.

Active access to environmental information

Constraint 3: People are less interested in regional and governmental level environmental information.

Naturally, the average person has little motivation to seek general environmental information. However, most of us rightly become extremely concerned once there is a local environmental problem, e.g., a problem with drinking water, a new landfill in the vicinity, etc.

Recommended remedy: The government should spend fewer resources on producing and disseminating hard copies of summaries on the state of environment of the whole country or large regions (those who are interested in that level of information usually have access to the internet where these documents are available), but should support the municipalities to prepare and distribute local reports and analyses.

Passive access to environmental information

Constraint 4: The authorities are afraid of giving out information which *might* constitute a "business secret."

Business-related confidentiality is clearly regulated in civil law and competition law in Hungary, but the regulation and the related court practice is usually too sophisticated for most administrative officers. But under Article 81 of the Hungarian Civil Code, to give out and use business information is not unlawful unless it causes harm to the original owner of the information.

Recommended remedy: The government should issue clear guidance on the protection of business secrets and should organise training on it - in consultation with concerned NGOs, business organisations and legal scholars.

DATA PROTECTION OMBUDSMAN

The position of the data protection ombudsman was created by the Act No. XVIII of 1992 on Protection of Personal Data and Dissemination of Public Data. The ombudsman also represents a forum for legal remedy when public information is unlawfully denied, although advice given on any matter is not binding. However, the annual reports of the ombudsman, covering the cases and the most important suggestions, represent a precious resource for the practical interpretation of the access to information regulations.

Constraint 5: As practical data reveal[25], the main „consumer" of environmental data and information is the business sphere itself.

Access to environmental information regulations are a typical example of laws whose aim is to counterbalance uneven social situations. Those with economic resources, especially the large companies, can easily access any information they want: they know the system of the information market, they are familiar with the internal structure of the administrative bodies and they can afford the price of the information if this issue emerges. On the other hand, the victims of environmental pollution are frequently "socially disabled" persons who lack such advantages. It would be unjust if the scarce resources of the state to provide an environmental information dissemination system were used to make the rich richer instead of giving a chance to the poor. But (quite rightly), the Aarhus Convention prohibits the authorities from asking the reason for the request of environmental information.

CONFIDENTIAL CRIMES?

The Hungarian data protection ombudsman was asked by two journalists to issue an opinion on the following case. The journalists asked all twelve regional environmental inspectorates in the country for the list of those companies which were fined on the grounds of pollution of the environment. Only one authority was willing to submit the complete list including reasons for and amounts of fines. The other inspectorates gave little or no information, all referring to business confidentiality, arguing that the requested information would harm the good will of the concerned companies.

The data protection ombudsman pointed out that the requested information is public interest information and does not fall into any category of the exemptions. He added: „persons, having infringed upon the law, can legitimately refer to the rules of business confidentiality in order to hide their wrongdoing from the public eye"[24].

Recommended remedy: If we accept the basic aims of public participation regulation, we are closer to a solution to this legal issue. Asking the client to give the purpose behind an information request would really discourage clients in certain situations and should be explicitly excluded as an option. The purpose of an information request known by the authority should not be used as an excuse for denial of the information request. Furthermore, individuals should not be denied access to information because of lack of financial resources. It would be perverse to have some sort of economic threshold for public participation in decision-making: after all part of the ethos of public participation is exactly to counter-balance interests which often have a hard financial motive. But hard-pressed public bodies may wish to consider some sort of mechanism to gain funds when they supply information which obviously serves a commercial purpose and has a "market value" when used commercially. Return of some financial rewards to the public body should also help strengthen the data collection system.

Constraint 6: Persons requesting information are frequently unable to clearly specify the data they are asking for.

Sometimes people do not know enough about the environmental topic they are interested in. In some cases the clients may not be able to specify which part of a large database they should be asking for.

[24] The 1997 annual report of the Hungarian data protection ombudsman, pages 340-5.
[25] The 1997 annual report of the Hungarian data protection ombudsman, page 136.

THE NEED TO PINPOINT INFORMATION

The Hungarian Supreme Court has pointed out that „The mayor is obliged to issue a copy of the minutes of the Municipality Council only in cases when the requester definitely and concretely specifies which part he needs." In the given case the requester did not study the schedule of the council meeting, so he asked for the whole protocol, a voluminous file which would have absorbed several months' worth of the budget just to photocopy. The Supreme Court held that the mayor was lawful in denying the request, which should have contained at least the reference to a certain point or topic in the schedule[26].

Recommended remedy: Capacity building. Cases like that of the Hungarian Supreme Court could be solved if the mayor had the culture and willingness for capacity building. The request should have been clarified with the requester to discover which part of the schedule was of interest. In the more difficult cases, when complicated structures or difficult topics prevent the client from clearly specifying his / her request, more developed capacity building measures are needed.

Public participation

Constraint 7: Administrative bodies other than environmental or nature protection bodies are reluctant to acknowledge the environmental nature of several cases which have important ramifications for environmental protection. In practice, in quite controversial cases, environmentally important projects such as road construction, mining and water management find the authorities denying the rights of environmental groups to participate in the decision-making. So important decisions may well be unbalanced, favouring just short term investment interests.

Similarly, the Environmental Code obliges ministries to send their draft legislation with significant environmental effects to the Ministry of Environment, in order to enable public discussion. In practice, almost no laws are sent.

Recommended remedy: Parliaments shall incorporate the „integration principle" (integrating environmental considerations into all policy areas) not only in environmental legislation but in the relevant legislation in other legal fields. Such repetition of the principle is necessary to tackle the old habits of administrative officers who consider only the narrowest application of regulations in practice.

Capacity building

Constraint 8: In spite of a rich and detailed system of public participation regulations, members of the public remain passive during decision-making processes, or only become active after the main decisions have been taken. They may be faced with local political and administrative decision-making processes including physical planning, EIA, integrated pollution prevention and control permitting, construction and usage permitting: the whole process can be a jungle of rules and regulations for the citizens.

Recommended remedy: Capacity building, both on a general and individual level, is needed. Environmental brochures and media messages should pay attention to the procedural aspects of public participation. Citizens need a general overview of the system by which the authorities deal with environmental cases, the process they follow and the ways to intervene in the process. On an individual level, the authorities have officers whose task (at least part-time), is to inform the concerned public, both those who have already shown interest in the given case and those who might be interested if they were given information.

A further solution would be to incorporate into relevant laws a responsibility of the authorities to alert concerned communities well before decisions are taken in particular cases.

OFFICIAL HELP FOR CITIZENS

In Bács-Kiskun County, with Canadian support, as many as 13 city municipalities and numerous other administrative bodies introduced a new administrative position: the information rights officer. The right officers accelerate the fulfilment of information requests, help citizens to find the right officers and help formulate requests in a proper way. These officers received training from leading experts of the Hungarian Data Protection Ombudsman[27].

Access to justice

Constraint 9: One continuing problem is the general lack of understanding of environmental matters on the part of judges. This stems from both an objective and a more subjective origin. The objective element is that the environmental cases are usually managed by administrative authorities, whose decision is supervised by civil courts upon request. However, the supervision is restricted to the procedural matters, and to the substantial legality of the decision itself. This means that judges frequently can avoid dealing with the factual environmental issues.

The more subjective element of the judges` ignorance is rooted in social factors: in common with the whole of society, there is a general lack of basic environmental awareness and sensitivity.

Recommended remedy: At least every county court should have specially trained and appointed environmental judges. In 2000, EMLA collected undersignings from numerous leading private attorneys of Hungary and sent a petition to the head of the Hungarian Supreme Court and to the minister of justice, asking the nomination of these environmental judges, but our request remained echoless.

[26] The case was published under No. BH 1996. 581.
[27] The 2000 annual report of the Hungarian data protection ombudsman, http: / / www.obh.hu

A further remedy could be regular environmental training for judges. In 1997 with the help of the US Environmental Law Institute, EMLA organised such a training, although with modest attendance as compared to training for prosecutors undertaken the next year. But this should be unsurprising – environmental prosecutors exist in the public attorneys' offices in every county.

II. PRINCIPLE 15

Constraint 10: Legislators do not understand the real meaning of the word „precautionary".

Unfortunately, the word „precautionary" in the phrase „precautionary principle" has been used in its original, everyday context in several legal texts. Hence the full implications of this unique environmental principle cannot prevail in the texts of Hungarian laws nor in practice.

Article 4, Point x) of the Hungarian Environmental Code[28] (written three years after the Rio Declaration), defines the word "precaution" in the following way:

> *"a decision or measure which is necessary for mitigating environmental risks, for preventing or mitigating environmental harms".*

Similarly, the attachment on qualification of wastes in the 1996 hazardous waste governmental decree[29] uses the word "precaution" in the regular, everyday sense.

Recommended remedy: We need to enhance and accelerate the influence of the international laws on the Hungarian legal system. The Hungarian system has serious difficulties in harmonising its laws with the ratified texts of the international law[30]. The impact on the new laws is felt only five or more years after ratification. For instance the new waste regulation[31] or the air protection regulation[32] now use the term "precautionary principle" in harmony with the Rio Declaration and other international documents like the Climate Change Convention or the Danube Convention of 1994.

It is also promising that the Hungarian Environmental Program[33] also uses the term in the correct context and this will influence further environmental legislation.

Constraint 11: Courts and administrative bodies cannot use the precautionary principle until it gains a generally accepted, stable legislative form.

Until contradictions are removed, bodies will in fact avoid using the law or might use it somewhat improperly in important cases. This may open the door to hazardous new investments being given construction permits that can later be difficult if not impossible to revoke.

Recommended remedy: The Hungarian General Administrative Procedural Law[34] (hereinafter: Áe.), like many similar procedural laws in other countries, requires the administrative bodies to give a full explanation of their decisions. If the explanation is not a hundred percent convincing with respect to the lawfulness and reasonableness of the decision, the decision itself shall be rejected by the second level administrative body or by the court. So the burden of proof to demonstrate that the permitted activity poses no danger to the environment rests on the administrative bodies. In this way a proper use of an old procedural rule can bring us close to the actual meaning of the precautionary principle.

This exact argument has been used by the court[35], in an EIA case about a large hazardous waste incinerator in Garé (see box).

BURDEN OF PROOF TO DEMONSTRATE NO HARM

„According to Article 60 of Áe, the administrative process run by the Defendant[36] was lead by Chapters II-IV of Áe. According to Article 26 of Áe. the authority shall clarify the facts for its decision. If the available documents are insufficient, the authority will take additional evidence, *ex officio* or upon the request of clients. At the same time Par (4) of the same Article stipulates that the authority must evaluate the evidence individually and as a whole and the authority will form its opinion based on the facts.

„The Court considered that the Defendant did not fulfil its obligation to clarify the facts, because it failed to assess the expected social and economic consequences in the area of Siklós, Villány and Harkány. It also failed to examine the consequences of wind direction and of the vicinity of the border of Croatia. In connection with the latter, Article 9, Par (2) of R[37] stipulates that the administrative authorities leading the case are obliged to inform the Ministry of Environment and Regional Planning immediately if there is a possible transboundary environmental effect.

„The Facts shall be clarified before the decision is brought and upon the call of the Defendant, Intervener I (the requester of the permit) should have proved that there exists no obstacle to issuing the permit as according to the Court, the burden of proof rests upon Intervener I."

[28] Act LIII. of 1995. on the General rules of environmental protection.
[29] Governmental decree No. 102/1996. (VII. 12.) Korm. on Hazardous waste.
[30] Act XI. of 1987. on Legislation refers only a mandatory EU harmonization section of the Hungarian laws, there is no similar obligation in connection with all of the international legal rules.
[31] Article 4 of Act XLIII. of 2000. on Waste Management.
[32] Attachment 1 of Governmental Decree No. 21/2001. (II. 14.) Korm. on Certain rules of air protection
[33] Accepted by the Parliament in its decision No. 83/1997. (IX. 26.) Ogy.
[34] Act IV. of 1957 on the General Rules of Administrative Procedure as was modified in several times.
[35] Pécs City Court, Case No. 2. P. 21. 839/1996/36.
[36] The defendant, as usually in the administrative court cases, was the second instance administrative body, while Intervener I, was the requester of the environmental permit.
[37] R. means in this text Governmental Decree No. 152/1995. (XII. 12.) Korm.

POLAND

Jerzy Jendroska, Director, Environmental Law Centre, Wroclaw

I. PRINCIPLE 10

Overall, and regardless of 3 changes of governments since the Rio Conference, there has been constant progress in implementing Principle 10 in Poland both in legislation and in practice. The progress accelerated immensely at the beginning of 2001 with the entry into force of new legislation: the Act of 9 November 2000 on Access to Information on the Environment and its Protection and on Environmental Impact Assessment. The Act implements three EU Directives: on access to environmental information (90/313), on EIA (85/337), and on SEA (2001/42), as well as the Aarhus Convention.

However, the 9 November 2000 Act will be repealed and replaced by a more wide-ranging law this year, when the Act of 27 April 2001 Environmental Protection Law enters into force on 1 October 2001. The Environmental Protection Law is a code-like, extensive piece of legislation (440 Articles on 150 pages) which regulates all horizontal issues, including those incorporated from the earlier act (the chapters on access to environmental information, on public participation, on strategic environmental assessment and on EIA) as well as some substantive sectoral issues - specifically air pollution and noise control.

The Act contains also some general principles applicable to the entire environmental legislation, including principles of access to environmental information (Art. 9) and of public participation (Art.10). Both principles are rights-based, i.e. they grant everyone the right to information and the right to participate in decision-making on environmental matters.

Access to environmental information

Good examples

1. Authorities responsible for environmental matters are obliged to keep publicly accessible records of data concerning documents which are considered to include environmental information most needed by the public. Documents listed in the records fall into 6 categories:

1) applications for decisions concerning all types of development consents and pollution permits;
2) the actual decisions concerning the above consents and permits;
3) policies, strategies, plans and programmes and their drafts;
4) relevant documentation needed in decision-making (like environmental impact statements, post-project analysis etc.);
5) regularly submitted reports from polluters about their emissions into the air, water and land;
6) other documents. They include a summary (called an "information chart") of each document listed and the index of all entries. The data to be included in the information chart are slightly different in relation to each category of documents but in general they include the name and subject matter of the document, date of its preparation (submission, issue etc.), cross-references to other relevant entries (e.g., to an information chart about the relevant EIS, or the final decision), notice about exemptions from disclosure (if any), etc.

Records serve as a tool for both access to information and for public participation. Documents listed in the records are maintained by the officials in charge and by law should be made accessible the same day a relevant request is filed (as opposed to all other environmental information which has to be made available within one month). This provides for immediate and easy access to information.

Records can be maintained both in traditional (paper) form and in electronic form and accessible on the Web. The traditional form is still prevalent in Poland. In this respect the Polish system of records is very useful – it has the advantages of public registers (immediate and easy access to most needed information) without its costs. There is no need to duplicate each document in order to keep it constantly available for inspection in the register, and less space is needed for keeping only records and not the actual documents.

2. The Environmental Protection Act provides for a nationwide system (called the State Environmental Monitoring System) for collecting, maintaining and disseminating environmental information, mostly from monitoring programmes and site inspections. It includes, though is not limited to, establishment of ten different electronic databases which, by law, must be accessible through public telecommunication networks. Specific environmental information on these databases includes mainly local monitoring pollution data in relation to air, water, soil contamination, noise, etc. These databases, when finally established, should help to stimulate interest in the information by providing detailed and locally relevant information, rather than nation-wide overview or summary information.

3. As already more than 20% of the population in Poland is on-line, it is of vital importance that authorities should disseminate information this way as well. An excellent example are the web pages of the Lower House of Parliament where virtually all information concerning its activities is immediately available, including information about the legislative processes, minutes of sittings, draft laws etc (www.sejm.gov.pl). Some regional and local authorities can be credited for similar excellent use of electronic tools for communicating with the public.

The cities of Lódz? (*www.uml.lodz.pl*) and Szczecin (*www.um.szczecin.pl*) have been awarded Gold Medals for the best electronic information systems among big cities in Poland (there is also a separate category for small cities). In both cities local ordinances oblige all municipal officials to release all information electronically. The constantly up-dated home-pages include all local legislation, information about public bids, explanations about procedures, model applications for various decisions, information about local authorities, some maps etc. In both cities there are 2 full-time positions responsible for running the service. In each city the cost of running the service (about 10.000 PLN- 2.000 USD monthly) is considered extremely effective bearing in mind the demand (about 4000 visits monthly with about 1600 – 3000 pages accessed daily).

Constraint 1: Publicly accessible records do not constitute a fully comprehensive information system, despite the fact that the details concerning the format of the records, types of information to be included and categories of entries are standardised. Possibilities for maintaining the records in electronic form are seriously constrained by the lack of standard software that would facilitate networking.

Recommended remedy: The Environment Ministry should undertake to specify standard software and distribute it free of charge to all relevant authorities. Local authorities that do not yet have enough hardware should be encouraged to acquire it - and supported financially (possibly by the Environmental Funds) in doing so. Those who are not yet on-line should also be encouraged and assisted. Central government should facilitate necessary training.

Constraint 2: Reports from thousands of individual polluters about their emissions into the air, water and land (which are submitted regularly to environmental authorities within the pollution charges scheme and are being made available via publicly accessible records) do not constitute a nationally comprehensive PRTR system. Reporting systems for each medium differ, being based on different concepts and relating to different pollutants. This makes it practically impossible to do any comparison and tracing of pollutants that might migrate from one medium to another or which could be released into different media by a polluter. Indeed, this creates some inefficiencies**.** The significant work that both the authorities and the regulated community put in to prepare and administer the huge amounts of data and information is partly wasted and cannot be sufficiently utilised because of the lack of integration across media.

Recommended remedy: Efforts should be made to implement the political commitment made in point 129 of the Second National Environmental Policy adopted by the Council of Ministers on 13 June 2000, which envisaged establishment of a national, electronically accessible PRTR system based on OECD Guidelines[38]. This would result in a release and transfer register which is integrated with respect to air, land and water.

Constraint 3: Reminiscences of the totalitarian tradition heavily influence practices with respect to access to information. Not all authorities and courts have got used to the concept of openness in public life. Authorities tend to refuse information by wrongly and arbitrarily interpreting the "official secret" clauses from various laws that allow for confidentiality of certain official information, and, until recently, courts sometimes sustained such practices. These relate mostly to broadly defined financial aspects of official activities – priorities in granting public funding (including funding from environmental funds), public tenders for certain services etc.

Recommended remedy: Broad educational efforts are needed, including training and the issuing of manuals and guidelines concerning access to information. Challenging specific decisions in the courts and widely publicising favourable verdicts may also be a very powerful educational tool.

IS A BUDGET REPORT AN OFFICIAL SECRET?

The Audit Committee of a community's local council had regarded its sitting to discuss its budget implementation to be closed to the public, and declared part of the relevant official minutes to be secret. A local journalist challenged this decision at the administrative court. The court upheld the decision by finding it legitimate to both exclude the public from the sitting and to make confidential part of the minutes. Moreover the court considered decisions concerning confidentiality of "official secrets" as being outside the scope of judicial control. This verdict was widely reported and criticised in media. As a result an extraordinary appeal from the administrative court verdict was tabled at the Supreme Court. The Supreme Court in its judgement of 1 June 2000 (III RN 64/2000) crushed the verdict and made it crystal clear that all decisions concerning confidentiality of official secrets are subject to judicial control. Moreover, the Supreme Court found the original decision and subsequent verdict to violate a number of Constitutional principles, including the right to official information granted in Article 61 of the Constitution of 1997. In its judgement the Supreme Court emphasised that any refusal of information may be based only on reasons stemming from the Constitution or international treaty and have clear statutory authorisation.

Constraint 4: Another side-effect of the totalitarian tradition, where personal data were not protected at all, is the current tendency to over-interpret already very restrictive provisions of the Personal Data Protection Act. This is one of the biggest constraints in practice to access to information, or even more broadly, to the flow of information. Almost every piece of information including a name or information that facilitates identification of an individual tends to be treated as secret and exempted from disclosure. This is of particular importance in the situation where many company names are the names of their owners. Getting information about their environmental performance, including pollution reports is often quite difficult.

[38] OECD (1996). Pollutant Release and Transfer Registers: A Tool for Environmental Policy and Sustainable Development - Guidance Manual for Governments. OECD/GD(96)32. Paris, OECD.

Recommended remedy: A broad educational effort is needed to draw a reasonable line between justified protection of personal data and the right to information. In any case, since ownership of a company is not necessarily a confidential piece of information, it would seem reasonable to treat the company name as identifying the legal entity that is the company, irrespective of its identification of the owner.

Public participation

Good examples

1. The above mentioned Act of 9 November 2000 introduces a set of procedural rules concerning public participation. These rules, modelled on Article 6 of the Aarhus Convention, work like a piece of Lego that can be built in into various procedures. So they are pretty much the same for public participation in both specific decisions and in preparation of plans, programs, policies and strategies. The Act requires these public participation rules to be applied in relation to concrete decisions which require an EIA, and in the preparation of plans, programs, policies and strategies that require a Strategic Environmental Assessment. These rules apply also to a number of other procedures, namely:
– the integrated permit procedure (integrated pollution prevention and control),
– adoption of safety programs in relation to control of accidents, and
– permitting procedures related to Genetically Modified Organisms (GMOs) - for contained use, deliberate release, marketing, transfer and export of GMO products.

2. The public participation rules include extensive requirements regarding notification. The public shall be notified by placing the information on the notice board at the seat of the authority which is responsible for the matter and bill-posting in the vicinity of the proposed project. Where the seat of the responsible authority is in a different community from that directly relevant to the notice, then additional publicity occurs - by a publication in the local press or in a manner commonly used in the locality or localities which are relevant given the subject of the notification. Notification of the public also occurs through placing the information on the website of the authority responsible for making the decision (if the authority has such a site).

3. The Environment Ministry commissioned one of the NGOs to help it establish a database of NGOs. Following the requirement of Article 7 of the Aarhus Convention to identify the public concerned, all NGOs have been invited by the Ministry to indicate whether they are interested in decision-making procedures at the Environment Ministry and in receiving individual notifications concerning draft laws, regulations, plans, programmes etc. and in which area (for example, nature conservation, water management, or waste management).

4. The only existing general purpose coalition of environmental NGOs (the Polish Green Network comprising ten NGOs from all over the country) has successfully lobbied Parliament in relation to the new public participation rules. It can be credited with getting the legal requirement to place notifications on the authority websites.

Constraint 5: It has to be recognised that most NGOs are not interested, even sporadically, in participation in law and policy-making etc, at least at the central level. Most NGOs operate in a local sphere, and have limited resources. So only a few NGOs responded positively to the Ministry offer and showed interest in being individually notified. This undermines efforts to broaden the official possibilities for public participation - officials say: "why bother, if they are not interested?" - and contributes to the democratic deficit.

Recommended remedy: NGOs should be encouraged to network and to create umbrella organisations, recognising that efforts should go into capacity-building. More educational action is needed to make NGOs and the public at large interested and involved in "strategic" decision-making.

Constraint 6: Still too few authorities treat their web pages as an active instrument. Officials usually do not have the necessary skills to use it and so rely on the computer specialists. Very few authorities can afford such staff on a daily basis. This leads to the requirement to place notifications on the website either being neglected or to unnecessary delays in decision-making.

Recommended remedy: In fact, much of the routine work could be undertaken by non-specialists with a relatively small amount of training. Authorities should undertake to provide training for their officials how to actively update their web pages and introduce specific internal rules and procedures in this respect.

Constraint 7: Polish administrative law requires authorities to call hearings in certain situations. However, these are not always described sufficiently clearly by the law, leaving authorities with broad discretion in this respect. Authorities are rather reluctant to call public hearings and tend to interpret legal provisions concerning the issue in overly restrictive ways. Far too often, this tendency helps to turn natural differences of interests into conflicts, often an unnecessary development.

Recommended remedy: Guidelines should be issued when and how to use public hearings in environmental decision-making. The public should more vigorously indicate abuses of procedural rules concerning the hearing at the same time as challenging final decisions. Courts should pay more attention to this issue.

Access to justice

Good examples

1. The Polish legal system grants very liberal rules in relation to standing. Any properly registered NGO can file a public interest lawsuit within the area of its statutory goals.

2. When challenging administrative decisions at courts, the liberal view of standing is reinforced through very

favourable rules concerning costs. The court fee is very low and there are special rules concerning costs. While the general rule in civil procedure is that the winning party is to be paid its costs (including court fees, lawyers' fees etc.), in the procedure at the administrative court this rule does not apply if the winning party is a public administration body. In other words: there is no risk in challenging such a decision at court.

Environmental NGOs have taken extensive advantage of the existing rights. There are hundreds of cases yearly and there is virtually no single decision concerning a project of potential significant impact on the environment that would not be challenged by NGOs or neighbours and subjected to court review.

Constraint 8: In the majority of cases the court finds some inadequacies in the decision-making and adjudicates in favour of the plaintiffs. However the liberal rules have also encouraged some frivolous actions. Even worse is that some NGOs are being accused of a level of corruption by seeking financial gain for not challenging a decision at court. And developers quite often pay it. Recently (spring 2001), the media widely reported a case where an NGO famous for vigorously opposing any development project in Warsaw was proven to have accepted almost one million US dollars as a "donation" from a French developer wanting to build a hypermarket in Warsaw.

Such cases, however infrequent they are, result in creating an unfavourable climate for public participation and environmental NGOs in particular. One result is that these cases have prompted developers to push for changes in the law that would seriously limit the possibilities for challenging development consents.

Recommended remedy: NGOs should refrain from taking frivolous actions meant only to delay the development and not based on reasoned grounds. Moreover, NGOs themselves should take action to stigmatise rare cases of "bribery" and distance themselves from organisations shown to conduct such practices.

II. PRINCIPLE 15

Good examples

The precautionary principle has been present in Polish law and policy for years already, although it was not specifically articulated until recently. For example, precaution was one of the driving forces for banning nuclear power stations in Poland. The Environmental Protection Law of 2001 codifies the principle as one of the main principles of environmental law, and the II National Environmental Policy adopted by the Council of Ministers on 13 June 2000 further clarifies how it should be interpreted.

> Art 6.2 of the Environmental Protection Law of 2001 reads:
> "Whoever undertakes an activity, which negative impact on the environment has not been fully recognised yet, shall, applying precaution, undertake all possible preventive measures".
> The II National Environmental Policy declares it (point 13) one of the key principles of environmental policy and makes it clear that this principle requires "addressing environmental issues 'on the safe side' i.e. undertaking appropriate measures already when there is a reasoned possibility for risk, without having to have a full scientific evidence for it".

Constraint 9: Polish legal system has traditionally applied the precautionary principle at the legislative level – i.e. it was the law itself that *generally* restricted certain activities rather than authorities making decisions in individual cases. A recent example is the December 2000 amendment to the Nature Conservation Law of 1991, which introduces a categorical ban on any new development project (unless implementing an important public function) listed as those subjected to EIA (i.e. those listed in Annexes I and II to the EIA Directive) to be authorised on the areas of protected landscape. For the purpose of this provision such projects are considered to have a negative impact on the environment by definition i.e. regardless of the findings of the respective EIA reports.

Such an approach to the precautionary principle involving "across the board" bans on all private projects on huge areas may well prove to be counterproductive. Such a ban includes not only heavy industry but also for example any camp and caravan sides, holiday villages, marinas, ski runs etc. And yet the areas of protected landscape are supposed to base their development on tourism. This affects the people's ability to make a living, and it seems likely that the ban will lead to regional and local authorities vetoing establishment of any new protected area.

Recommended remedy: Special caution should be given to using the precautionary principle at the legislative level i.e. banning some activities "across the board". While such bans seems justified in relation to activities where degree of uncertainty is high and potential effects can be huge and irreversible (like for example nuclear power plants) for other activities much more appropriate seems adopting this principle on individual basis.

Constraint 10: The law introduces several instruments that may be used to apply precaution in individual cases. The Environmental Protection Act of 2001 requires authorities to refuse an environmental authorisation (i.e. either an integrated permit or any media-specific sectoral permit) in cases where the proposed activity could result in significant deterioration of the environment or risk to human life and health (Article 186.1 in conjunction with

Article 141.2). Authorities may also apply conditions in a permit and require cover for claims for potential damage in the form of a deposit, bank guaranty or insurance policy (Article 187). Similar provisions are in other environmental statutes (for example in the GMO Act of 2001). Bearing in mind the lack of tradition in applying the precautionary principle in individual cases and the absence of any court verdicts, manuals or other official guidance, it is not surprising that the implementation of the precautionary principle may well be haphazard. The same provisions may be either applied abusively and arbitrarily or too restrictively. In the former case, it may discredit the precautionary principle by being used inappropriately and too often; in the latter case, if authorities seek complete scientific evidence before applying a measure (e.g. to refuse a permit) it may hardly ever be never used.

Recommended remedy: There should be issued some guidance notes for authorities with some criteria to be applied in relation to precautionary principle when issuing individual decisions.

NEWLY INDEPENDENT STATES (NIS)

Olga Razbash, Attorney at law, Chair of the Regional Public Centre, "For Human Rights and Environmental Defence"

Environmental, social and economic problems in the NIS still are growing, even though it is already 10 years since the disintegration of the USSR and since which time a lot of NIS legislation has been adopted in which the Rio principles 10 and 15 were embodied one way or another. There are more and more transboundary environmental conflicts such as problems of pollution of air and water, lack of drinking water resources etc. In general, NIS governments do not clearly understand how to obtain sustainable development, what it is, and what is the role of Rio principles 10 and 15 for the new democracies. Agenda 21 has still not become a key criterion for environmental decision-making, or for day to day management. A comprehensive approach including both Rio principles was not seriously taken into account during NIS economic reforms. As many experts underline, the result of all the reforms undertaken in NIS is the obvious diminishing of the quality of life, as indicated for example by the UN Development Programme's human development index.

This report undertakes a brief analysis of how Rio Principles 10 and 15 are realised and constrained in current NIS legislation.

I. PRINCIPLE 10

In NIS legislation and its implementation there are many gaps concerning public participation. Thus, in spite of numerous legal provisions in all the new NIS constitutions and in basic environmental protection laws, environmental impact assessment (EIA) laws and natural resource management laws (e.g. forest, water, ambient air protection) which declare rights of access to environmental information and public participation in decision-making, procedural guarantees to exercise these rights are missing. This should be a crucial matter for the participatory democracies which are so young and still so weak in NIS. It leads to an imbalance of interests, inequalities of citizens and communities, growing uncertainty and environmental legal ignorance in NIS societies, increasing the distrust between individuals and State, between business and consumers, and so on.

Adequate public participation in environmental decision-making needs early and active public information and involvement , beginning with adequate recognition of all interested parties through to full public involvement in implementation and monitoring of the decision. For this reason, the issue of the active and passive roles of NIS states in providing efficient (timely and adequate) access to environmental information is crucial for understanding how Principle 10 works in this region.

Access To Environmental Information

A serious constraint in NIS access to information legislation is the lack of a general definition of "environmental information". Only comprehensive analysis of numerous legal provisions in the huge block of different laws, governmental decrees and ministerial regulations can lead to the conclusion that "environmental information" which could never be classified and withheld from public access should include information on:

– adopted relevant legislation (laws, decrees, ministerial rules and regulations, instructions, standards);
– the state of the environment and its components (such as natural resources as forests, water, air etc.);
– pollution of the environment (including radioactive contamination);
– emissions into the environment;
– the state of citizens' health;
– risks for human health;
– sanitary-epidemiological information (epidemics, pathogens, quarantine orders, quality of drinking water and air; governmental measures, etc.);
– emergency situations, natural and technology-related accidents and disasters.

Another problem is that in NIS legislation there is no system of detailed procedural provisions on access and provision of environmental information. Governmental bodies enjoy a wide discretion in formulating such details in numerous ministerial rules and regulations which in reality often limit widely declared citizens rights. Thus, in all NIS legislation there are provisions (or separate laws) on state and commercial secrets: requests for information can be rejected if the requested information is classified as state, commercial, an official secret, or personal data (privacy). And legislation proclaims that information which *cannot* be classified and closed *must be defined* by law or rules and regulations. Here lies the gap for authorities to exercise discretion. There are also examples of liberal legislation; for example in Russian Federation legislation there is a direct prohibition on withholding environmental information and limiting access to it. But in practice, on the basis of "instructions", this very progressive provision can be limited.

Some NIS legislation (e.g., Ukraine, Moldova, the Russian Federation) has provisions which make it possible to apply a so-called " public interest test" to demand and obtain disclosure of classified information. But to use such a "test" one needs deep legal analysis of separate provisions of "human rights" parts of NIS constitutions, the different laws (including environmental, sanitary-epidemiological, emergency, industrial safety, EIA laws), ministerial rules and regulations. Sometimes these provisions contradict each other.

The continuing lack of clear harmonised general definitions in the NIS region causes a lot of disputes and conflicts which are tremendously time- and resource-consuming. This situation leads to an increasing number of conflicts and lawsuits, overloading a court system which is already overloaded with other categories of disputes.

A lack of developed procedures also leads to the impossibility to efficiently prevent and compensate for different types of environmental damages (including damage to peoples' health or property) or to effectively overcome the consequences of such damages, such as cleaning up contaminated territories and settlements. Without adequate information it is impossible to make an good diagnosis and to cure problems caused by pollution.

A pilot draft law on access to environmental information was adopted in December,1997, by the NIS Interparliamentary Assembly in St. Petersburg, but only the Republic of Moldova has developed a draft of the relevant national law. The draft is still in progress, and not yet adopted by the Parliament. However, Moldova has adopted a Governmental Decree on public participation in environmental decision-making in 1999.

The entry into force of the Aarhus Convention will obviously and inevitably influence the development of legislation in the NIS region, including the definition of environmental information. These developments in other countries will also affect the Russian Federation and Uzbekistan, even though these two NIS countries have not signed or acceded to this very important instrument.

Conclusions

NIS countries will have to develop their national legislation to incorporate international "Aarhus" standards on access to environmental information. There is a great need for comprehensive general law on procedures for access to environmental information in each NIS country based on progressive international standards. Obligatory standards should be adopted by all governmental agencies and business entities.

Governments and the NGO community should support and implement the basic principles of the Aarhus Convention:

– The public interest in disclosure of information must prevail above any private and state interest to keep it secret. To implement Principle 10 effectively, NIS countries need legislation which imposes the burden of proof on the holder of the information. Special mechanisms (commissions, committees, special courts etc.) are needed to weigh the different interests.
– There should be a shorter time – as soon as possible but within 10 days – for refusal to provide the requested information. This is speedier than called for in the Aarhus Convention but better matches time limits for public comments and access to justice procedures in NIS. Otherwise the one-month time limit which now exists in most NIS legislation very often makes the information obsolete and too late for use, making public participation rather theoretical and ineffective. Unfortunately, NIS bureaucracy often uses this formal deadline to exclude the public from decision-making procedures.
– The form of the requested information is as important as the guarantee of equal and timely access to it. Legal provisions should give the public the right to receive information in the form requested (on paper, floppy disk, by e-mail etc.), if it exists in this form.

The international community (including relevant UN programmes and funds) should actively develop awareness and training projects for decision-makers and other stakeholders on access to information and techniques of public involvement in environmental decision-making in NIS countries. This would increase and improve the transparency of government and inter-sectoral dialogue, helping to create efficient and effective mechanisms and to establish democratic traditions of wide public involvement. There is also a great need for technical support to help create and develop information resources (in areas such as data base technology, environmental monitoring programmes, information exchange etc.).

Environmental Monitoring and Sources of Information

During the last decade informational support systems for nature conservation and management have been changed significantly several times. The common information system on the territory of the former Soviet Union was destroyed. Scientific and informational exchange between regions became more complicated due to continual lack of funding and the creation of new political environments and barriers. On the other hand, the NIS countries have quite high levels of technical, scientific and human capacity - large banks of data and techniques were created, scientific schools established and specialists trained during several decades of the region. Given the slow but forward moving computerisation process in state environmental institutions, conditions for informational co-operation and exchange are being created again. In many NIS countries, environmental ministries have already created Internet sites. For example in the Russian Federation the state duty to actively disseminate environmental information is being fulfilled through the Russian Environmental Federal Information Agency (REFIA), which has been established by the Ministry of Natural Resources. It acts also as a UNEP Infoterra information centre. REFIA supports the official Russian website (*www.priroda.ru*) on environmental problems, management, etc. In Moldova, Ukraine, Belarus and Georgia there are also some efforts to create websites for the central governments and parliaments, but the lack of financial resources and indeed lack of cultural tradition for this sort of activity makes the process very difficult and slow.

Official State of the Environment Reports (SoE) are regularly published in the NIS Countries (usually once a year, although often with some delays). For example in the Russian Federation, Ukraine and Moldova, SoE reports are published annually as separate books, Internet editions and summaries in the "Green World" newspaper.

While a wide range of research and other institutions work on different geographical information systems, this work is still developmental and not so broadly used in the region. However there are a number of successful examples from Moldova, Ukraine and the Russian Federation such as the forest cadasters (a comprehensive data base). There are

cadasters or focal points for specially protected natural areas in NIS countries which allow efficient exchange of information on endangered species. Huge efforts are underway now to create an up-to-date land use cadaster.

A lot has been done in this area within international projects and programmes, often by specially established teams and groups and organised by NGOs. The Global Environment Facility (GEF) project "Biodiversity Conservation in Russia" is one such example (www.rcmc.org).

Long-term NIS-wide projects include the 1990s Biodiversity Atlas for Northern Eurasia and "Nature Records" (collecting and systematising data from natural reserves in the Russian Federation and a number of other NIS countries (www.biodiversity.org).

The role of non-governmental organisations

NGOs in the NIS play an important role in information exchange. There are numerous information networks on the post-Soviet space, support a number of web-sites, publish electronic and printed newsletters and digests, dedicated to both interested public and special target groups (environmental NGOs, media, decision-makers, etc.). Most publications and materials are in Russian, but there are already several English language editions published on a regular basis, e.g., Moldova, the Russian Federation and Ukraine have some websites on legislation and on forestry. Unfortunately these publications depend to a great extent on funding provided by foreign donors such as international environmental organisations and programmes. NIS countries do not have the financial resources or mechanisms to support public information activities at the moment.

International co-operation

Despite the difficult economic situation, all NIS countries are paying special attention to international co-operation. Almost all NIS countries have signed or joined numerous international conventions and agreements with chapters on access to information and public participation in environmental decision-making. These include instruments such as the Convention on Long-range Transboundary Air Pollution (1979), the Climate Change Convention, Convention on the Transboundary Effects of Industrial Accidents Convention on the Transboundary Effects of Industrial Accidents, and the 1998 Aarhus Convention. As mentioned above though, notable exceptions are the lack of signatures from the Russian Federation and Uzbekistan to the Aarhus Convention.

All NIS countries have adopted legislative documents regulating procedures for publication and dissemination of information and texts of international conventions and agreements, where these became a part of national legislation in the NIS countries after their ratification (according to the Constitutions of the NIS countries).

In order to develop necessary conditions for the implementation of the international agreements, NIS Parliaments have accordingly adopted their own national laws and legislative documents *(see box).*

EXAMPLES OF NATIONAL LEGISLATION (NOT NECESSARILY COMPREHENSIVE):

Belarus has adopted laws of: environmental protection; the Land Code; sanitary-epidemiological safety of the population; radioactive safety of the population; state environmental expertiza [a system to review compliance of EIA procedures] and EIA regulation of the Ministry of Environment; National Program on rational use of natural resources and environmental protection;.

The Russian Federation has Federal laws on: environmental expertiza; the Land, Forest and Water Codes; specially protected natural areas; ambient air protection; sanitary-epidemiological safety of the population; radioactive safety of the population; the City Construction Code; wild life protection; referendum; protection of consumers rights.

Ukraine: environmental protection; environmental expertiza; information;
public petitions; referendum.

Moldova: environmental protection; petitions; access to information ; public associations of citizens 1996; environmental expertiza and EIA.

Armenia: basic law on environmental protection; EIA; the Water Code; the sanitary-epidemiological safety of the population; state and official secrets; population protection in emergency situations; city construction; use of nuclear energy for peaceful aims.

Turkmenistan: environmental protection; mass media; protection of state secrets; commercial secrets; public associations; ambient air protection; enterprises; foreign concessions; investments; consumers' rights.

Uzbekistan: nature protection; guarantees and access to information; radioactive safety; population and territories protection in emergency situations of natural and technological origin; consumer rights protection; environmental expertiza; plant protection and use.

Many international agreements stimulate informational support for environmental and nature conservation activities. For example an agreement between the Government of Belarus and Switzerland on development of forest territories' cadasters was signed in 1996. To implement this, Switzerland granted 3.5 million US dollars to Belarus.

In the framework of the Commonwealth of Independent States (CIS) the permanent Interstate Environmental Council of the CIS (IEC) has been established. Co-operation among member states in the IEC framework is actively developing. The following documents have been developed and signed: the Agreement on informational co-operation in ecology and nature conservation, and the Statute of the inter-state environmental informational agency "Ecoinform". The IEC has also approved a draft Agreement on co-operation on the rational use and protection of transboundary water bodies.

A wide, well-developed and successful system of environmental monitoring had been established in the former Soviet Union, including a network of field observation stations, laboratories and institutions that covered the whole territory of the region. Now network connections are lost in many parts due to lack of funding, age of equipment, a "brain-drain" to the West, new economic barriers and newly established borders between states, etc. Meanwhile, there are some attempts to restore and modernise the information system of biomonitoring (ISBM) in the Russian Federation in the GEF special project framework.

Conclusions

The monitoring system needs revitalising and reconstructing in and across all NIS countries. The vast territory of the former USSR has a lot of valuable and unique transboundary ecosystems, and both public participation and the precautionary principle should apply to help protect this resource. In Moldova, the special Centre of Environmental Monitoring was created in the Ministry of Environment, providing environmental information not only to government agencies, but also to the public.

Financial assistance is needed for this purpose.

Public participation

Public participation in plans, programs and policies is not regulated well, although in the basic laws on environmental expertiza in many NIS countries there is a mention of public discussions of environmental programmes. There is little or no public participation regulation in the drafting of legislation / rule-making procedures, although some level of involvement may occur (*see box*).

In order to carry out an EIA properly and to include public participation, an investor is obliged to carry out a number of steps. Together with local municipal authorities, public discussion of the EIA must be undertaken, and materials from the discussions incorporated into documentation which is then submitted to the state environmental expertiza (review of the EIA process). This is paid for by the investor. Once publication of an EIA notification has occurred, the investor must accept and register all the public comments; they should be taken into account during the EIA procedure and reflected in the EIA materials. The public must be provided with access to the research materials used or produced during the environmental assessment process.

The Ministry for the Environment may receive and consider comments submitted in written form by the public after notification of the activity. The Ministry must inform the public and concerned members of the public who had submitted their comments and recommendations to the project, about the results of consideration by the state environmental expertiza Commission. In the Russian Federation, for example, if there is a public environmental expertiza procedure organised (under Articles 4 and 19-25 of the Federal law "On environmental expertiza"), the Ministry must provide access to all materials submitted by the investor for the state environmental review (SER); information about the results of SER should be delivered by the Ministry to all interested organisations (Articles 7 and 8).

EXAMPLES OF PARTICIPATION IN LAW MAKING

Ukrainian NGOs have actively participated in the elaboration of the Sustainable Development Concept of Ukraine, and in drafting laws on charity, wastes, drinking water, and management of GMOs.

Environmental NGOs in the Russian Federation were actively involved in developing National Environmental Action Plans and National Environmental Health Action Plans, in the draft law on sanitary-epidemiological safety of the population, on environmental expertiza, and in drafting EIA regulation.

In Moldova, the public (as environmental NGOs) actively participated in the administrative council of the national and local environmental fund; and in the National Council for Preparation for the World Summit Sustainable Development established in 2001.

In 6 regions of Belarus, the public participated in the elaboration and realisation of regional programmes on the comprehensive development of territories and settlements; and in the programme of rational usage of natural resources and environmental protection.

Conclusions

Although the theoretical framework for public participation exists (at least in EIA procedures), there is still a great need for very early scoping to define all the public concerned, a need for more detailed procedures covering the very early stages of public notification at the beginning of the activity or state environmental expertiza, and more clear provisions providing a guarantee that the public should be heard and their comments to be taken into account.

As far as public participation in policies, plans, programmes and legislation goes, the framework is even less developed. Probably all NIS countries need to develop a better acceptance that "environmental decisions" are taken in ministries other than environment ministries, and greater clarity is needed in legislation to define the rights of public participation with respect to the more strategic areas of decision-making (i.e. beyond the site-specific environmental impact assessments).

Access to Justice

Access to justice in NIS countries varies from country to country, although in basic legislation (constitutions and laws) there are provisions which give standing to members of the public and make it possible to sue authorities and polluters.

There are many hot issues which deny true justice: corruption, public authorities ignorant of environmental law, non-independent court system, lack of rule-of-law

tradition, lack of fair, equitable and timely access to justice; lack of equitable and timely access to environmental information and to proofs (to decisions of other bodies); the lack of an unbiased and objective approach by judges to the issues of protection of citizens' environmental rights; whether NGOs have sufficient interest to be involved in court cases. Putting these wrongs to right will inevitably need both legislative and cultural reforms and time.

To attempt to overcome the constraints (political and other types of pressure on individuals), NGOs have created coalitions of citizens and environmental and political NGOs, and involving as many experts as possible (e.g., architects, legal and/or scientific researchers, academicians) in order to provide their consultative conclusions on special matters, such as land law issues, management and construction activity and design documentation etc. This helps to build a body of expert opinion, but is no substitute for meaningful access to justice.

II. PRINCIPLE 15

International legal instruments and NIS national legislation

There is no general rule for interpretation and implementation of the precautionary principle (as in Rio Principle 15) in NIS legislation. Nevertheless, many international agreements and conventions which refer to the precautionary principle have had a great impact on the development of NIS environmental legislation. The Soviet Union disintegrated in December 1991, just on the eve of the Rio Conference in 1992. So all Rio agreements signed by NIS countries became a part of their national legal systems after the ratification according to the provisions of NIS constitutions.

Although some of the international instruments do not explicitly refer to the use of precaution, they have been interpreted as adopting a precautionary approach. For example, agreements for the protection of specific marine regions have endorsed the concept of precaution. Thus, in view of increasing and serious damage, marine conservation and the management of fisheries are areas where NIS governments have agreed to adopt precautionary approaches. Just recently, in August 2001, the Russian Federation has declared a moratorium, based on the precautionary principle, on the Caspian sturgeon fishery.

The 1985 Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) have been cited as being the clearest examples of the implicit adoption of a precautionary approach in an international agreement. Similar formulations have been incorporated, or referred to in numerous multilateral and regional environmental instruments such as the UN Framework Convention on Climate Change (1992), and more recently, the Protocol on Biosafety to the Convention of Biological Diversity (2000) and the draft Convention on Persistent Organic Pollutants (Stockholm, 2001).

NIS countries are parties to almost all these international agreements, thus incorporating the precautionary principle into legislation. Special governmental decrees and laws have been adopted to absorb international requirements and adapt them to the national legal systems. For example, in the Russian Federation, the Federal government has adopted two special decrees concerning policy in production of substances that deplete the ozone layer.

In NIS countries special commissions have been created to monitor the compliance with international obligations of the NIS states (for example, in Turkmenistan, Russian Federation, and Moldova). All NIS states take part in the Commission on Sustainable Development.

Current NIS legislation is in formal compliance with the precautionary principle: the high priorities of human health, public interests, and citizens' rights are declared both in national constitutions and in basic environmental protection and human health protection laws and ministerial rules and standards, and also in the legislation which regulates industrial and commercial activity. There are several texts of laws where the word "precaution" is used. Nevertheless, in these acts the precautionary principle is not developed.

Environmental Impact Assessment and State Environmental Review (SER)

In all NIS countries special legislation on environmental expertiza (state environmental review, SER) and EIA provides for procedures which are based on some of the characteristics of the precautionary principle. In all laws on SER there is a presumption of danger for the environment of all industrial activities declared, and the SER procedure - if used properly and constantly - is a preventive instrument to avoid or minimise possible environmental damages.

Within the EIA procedure (a preliminary and separate procedure from SER) an investor must provide a risk assessment of the proposed activity including eventual accidental pollution, formulate possible preventive measures and evaluate the possible alternatives. However the investor is not obliged to consider the "zero" variant, i.e., the possibility of not undertaking the activity.

As noted in the previous section, in conjunction with the local municipal authority, the investor must conduct a public discussion of the EIA, and include the outcome in the documentation which is submitted to the state environmental review process. This is paid for by the investor. For example, under the new Russian Federation EIS Regulation of 16 May, 2000, an investor has 30 days from publication of EIA notification to take and register public comments; they should be taken into account during EIA procedure and reflected in the EIA materials. The precautionary principle/approach is also realised in the legal provision to carry out secondary SER if the submitted design and documentation are not in compliance with requirements (as in Belarus, the Russian Federation, Moldova, Ukraine, Uzbekistan).

But the reality is that in NIS countries laws on environmental expertiza and EIA regulations are ignored and EIA and SER are not carried out at all, or these parts of the EIA report are often neglected by decision-makers during the SER. And cost-benefits arguments usually prevail upon the precautionary approach. Unfortunately, one of the main violators is often a State. Governments are eager to obtain immediate economic benefits or solve social problems speedily and "cheaply" (energy, municipal housing, jobs etc.), forgetting or ignoring the precautionary principle.

In some NIS countries citizens have legal standing (Russian Federation, Ukraine, Moldova) to challenge the conclusions of the SER as acts of governmental bodies violating citizens rights (for healthy environment, timely adequate information, adequate real public involvement). But usually courts decide in favour of the authorities and investors, by considering the cases only on procedural, not substantive grounds, and not looking into the content of the challenged reports.

The quality of the EIA and SER reports depends very much on independence and professionalism of the chosen experts and the transparency of the whole evaluation procedure. This means timely and effective public participation at the very first stage of the assessment - preferably, at the stage when the investor applies for a piece of land to locate some commercial enterprise (as under the Russian Federation Land Code (Art. 28)). Independence and objectiveness are basic principles of the SER procedure as proclaimed in the EIA legislation of NIS countries.

Unfortunately, the way the experts are chosen and paid in NIS countries does not guarantee their independence. For example, in Armenia, the Russian Federation, Moldova and Ukraine the experts are chosen and paid by the investor at the EIA stage, and at the stage of SER they are chosen by the Environment Ministries, but paid by the investor through Ministry SER Departments. Rather often, these experts are the same at the EIA and SER stages.

Although "flying out from one nest" of the former Soviet Union, NIS countries with very similar basic declarations and laws in force, can still be conditionally differentiated into several categories: those with more or less democratic practices and those traditionally very totalitarian (most of the Central Asian NIS countries). For example, in Ukraine, the Russian Federation and Moldova there is a possibility for NGOs to nominate their representatives as experts into the governmental SER commissions. In the Russian Federation under the Federal law "On environmental expertiza" this goes further and the provisions of Chapter IV provide for public environmental expertiza, but their conclusions are not obligatory for the SER commission and during the last three years none have ever been taken into account.

On the other hand, in Uzbekistan and Turkmenistan there are no newspaper publications covering materials and information about EIA and planned activities and projects, and no cases of public environmental expertiza. Information about the "proposed" projects only comes together with the actual beginning of the works. There is no chance for public participation and thus no chance for a real precautionary approach.
Another problem also is that there are no governmental capacity building programmes in the environmental area to provide public access to expert consulting services, and NIS citizens have no resources to pay for experts and expensive research.

All these factors, in our view, lead to a big imbalance of rights and interests, with huge inequity between citizens on one side, and authorities and business usually on the opposite side, and meaningful compliance with Principle 15 loses out.

A further problem with EIA and SER procedures is that, as almost 6 years' experience shows, each expert uses rather specialised knowledge, applying separate ministerial standards, and misses the overall view by not taking into account the synergistic effects of different adverse impacts on environment and on human and ecosystem health. There are still no comprehensive environmental standards respecting societal values and a precautionary approach in NIS countries.

Even objective and comprehensive economic analysis of a proposed activity (which should include all aspects of possible expenses and losses) is usually neglected by the authorities. Therefore the law should oblige the proponents of an industrial activity to do such an analysis, especially including an analysis of the measures to prevent environmental degradation.

Legislation where the precautionary principle can be introduced - e.g., on EIA, wastes and chemicals, GMOs - should be based on all the above mentioned considerations.

Genetically Modified Organisms

The NIS governments has been slow in transposition of the European legislation on GMOs. There have been already two attempts to prepare a law on GMOs that provides for low standards of risk assessment and of public participation in GMO management. The actual regulation of these issues provides for a risk assessment for deliberate release of genetically modified higher plants, but there is no detailed format for this risk assessment and the final decision is taken by a body whose members are not checked for an eventual conflict of interest.

To date, special legislation on GMOs (or Living Modified Organisms) exists only in the Russian Federation ("On State regulation in the field of genetic engineering activity" (1996)); and as draft laws in Belarus, Ukraine and Moldova. Interestingly, the Environment Ministry in Moldova put their draft on the Internet for public information and discussion.

One can find a precautionary approach and some provisions which would relate to GMOs in other laws and regulations concerning plants and seeds and rules of

export/import, - for example, in the Moldova law " On control for export, re-export, import and transit of strategic goods", 2000; the law " On plant protection" etc.).

But the existing legislation does not effectively regulate issues of timely and adequate public information about the use and release of GMOs into the environment.

In Armenia, Turkmenistan, Uzbekistan, for example, there is no special legislation on GMOs, although these NIS countries (and the others) have signed the Cartagena Protocol on Biosafety.

The Belarus NGOs consider this situation as an extremely dangerous one for their country, and even for the whole NIS region, as the lack of regulation permits biotechnology companies (transnational and national) to act freely on their territory, possibly endangering the biodiversity of the NIS countries ultimately.

The Cartagena Protocol on Biosafety

Though the Cartagena Protocol on Biosafety has not yet entered into force, there are increasing references to it in the NIS region. However, the precautionary principle may be described, interpreted and investigated in the specialised literature on international environmental law, but it does not feature much in the mass media, although some "consumers rights" articles cover the hot topics of product safety and GMO use in agriculture.

There are a number of important key issues concerning GMOs - including their uses in food, agriculture, medicine and pharmaceutical substances, in the field of biotechnology and globalisation processes, public awareness, the need for special training for the public and decision-makers in this complex and controversial field. Deliberate releases of GMOs into the environment are increasing tremendously, yet there is a lack of adequate control. More and more biotechnology companies are exporting their products and technologies, locating their industries in NIS countries with very weak controls over product safety, coupled with a lack of adequate information, an uneducated population and often corrupt authorities.

It is crucial that NIS countries - with the help of EU institutions - provide for product safety through risk assessments, effective management and information exchange.

The precautionary principle in other areas

One can see some embodiment of the precautionary principle in specialised areas of legislation concerning environmental, radiation and/or industrial safety which is now being intensively developed in some NIS countries.

During the last 10 years, NIS countries have rapidly developed waste management and natural resource use legislation in which one can see the precautionary approach in many provisions (e.g., recognising the "possibility" or "danger" of future damage to the environment). For example, Moldova has a law "On industrial and consumer wastes", and a similar law exists in the Russian Federation, with provisions based on the basic principle of civil law of stopping any activity which may cause any damage in the future (for example, Art. 1065 of Russian Federation Civil Code). In Turkmenistan, for example, legislation has not yet acknowledged this legal category.

The regulations on licensing requirements establish more strict limits for more environmentally risky activities, in the laws on exploitation of soils, mining legislation, and laws on radioactive materials and their management. They all contain a requirement for "full scientific substantiation" of projects and activities. Thus, the Turkmenistan law " On mining" introduces the possibility to limit or to fully or partly stop mining if there is a danger to lives or health of people, to the environment or to other industrial objects (Article 7). Mining licenses are issued only if the applicant provides plans for environmental protection and damage and emergency prevention.

Legislation provides for the possibility to acknowledge some territories as zones of environmental emergency and disaster even before real damage is caused, but when there are constant negative environmental impacts which endanger human health or the state of natural ecosystems, including the genetic pool of plants and animals. However, forest and water management legislation in NIS does not contain provisions for a direct precautionary approach.

As for construction legislation and standards, there are a number of provisions proclaiming a precautionary approach and prevention of environmental damage but in reality authorities very often violate their own legislation or even national limits and standards. Various violations caused by city construction projects often lead to conflict and court cases.

Conclusions

There are no case studies in which courts or administrative bodies have based their decisions clearly on the precautionary principle.

In basic national policies the precautionary principle is not sufficiently reflected. Nor is it covered sufficiently in the specialist legal literature. In the context of national legislation the precautionary principle is often considered as a part of the prevention principle, or of the principle of environmental safety. However the public of NIS countries use the precautionary principle while lobbying for their own interests. Thus the Ukrainian environmental NGOs used it as one argument in the process of formulating the official Ukrainian position for the Conference of Parties under the Climate Change Convention

As legal analysis shows, the precautionary principle is embodied (indirectly) in many NIS national laws and regulations, but mainly these have a declarative character and there is insufficient implementation of the precautionary principle in practice. It is crucial to introduce this principle into environmental legislation and into the main environmental policies and programs.

The International NIS NGO Conference on Sustainable Development held in Moscow this July made several recommendations:

– NIS states should confirm their commitment to Principle 15, which should become a basic principle for all types of activities at all levels; there should be clear definitions in all national legislation;
– the precautionary principle must become the basic principle in international environmental and trade legislation; and must be the central point in all international negotiation processes;
– States should pay special attention to the problem of GMOs and GMO products, their world-wide dissemination, and their potential danger to the sustainability of existing ecosystems;
– NIS countries must harmonise their legislation and practice with the European standards for risk assessment and public participation in case of deliberate release of GMOs and of placing on the market of products which contain or consist of GMOs, whilst also preserving progressive democratic approaches at the national level;
– the Cartagena Protocol on Biosafety must be ratified by the necessary quantity of states and enter into force before 2006;
– an international convention on civil liability for damage to biodiversity and biosafety should be elaborated without delay.

ARMENIA

Dr. Karine Danielyan, Chair of the Association for Sustainable Human Development, Armenia

In the legislation of the Republic of Armenia, access to environmental information, public participation in environmental decision-making, and effective access to administrative and court review procedures are widely incorporated and to some extent implemented. Unfortunately, the same is not true concerning the Rio Principle 15, the precautionary principle.

Thus, in the Constitution of Armenia it is declared that each person has right of freedom of speech, including the freedom to seek, obtain and disseminate information and ideas using any information tools, independent of state boards (Chapter 1, Article 24). Each person has the right to protect his/her freedoms and interests provided by the Constitution and laws, through administrative and court review procedures (Chapter 2, Article 38). Each person has the right to professional legal help; in cases appointed by law such help is provided for free (Chapter 2, Article 40).

It is important to underline that the Constitution of the Republic guarantees that ratified international agreements become a part of the legal system of Armenia. If national legal norms differ from those established in international agreements, then international norms have supremacy (Chapter 1, Article 6). This is also provided in several Armenian laws. This means that all provisions of the conventions which are relevant to the Rio Principles 10 and 15 and ratified by the Armenian Parliament are obligatory. The Aarhus Convention has been ratified by Armenia in April, 2001. If adequate mechanisms for its implementation are developed, then this international legal tool could play a huge role in raising public awareness, in providing information and encouraging civil society involvement in environmental decision-making. Indeed, NGOs co-ordinated by the Environmental Protection Advocacy Centre (EPAC) considerably influenced the ratification process itself.

I. PRINCIPLE 10

Access to information

The following laws of Armenia provide for necessity and conditions of access to environmental information (including sanitary-epidemiological and emergency information) and direct obligation of authorities to actively inform the public, especially the public concerned:
– the Basic Law of the Republic of Armenia on protection of nature (Article 11);
– the Water Code (Article 60);
– "On environmental impact assessment" (EIA) (Articles 2, 8);
– "On provision of sanitary-epidemiological safety of the population of Armenia" (Article 10);
– "On the state and official secrets" (Article 10);
– "On protection of the population in emergency situations" (Article 5);
– "On city construction" (Articles 13, 14);
– "On usage of nuclear energy in peaceful goals" (Articles 3, 12);
– the Decree of the Armenian Government #660 of 28 October, 1998: "Procedure for informing on planned changes in a habitat and public participation in discussion and decision-making on published city construction programmes and projects."

According to Article 11 of the Basic Law on nature protection, each citizen of the Armenian Republic has the right to request and to obtain timely, adequate and accurate information on the state of the environment. Local authorities have five days in which to notify citizens via the mass media where and when one can inspect projects and designs submitted to the state environmental expertiza (Article 8 of the Law on EIA).

Legal persons and individuals have the right to receive information from the competent governmental agencies about safety or risks of use of nuclear energy at planned, operating or closed nuclear plants, and also about the levels of radiation, as long as this information is not classified as a state or official secret (the law "On safe usage of nuclear energy in peaceful goals", Article 12).

Public participation

Participation of the public concerned in environmental decision-making procedures is provided for in the following laws:
– "On EIA" (Articles 3, 9, 10, 15);
– "On mining" (Article 40);
– Forest Code (Article 46);
– "On ambient air" (Articles 9, 21);
– "On provision of sanitary-epidemiological safety of the population of Armenia" (Articles10, 23);
– "On city construction" (Articles 14);
– "On safety of usage of nuclear energy in peaceful goals" (Articles 3, 10);
– "On Lake Sevan" (Articles 17, 18);
– Presidential Order 1997 "On state governance in regions of Armenia"; and
– Presidential Order 1997 "On state governance in Erevan City".

Public participation in EIA procedures is carried out in three stages:
– first stage – the decision whether to carry out an EIA (first public hearings);
– second stage – public hearings on submitted documentation (second public hearings);
– third stage - public hearings on the professional expert conclusion (third public hearings).

According to the law, the initiator or investor notifies the competent authority about the planned activity, organises the EIA procedure, carries out the public hearings, and provides for financial support of the research and other work for the EIA.

And there are some additional opportunities for the public to participate – in the form of independent public environmental expertiza, carried out by NGOs.

Access to justice

Access to justice is guaranteed by the Constitution of Armenia. In addition, this right is also embodied in the procedural provisions for filing complaints in court against unlawful actions of government bodies, officials or local authorities if they have violated citizens' rights and interests (Article 11 of the law "On the procedure of consideration of citizens' proposals, complaints and appeals"). Article 13 of the law "On city construction activity" declares the citizens' right for court review of violations in EIA procedures. And limitation or infringement of citizens' sanitary rights can be protected by court review according to Article 11 of the law "On provision of sanitary-epidemiological safety of the population of Armenia".

NGOs such as the Association for Sustainable Human Development, EPAC and Environmental Survival play a huge role in explaining the Rio Declaration and relevant national provisions. These NGOs have published popular literature, and organised conferences and workshops etc.

However, there are big gaps in practical implementation of both principles. Access to information is provided in general, but the main problem is the bad state of the environmental monitoring system in the country - it cannot provide adequate environmental information and is in need of serious improvements.

Members of the public often obtain information under their own initiative, and not because of active dissemination by the state. In earlier times (1992-94), the Ministry of the Environment actively provided information on planned EIAs and regularly published special bulletins on the state of the environment and protection measures. But because of economic and political crisis this good practice was stopped. The only National Report on the State of the Environment was published by the Ministry of the Environment in 1993. Now slowly this practice is being restored but needs a lot of financial support.

In spite of many difficulties, public involvement exists - but only under pressure from NGOs and individuals and with many constraints from officials. In practice, public hearings are not carried out. For example, despite all public protests the Erevan city authorities have actively permitted commercial city construction (often for bars, restaurants, gambling houses, hotels) which has destroyed green zones (parks, boulevards) and violated sanitary-construction standards. Moreover, after active protests by citizens and the NGO community, the President of Armenia publicly condemned environmental NGOs on TV. The lawsuits filed by the NGO EPAC against the Mayor of Erevan and by the Green Union of Armenia against the Prime Minister were rejected by the courts. As a compromise, the city government created the Environmental Council and organised meetings between the Mayor and residents of Erevan. Environmental NGOs were invited by the Prime Minister to a special session on green zones in the city of Erevan, and the Protocol #65-113 of 16 May, 2001 has been issued containing relevant orders to create regulations on the topic. So there is some progress on paper, although in reality destruction of green zones continues.

II. PRINCIPLE 15

The Rio Declaration Principle 15 is not implemented in Armenia at all, although it is declared that the Ministry of the Environment and the State Committee on emergency situations and the National Seismic Safety Service act on the basis of prevention of environmental damages. Such a preventive approach is also reflected in the national legislation.

Nevertheless many scientists and environmentalists in Armenia follow the precautionary principle. For example, a recent publication in the weekly magazine "Business Express" contained an interview with several well-known scientists on the issue of using and handling genetically modified organisms (GMOs) and GMO products (*"Trojan horse in nice package", Julia Kuleshova*). Also the Earth Charter (an initiative of the Earth Council and Green Cross International), which invokes the precautionary principle, is rather popular in Armenia. These facts could be considered as very first steps in implementation of Principle 15 in Armenia.

BELARUS

Dr. Evgeniy I. Shirokov, Belarusian Habitat Centre and International Academy of Ecology

The Constitution of the Republic of Belarus (adopted in 1994 and amended in 1996) declares in Articles 34, 46 and 55 a number of relevant clauses: the right to an environment wealthy for life and health and for compensation for damage caused by violation of this right; the right of access, storage and dissemination of adequate, true and timely information about the state of the environment; the right of public participation in decision-making through democratic procedures. On the other hand, it is necessary to emphasise that existing practice and "democratic procedures" do not necessarily guarantee adoption of decisions in favour of the public interest.

To our view, there is a problem in Belarus, as in other NIS countries, beside access to environmental information - the problem of the inadequacy of information. Modern nation-wide systems of environmental monitoring are very expensive, and economic constraints in NIS countries make these systems unavailable. This leads to misinformation and even disinformation, which is of course not useful for our societies.

International co-operation and agreements

The Republic of Belarus constantly maintains its contacts with several inter-governmental international organisations in the area of environmental and health protection: UNEP, World Meteorological Organisation, WHO, UNECE, OECD, European Commission and many others. In recent years, co-operation with big international organisations has also grown – such as the Council of Europe, UNESCO, the International Agency for Atomic Energy (MAGATE), the World Bank, the European Bank for Reconstruction and Development, and the International Union for the Conservation of Nature (IUCN).

In the area of environmental protection and international co-operation, the priorities are development of bilateral contacts, first of all with the NIS countries – members of the NIS Inter-governmental Environmental Council, and also with potential investors (Germany, Switzerland, Denmark, Netherlands). Environmental agreements have been signed between Belarus and Latvia, Russian Federation, and Ukraine; and between Ministries of the Environment of Belarus and Poland, Denmark, Moldova, Lithuania and Bulgaria. In 1996 an agreement between Belarus and Switzerland was concluded to develop registers (cadasters) of forest territories. Switzerland provided for a grant of 3,5 million USD.

Within the framework of the NIS Inter-governmental Environmental Council co-operation is actively developing. The Agreement on environmental information exchange has been recently signed, the inter-governmental environmental information agency "Ecoinform" has been established, and a draft Agreement on the rational use and protection of transboundary watercourses has been approved.

So far Belarus has signed and ratified all the international conventions and protocols in which public participation and information access and also precautionary principle provisions are embodied.

National legislation

National environmental legislation is elaborated in the framework of the Concept of state policy of the Republic of Belarus in the field of environmental protection, adopted by the Supreme Council on 6 September 1995.

Environmental Protection Law

The Environmental Protection Law of Belarus of 26 November 1992 is the basic law for all environmental legislation, which means that it is this very law that defines the environmental mechanisms to regulate relationships between the State, humankind and Nature. There are several public participation provisions in this basic law, and all governmental decrees and ministerial regulations or decisions of local authorities have to be in compliance with these norms to implement them.

In the National Program of Rational Use of Natural Resources in Belarus some attention is paid to the role of public associations.

Sanitary-epidemiological legislation

The law "On sanitary-epidemiological wealth of the population" of 1993 (new version of 2000) guarantees citizens the right for health protection and access to health information and participation in decisions concerning health. The health policy is based on WHO principles.

In 1998 the law "On radioactive safety of the population" was adopted and it provides for early information to the public about possible radioactive risks and dangers, and for access to information in emergency situations connected with radiation emissions.

State environmental review and EIA

The law "On State environmental expertiza" was adopted on 18 June 1993 (new version – 2000) and provides for some forms of public participation in environmental decision-making on individual projects. But lack of procedural guarantees makes it crucial to improve this law in the letter and spirit of the Aarhus Convention.

To fulfil international obligations under the Convention on biological diversity, the draft Strategy on biodiversity

protection has been elaborated in the Republic, and the public is considered to be a valuable partner in this document. Also numerous decree and instructions have been adopted to oblige investors and developers to provide for Environmental Impact Assessment (EIA) at the very beginning of their activities – at the stage of making a design, for example (the EIA Regulation of the Ministry of Environment of February, 2001). The EIA procedure is in compliance with the UNECE Convention on EIA in a transboundary context.

The Land Code

The Land Code was adopted on 4 January 1999 and some public participation rights are provided here with respect to decision-making concerning individual housing, but again with very little procedural details. Only citizens of the Republic of Belarus who live continually in the republic have the right to own a piece of land, which they can purchase via auctions.

Land cadasters (both national and local) recently created in Belarus can serve as a source of valuable environmental information.

The Forest Code

The Forest Code was adopted on 21 June 1979. Belarusian forests are the property of the state, but the rights and procedures for renting a piece of forest were incorporated in the Code. In connection with these rights, public access to relevant "forest" information is provided.

The Water Code

The Water Code was adopted on 15 July 1998. To realise its provisions in 1998 the Republican Programme on measures to improve the drinking water supply system was adopted. This took into account recommendations of the UNECE water committee, the International Water Supply Association, WHO, and the good practice of some other countries. Public participation and access to water information is a necessary part of the programme.

Urban construction legislation

In the area of urban construction activities, several comprehensive policies have been elaborated in the Republic, such as the State Scheme of comprehensive territorial planning (National Plan). At the regional level, schemes of comprehensive territorial organisation of oblasts, groups of administrative regions (Regional Plan), have been developed; and at the local level, schemes of comprehensive territorial planning for the administrative regions, green belt zones for settlements, general plans for cities and other settlements have been developed.

Currently this programme is the main comprehensive analytical document at national level, containing a lot of economic, social, demographic, environmental data and prognosis for city construction activities. But there is still a great lack of public participation provisions and practice in these procedures.

Genetic engineering

The draft law on Biosafety, which still does not provide for labelling of GMOs in food, has been already in the process of elaboration for two years, but is not yet adopted. This creates a very dangerous situation for biodiversity and human health protection - the vacuum of legal regulation makes for a lack of controls for both international biotechnology companies and national GMO researchers.

Specially protected natural areas, flora and fauna

The law "On specially protected natural areas and objects" was adopted on 20 October 1994 (new version – 2000); and the law "On protection and use of wildlife" was adopted on 19 September 1996. Neither of these laws fully embodies Principle 10.

Waste management and industrial safety

The law "On wastes of industry and consumption" was adopted on 25 November 1993. In 2000 the law "On industrial safety of the hazardous industrial objects" was adopted, in which the precautionary principle is incorporated in its "more preventive" aspect to avoid industrial accidents.

Currently in the Republic a lot of measures are undertaken to minimise production of industrial wastes. Under the Programme of consumer waste management in Belarus, the public should be broadly involved and trained in new ways of waste management to have some impact in every-day life.

Legislation on emergency situations

The law of the Republic "On population and territories protection from emergency situations of natural and technogenic origin" was adopted on 5 May 1998, giving a start to the formation of a new state system, which trains people how to act in conditions of danger and emergency. Officials are responsible for the timely informing of the public about all the risks and threats, about emergency situations and about measures to prevent them and to overcome the adverse consequences.

Environmental citizens' rights and ways to legally protect them (including access to justice in courts and/or administrative bodies) are provided by the whole group of the above-mentioned Belarusian laws and regulations. One can also see the Rio Principles 10 and 15 to some extent incorporated in such political but legally non-binding documents as the "National Concept of settlements development in Republic of Belarus" (1996); "National Plan of Action to develop settlements in Republic of Belarus" (1997); "National Strategy for Sustainable Development of Republic of Belarus" (1997); " National program of rational use of natural resources and environmental protection 1996 – 2000"; and the " National Plan of Action on protection and improvement of biodiversity". Regional programs on the main measures for comprehensive development of territories and settlements and on environmental protection are increasingly developed with more and more wider public involvement.

Still there some problems at the local level: the lack of available adequate information about targets and tasks of sustainable development, and about international obligations of the Republic of Belarus; the lack of understanding of the need and uses of local Agenda 21 activities; and the lack of experts to co-ordinate compiling of relevant documents.

A case study

The public is intensively involved in elaboration of sustainable development concepts and action plans. In the last 3 years there have appeared three rather contradictory governmental papers covering perspectives on the transition to sustainable development in Belarus (one belongs to the National Commission on sustainable development of 1996; the second one to the Institute of social and political researches at the Administration of the President 1997; the third to the Institute of economy of the Ministry of Economy, 2000). NGOs also actively participated in these discussions and, in November 2000, under an initiative of the Belarusian division of the International Ecological Academy there was established the NGO Council on Sustainable Development. This Council started to develop an alternative strategy for sustainable development for Belarus, as the NGOs considered the governmental one to be too narrow and "ministerial".

Conclusion

If the public participation principle is embodied more or less in the basic environmental legislation and some regulations, it is hard to say the same about the precautionary principle. Economic difficulties often lead to the ignoring of precautionary approaches, although the Belarus has large potential for sustainable development because of its geographic position and preserved ecosystems, existing infrastructures and considerable intellectual resources.

Examples of good practices in the country were highly acknowledged at the European ECO Forum pre-conference of European environmental NGOs before the Ministerial Conference on Environment in Aarhus 1998. A number of joint efforts have been undertaken, including the following:

– the co-operation between Belarusian NGOs and government in projects on energy-efficient individual houses from natural renewable materials (straw-bale technology);
– initiation of the State Programme on efficient countryside construction from renewables (1997-2000);
– design and promotion of cheap solar collectors; – elaboration of designs of eco-houses (1997 – 2000);
– elaboration of an alternative non-nuclear energy program for Belarus[39];
– research into wind potential in the north-west part of Belarus to prepare for the first wind station (250 kw, commissioned 19 August, 2000);
– initiation of parliamentary hearings on nuclear and alternative energy, as a result of which the design process for the nuclear power plant was stopped and favourable conditions for development of alternative energy were created (Decree of the Council of Ministries of the Republic of Belarus #400 (1997);
– the Belarusian NGO Council on sustainable development prepared the National Report on the situation in Belarus in the framework of the "Rio+10" process, and participated in the work of the International Forum of NGOs on sustainable development in New York (April 2000), devoted to the development of recommendations to the 9th Meeting of the Commission on Sustainable Development.

[39] See "Electricity in Eastern Europe 10 years after Chernobyl", Berlin 1997 (2nd edition).

REPUBLIC OF MOLDOVA

Julia Trombitskaya, Legal officer, BIOTICA,
Ecological Society Chisinau

Moldova actively participated at the UNCED meeting and signed the Rio Declaration in 1992. In this analysis of implementation of Principle 10, special attention is paid to access to information, active dissemination of information, public participation in decision-making, and access to justice. Principle 15, the precautionary approach, is understood in a wide meaning: lack of full scientific assurance should not be used as a reason for non-action[40].

The Constitution

The Constitution of Moldova (adopted in 1994) provides for implementation of both principles. Article 37 gives the right of access to environmental information and a prohibition on withholding or masking information about factors dangerous to people's health; Article 26 declares the right of each person to protect his / her rights and freedoms by lawful means; Article 41 provides for the freedom to associate; Article 75 declares the right of referendum; Article 20 provides for access to justice.

On the other hand, Principle15 is not directly reflected in the Constitution, but is indirectly incorporated to some extent in the right to a safe environment (Article 31(1)); in the right of health protection (Article 36(1)); in liability for environmental damage (Article 37(4)); in the obligation of owners to act in compliance with environmental protection requirements Article 46(5)); and Article 8 covers the supremacy of international law.

International agreements

The Republic of Moldova is a Party to all the main international environmental agreements and conventions (e.g. Convention on Biodiversity 1992; Climate Change Convention 1992; Vienna Convention on Ozone Layer Protection (1985) and Montreal Protocol; Ramsar Convention; Espoo Convention (1991); Aarhus Convention (1998) and many others with various provisions on public access to environmental information.

I. PRINCIPLE 10

Legislation

The law "On environmental protection" of 1993, adopted very soon after the Rio Declaration, provides the framework for protection of the environment. Article 3 declares the basic principles of nature protection but does not mention either public participation provisions or the precautionary approach. Only in Article 30 are declared the right for timely and adequate environmental and health information, the right of environmental associations to form, the right to participate in discussions of environmental laws and programmes, to comment on individual projects to locate and construct industrial units, the right to demand that governmental bodies stop hazardous activities which cause irreversible damage to environment, and the right for environmental referenda.

Authorities and the Ministry of the Environment (MoE) have obligations to disseminate information actively and systematically amongst the population. Article 25 of the law provides for possibilities for the public to initiate governmental environmental expertiza (a state review of projects and their impacts).

Recommendation: This law was not changed since 1993, and there is a great need to modernise it and to adopt new provisions in compliance with new trends of international and national legal provisions.

To obtain needed information, the public can also use the law "On petitions" (1994) which widely defines the term "petition", and also the recently adopted law "On access to information" (2000). The draft law "On access to environmental information", elaborated by the NGO BIOTICA, on the basis of the Sofia Guidelines of 1995 and submitted to the Moldova Parliament in 1996, was approved by the Parliament at the first reading in April 1999 on the eve of the first Meeting of Signatories to the Aarhus Convention. At the same time it still was not submitted to the second stage.

Recommendation: After adoption of the basic law "On access to information" this law could fulfil the gaps between national legislation and provisions of the Aarhus Convention.

There are two further laws very important for public participation: the law "On public associations"(1996) and the law "On environmental expertiza and environmental impact assessment [EIA]" (1996).

In the law "On environmental expertiza and EIA", Article 5 on public participation (requiring access to information on EIAs and other design documents, transparency, participation of individuals and NGOs and the taking into account of public comments) is considered as one of the basic principles of such expertiza. In a separate chapter of this law there are detailed provisions and procedures for public environmental expertiza which can be initiated and carried out by officially registered environmental NGOs. This type of expertiza concludes with recommendation

[40] E.g., see Philippe Sands, Principles of International Environmental law I. Frameworks, Standards And Implementation, Manchester University Press (1995).

only, and can become legally binding only after approval by the MoE or a relevant subdivision. The regulation on EIA that is an attachment to this law regulates in detail the procedures for informing of the public by the local authorities and the procedures for access to documents (EIAs and applications). Citizens may establish groups on their own initiative and it is possible for these groups, and for registered NGOs, to participate in EIA procedures.

In 1998 the law "On protection of ambient air" was adopted and it contains some provisions on public participation, e.g. the MoE and local authorities are obliged to inform the public about the level of air pollution (Articles 5 and 7) and to take into account public comments (Article 8). NGOs and individuals have the right to participate in development of environmental programmes, and to request and obtain information about the state of ambient air.

The law "On hydrometeorology" (1998) obliges the governmental agency "Hydrometeo" (who have a monopoly on hydrometeorologic information), to disseminate relevant general and special information (prognosis) via the mass media, e.g. on concentrations of chemical and radioactive pollutants, and to provide information in response to requests. The agency has the right to control the use of this information by legal entities.

The Water Code of 1993 and the Forest Code of 1996 also provide the right of the public to request and obtain information on the state of water and forest resources, on protection and improvement measures, to suggest and implement protection measures, and to conserve biodiversity. The Water Code has no possibility for the public to participate in decision-making processes regarding the location of enterprises, buildings or other objects that influence on the state of waters. One can also see the same lack of public participation in the law "On water protection zones and strips of rivers and reservoirs. Since the 1999 law "On drinking water", operators and state supervising agencies have to inform the population (regularly and at no charge) about the quality of drinking water (Article 13), and about exceedences of the admissible level of concentrations of substances which are under obligatory monitoring.

Mining legislation (the Mining Code of 1993) obliges mining enterprises to provide the State with relevant information, but unfortunately there is no mechanism for actively informing the public, and there are no provisions for public participation in decision-making.

Increasingly, modern conflicts between developers and the public interest occur in cities and towns, and so city construction legislation has become very important for realisation of Principle10 during the last decade. The law "On the basic principles of city construction and territories arrangements" of 1996 establishes the basis for public consultation (Chapter 4), further detailed in the Governmental Regulations "On consultations with the population in the process of elaboration and approval of construction and territory development documentation" of 1997 (there are several stages for public consultation; public hearings; notification of citizens and role of mass media; public polls). But there are no provisions covering any obligation to take into account the results of public consultations. And national development plans and other strategic documents are not objects of public discussion, which is not in compliance with the Aarhus Convention.

Another law important for residents of settlements is the law "On plants in cities and other settlements" of 1999. It established the right of access to information on the status of plants, on measures to protect biodiversity, on new construction plans, on planned changes in the status of green areas in the city. Citizens and NGOs have the right to suggest measures for the rational use and protection of green areas in settlements; to initiate and carry out public environmental expertiza; to participate in relevant decision-making; and to carry out referenda. A change in land status can be done only after approval of the local citizens in the neighbourhood.

As for public participation in decision-making on specially protected areas, this is regulated by the law "On the natural territories fund protected by the State" of 1998. Article 16 gives a number of rights to environmental NGOs: to develop, disseminate, and implement environmental programmes; to establish environmental funds; to participate in the control of and checking of special regimes in such territories; to publish and disseminate relevant materials; to obtain environmental information; to undertake scientific research in coordination with the MoE; and to propose creation of new specially protected areas. Unfortunately only this law and the law "On environmental expertiza and EIA" provide for such detailed public participation.

There are no public access to information and participation procedures in the law "On plant protection" of 1999, which is very strange for a law adopted long after the Rio Declaration.
On the contrary, the law "On wildlife protection" adopted earlier in 1995, contains many public participation provisions, including the right of NGOs to carry out public environmental inspections.

In the area of waste management, the law "On industrial and consumption wastes" (1997) provides rather vague procedures for approval of locations of waste-processing plants and waste storage sites. Local authorities and producers of waste must inform citizens about disposal and utilisation of wastes in the urban areas but contains no public participation provisions. This law is one in which the term "public" is used, but the meaning is not defined. The law also establishes liability for keeping information secret or for providing inadequate or false information on wastes or their emergency discharge.

The law "On industrial safety of hazardous industrial objects" (2000) establishes the obligation of operators of such entities to inform – in a timely way - specially authorised governmental agencies and the public about any accident at a facility (Article 10).

Near to this law is the law "On radioactive protection and safety" of 1997 which declares that citizens have a right (but not foreigners or individuals without citizenship) to information on available measures to protect health from nuclear pollution. The Department on civil protection and

emergency situations must actively inform public authorities and the public about risks and dangers, accidents and other emergency situations.

The use of natural resources and the licensing thereof are regulated by the law "On natural resources" of 1997, which guarantees public participation in relevant decisions and obliges public authorities to provide information on this area. The law also establishes the list of cases in which access to such information is limited (an infringement of somebody's rights; violation of a secret protected by law; danger to national security – Article 29).

Rules and regulations

The following governmental decrees, rules and regulations are crucial for the public participation principle:

1) Regulation "On the Minstry of Environment and improvement of territories" (approved by the Government Decree in 2000) – one of its functions is the constant flow of information to the population on the state of the environment. It also covers the involvement of the mass media and NGOs in the process of environmental decision-making.
2) Government Decree "On main functions, structure and staff quantity of MoE" (2001) – establishes a special Department of sciences, environmental education and public relations.
3) The National Programme on industrial and consumption waste usage. This was adopted by Government Decree and is a very deep and comprehensive document. Chapter 8 is devoted to public awareness and there is direct reference to the Aarhus Convention and to the creation of working groups to develop legislation and policies on wastes with the participation of public representatives.
4) The Decree of the Moldova Government of 2000 "On regulation of public participation in elaboration and adoption of environmental decisions" is in force. It implements provisions of the law "On environmental expertiza and EIA" of 1996 and Aarhus Convention provisions ratified in 1999, and establishes procedures for early notification of the public and also for sociological inquiries. Under this Regulation, authorities must involve the public in discussion of draft policies, laws and individual projects. For the first time in the history of environmental legislation there are definitions of "the public" and "public participation"– in compliance with the relevant articles of Aarhus Convention. Public participation must be permitted, but participation itself is voluntary. Participation for the investor and authorities is obligatory when discussing individual projects listed in the Annex to the law "On environmental expertiza and EIA". But there is still no detailed procedure for participation by the public involved and it is not clear how the Government is going to implement this "obligatory public participation" without capacity building (such as needing special funds for public participation).

The administrative councils of the national and local environmental funds (5 people each) have to include one representative of an environmental NGO nominated by the general assembly of NGOs (under the Regulation on environmental funds approved by the Government in 1998).

There are other important normative acts – decrees and regulations which more or less incorporate Principle10: the new Regulation on the state sanitary-epidemiological supervision in the Republic of Moldova (2000); the Regulation on environmental audit (1998); the National programme on stage-by-stage phasing-out of ozone depleting substances (1999); several parts of the National action plan for combating desertification (2000) directly provide for NGO involvement and education of the public on these issues and for establishment of a public consulting and information centre; the Regulation on integrated environmental monitoring (1998) makes environmental information available for the public, and has established the Centre for Environmental Monitoring.

Public participation in different commissions

This practice is becoming more and more usual in Moldova, and should be seen as good practice. For example, two representatives of environmental NGOs take part in the National Council on Preparation to the World Summit on Sustainable Development, and two members of the public participate in the Commission on evaluation of forest resources in 2001.

Public participation in law- and rule-making

There are a lot of examples of such public participation, both positive and negative. In 1996, the NGO "BIOTICA" were able to initiate legislation, when, in consultation with other NGOs, they elaborated the draft law "On public associations" which was adopted by the Parliament of Moldova.

The MoE delivers draft legislation not only to other relevant governmental agencies for comments, but also to the leading environmental NGOs. In 1998 – 2000 the MoE also carried out regular public hearings with NGOs.

As a result of public consultations the draft law "On State environmental expertiza" was crucially changed - the chapter on public environmental expertiza and on EIA were incorporated. At last the law was adopted in 1996.

In 1995 during adoption of the law "On wildlife protection", public representatives worked on many improvements of the list of endangered species and incorporated another 32 points.

A lot of amendments were made by environmental NGOs in 2000-2001 during elaboration of the Strategy on biodiversity conservation. In 2000 the MoE financed "BIOTICA" from the National Environmental Fund to elaborate the draft strategy for creation of a national "econet, a network of specially protected natural areas.

An unsuccessful example of public participation is the situation with the draft law "on access to environmental information" (introduced into the Parliament in 1996). In

1997 it was adopted as a model law at the Interparliamentary assembly of NIS, in April of 1999 was adopted by the Parliament of Moldova at first reading on the eve of the first Meeting of Signatories of the Aarhus Convention in Chisinau. But it is still not finally adopted as a law!

Public environmental expertiza

In 1994 – 1995, during decision-making on construction of the huge oil terminal in Gurgulesht at the Danube mouth, a group of Moldavian NGOs (Terra Nostra, Ave Natura, Agro Eco, Mold-Eco, Socio-Uman and others) initiated a public environmental expertiza of the design. A lot of shortcomings were revealed, some of which were corrected by the designer Ceproserving.

Participation by the public at both national and international levels helped save the Dnester River from a project to construct a road that endangered the Ramsar sites (2000). The design and construction had started without any EIA and environmental expertiza, neither national nor international. Coordinated actions of Moldova and Ukrainian NGOs lead to success - the international agreement between Ukraine and Moldova was concluded and the project was stopped.

EXAMPLES OF NGOS IN PUBLIC PARTICIPATION

McDonald's in Chisinau
In 1996 NGOs initiated a public environmental expertiza against a project to construct several McDonald's restaurants in the city requiring the felling of a number of trees and loss of one boulevard in the residential area. Active opposition by citizens forced the Parliament of Moldova to overturn the City Government permit and construction works were stopped. But the group of deputies – proponents of this project - appealed to the Constitutional Court, which acknowledged the decision of the Parliament as illegal because it interfered with the competency of local authorities.

Public advocacy to create a specially protected area "Gipsy"
An NGO working on biodiversity conservation, Fauna, discovered a valuable habitat for bats - a cave known as "Gipsy" - and persuaded local authorities to establish a specially protected area on the basis of two laws: "On local authorities" and "On natural territories protected by the State".

Environmental bulletin[41]
For several years, the territorial subdivision of the Environmental Movement of Moldova in Chisinau has collected environmental information from national and city authorities and carried out its own research on soil, air and food. This information is published in the "Environmental Bulletin" and is distributed to 600 respondents in schools, institutions, libraries, environmental NGOs, enterprises and governmental agencies. The Bulletin is published twice a month in Romanian, Russian and English and in electronic form.

II. PRINCIPLE 15

Although the law "On environmental protection" does not directly mention the precautionary principle, there are some separate elements that reflect this approach (Articles 5; 10(f)). There also elements of the prevention principle (Article 21) which sometimes is considered to be a more traditional expression of the precautionary principle. Some connection with the precautionary principle can be found in Article 61 of the law – in prohibiting the introduction of new species into the environment without a permit from the MoE.

Principle 15 can be found in Article 5 (a) and (b) of the law "On environmental expertiza and EIA", given the reference to a presumption of potential environmental danger of any planned economic activity based on use of natural resources and obligatory governmental environmental expertiza *before* decision-making. In Article 5 (d) the principle of scientific substantiation is underlined.

The law "On ambient air protection" (1998) also provides for realisation of Principle15 -
it prohibits the introduction of new types of activities, systems and equipment which are not in compliance with established norms and standards (Article 22) or for which there are no standards established.

Some connection with Principle15 can be seen in the law "On plants protection". Other laws on wastes, industrial safety, use of natural resources and on licensing are more concerned with prevention than about precaution. Production and use of toxic chemicals, plants, minerals that *may* cause environmental damage and lead to production of hazardous waste are prohibited. A special procedure for permitting dangerous types of industries and substances is established which requires the permitting body to undertake additional efforts to define risks and to use a precautionary approach.

Other laws mentioned above (on hydrometerological activity; forest and water legislation, legislation on city construction and protection of green zones and plants in urban areas have no direct reference to the precautionary principle, although some have provisions which could be interpreted as indirect references to the principle.

Genetically Modified Organisms (GMOs)

There is no special law on GMOs in Moldova. The current legislation does not regulate this issue at all. Moldova has signed but not yet ratified the Cartagena Protocol. The only reference to GMOs is in the provision of the law on control for export, re-export, import and transit of strategic goods (2000). This law prohibits export and other transfers of GMOs on the territory of Moldova; and information about GMOs cannot be withheld as a state secret (Article 13). The draft law on GMOs which was developed by the MoE in 2000 on the base of the relevant Ordinance of Romania gives an overview of definitions in this area and establishes a governmental commission authorised to make all kinds of decisions on GMOs.

[41] Cited from Cartea Alba a celui de al II-lea Forum al organizatiilor neguvernamentale din Republica Moldova, Chisinau, 2000.

However, as an example of good practice, it is interesting that this draft law was published on the Internet by the MoE for public comments.

Decrees, regulations and the precautionary principle

These are some decrees and regulations relevant to the implementation of Principle15:

1) National programme on use of industrial and consumption wastes 2000 (Chapter 3);
2) Regulation on EIA of privatised enterprises (1998);
3) New version of the Charter of State service on phytosanitary quarantine (1995)
4) New regulation on state sanitary-epidemiological supervision (2000);
5) Regulation on environmental audit (1998);
6) Some provisions of the national programme on stage-by-stage phasing-out of ozone depleting substances (1999);
7) National Action Plan on hygiene of the environment (approved by the Government in 2001).

Conclusions

Rio Declaration principles are reflected in the environmental legislation of Republic of Moldova, which has developed from a "zero" base in 1991. This analysis shows positive trends in the implementation of principles 10 and 15 at the end of 1990s. The proof lies in the increasing provisions on access to information and public participation procedures in laws and rule making appearing in 1998-2000, the direct reference to the Aarhus Convention in the National programme on use of industrial and consumption waste, and in other legislative and normative acts as described above.

As for constraints on implementation of Principle10, it is important to underline the inconsistency in terminology of laws and normative acts which regulate access to environmental information and public participation.

It is also necessary to improve and finish the draft law "On access to environmental information" to bring it into compliance with the current international and national environmental legislation. Besides, it is crucial that the MoE introduces the Decree of the Government "On public participation in elaboration and adoption of environmental decision-making" of 1999.

In some laws and normative acts a definite connection with Principle15 can be seen, but it is far from a thorough implementation of the precautionary approach. Such a "careful" attitude of the legislature to this principle may be explained by its very complex nature, and also by the fact that it is not in the list of basic principles of environmental legislation provided in the framework law "On protection of the environment" of 1993. But there is still room for optimism since in the last two years some acts of the executive branch have mentioned the precautionary principle, and in some of them it is even formulated.

At the same time, the precautionary principle is not applied to all areas of environmental policy and legislation, and its formal mentioning in legislative acts does not necessarily mean its implementation.

A crucial task is to not only modernise the older legislation of 1993 – 1995, but to harmonise the whole legal system with the newer approaches and principles formulated at the end of 1990s. The law "On protection of the environment" and the Code on the use of natural resources particularly need this harmonisation.

RUSSIAN FEDERATION

Olga Razbash, Attorney at law, Chair of the Regional Public Centre, "For Human Rights and Environmental Defence"

I. PRINCIPLE 10

The Constitution of 1993 of the Russian Federation declares and guarantees principle rights and freedoms of people similar to those in the main international declarations, although it was not until February 1998 that Russia ratified the European Convention on Human Rights**.**

Moreover, besides the right on access to information including environmental information, the right for access to public participation procedures in decision-making and the right for access to justice, Article 42 of the Constitution also declares the basic right to a wealthy environment and the right to compensation for damage to a citizen's health or property caused by environmental violations.

Access to information about health and risks is also guaranteed by Article 41 of the Constitution. Officials are liable if they keep secret information about risk factors which may endanger the health and even lives of people.

Articles 32 and 33 declare that each person has the right of free expression of opinions and ideas, to appeal to authorities and local municipals, in courts, and to disseminate information in any manner that is legal.

As all ratified international agreements and conventions are a part of the national environmental legislation according to Article 15 of the Constitution, it is reasonable to mention in this report that Russia is a Party to many important international legal instruments which have access to justice and public participation provisions, e.g. the Bern Convention on protection of habitats; the Convention on Biological Diversity; the Convention on Long-Range Transboundary Air Pollution; the Vienna Convention on ozone layer protection and the Montreal Protocol; the Framework Convention on Climate Change and the Kyoto Protocol; and others. Unfortunately, the Russian Federation still is not a Party to the two European conventions which are the main legal instruments for realisation of the Rio Principle 10 - Russia signed the Espoo Convention on Environmental Impact Assessment (EIA) in a Transboundary Context in 1991 but has not ratified it yet, and it still has not signed or acceded to the Aarhus Convention.

Federalism and environmental legislation

Russia is a federation, and in this analysis it is very important to mention that the legislation of the (sub-national) regions also play a big role in realisation of both Rio principles. On the other hand, the federal environmental and relevant legislation on the issues of joint Federal and regional competence has been developed and adopted with direct participation and after the approval of all 89 regions of Russia. Their own legislation must not contradict the federal legislation or the Constitution. As for other issues which are covered by their own sovereignty, the regions can adopt their own legislation. Frequently such legislation fills existing gaps and a lack of federal legislation in developing the basic principles, and sometimes it contradicts the federal principles and provisions leading to a Constitutional Court procedure to check and amend the situation.

REGIONAL LAWS EMBODYING PUBLIC PARTICIPATION

The law of Moscow "On protection of citizens' rights during realisation of city construction activity" (June 1997) provides for some procedural norms of public participation; the law of Rostov Oblast "On Referendum" provides for environmental referenda.

Local authorities and public participation

Under Article 6 of the Federal law on the basic principles of local self-governance (1997) and provisions of the basic law "On Protection of the Environment" (1991), the local authorities (municipal) have competence to adopt their legislation on management of municipal lands, waters, forests and other municipal natural resources, on local planning and development of settlements, to carry out monitoring and control for use of these resources, to monitor and control ambient air and water pollution, hunting and fishing, and wildlife protection. Local authorities must inform residents on the state of the environment, must report to the environmental protection agencies about pollution and all other violations of environmental legislation, and to pose fines on polluters for environmental damages.

Access to environmental information

Basic rights for access to environmental information and public participation in environmental decision-making are embodied in Article 42 of the Russian Federation Constitution of 1993. This right has been elaborated in the following laws and regulations:

- the basic Russian Federation Law "On Protection of Environment" (1991);
- Russian Federation Land Code (1991);
- Federal Law "On Information, Information Systems and Protection of Information" (1995);
- Federal Law "On Environmental Expertiza" (1995);
- Federal Law "On Safety" (1992);
- Federal Law "On Industrial Safety" (1997);

- Federal Law "On Sanitary-Epidemiological Safety of Population" (1999);
- Basic Law "On Health Protection of Citizens" (1993);
- Federal Law "On Protection of Population from Emergency Situations of Natural and Technogenic Character" (1994);
- Federal Law "On Mining" (1995);
- Federal Law "On Ambient Air Protection" (1999);
- Federal Law "On Specially Protected Natural Areas" (1995);
- Federal Law "On Wildlife Protection" (1995);
- Federal Law "On Basic Principles of Local Self-Governance Organisation"(1995);
- Federal Law "On Radioactive Safety of Population" (1996);
- Forest and Water codes (1997);
- Federal Law "On Archives";
- Regulation on environmental impact assessment of planned economic activity (2000).

There are also several Presidential Orders and Decrees of the Federal Government which guarantee citizens' rights of access to information of public interest and include the legal base for the so-called "public interest test" for opening classified information *(and see below)*.

In 1992 the President of the Russian Federation ordered all ministries and agencies to publish in the official bulletin all their rules and regulations that touch on citizens' rights and freedoms. Since 1994 no legal act (a law or any instruction, regulation, decree) is legitimate without official registration in the Ministry of Justice.

In March, 1997 the Russian Federation Government adopted the Decree "On order of collection and exchange of information in the area of protection of population and territories from emergency situations of natural or technogenic origin".

In 1992 the Russian Federation Government issued a Decree prohibiting the withholding of information on emissions into the environment, and this is crucial for permitting access to the entire block of information.

Constraint: There is no general definition of environmental information in the current Russian legislation, leading to conflicts and misinterpretations of numerous legal provisions. However, comprehensive analysis of these provisions make it possible to conclude that the whole range of "environmental information" (e.g. information on the state of environment, emissions and pollution, accidents, health status etc.) should never be classified and kept secret. Administrative and criminal liability has been established for those who violate this provision (Article 41-4 of the RF Administrative Code and Article 237 of the RF Criminal Code).

Conditions to obtain environmental information

According to Articles 24 and 29 of the Constitution, requested information on a citizen's rights and freedoms must be provided to any citizen who asks for it. Under Article 12 of the Federal law "On information...", all citizens and NGOs have equal right of access to state information resources and should not have to prove an interest in order to obtain the information (except in the case of classified information).

Constraint: There are no general federal procedural rules for government agencies to provide requested information which means that they exercise very wide discretion and each agency defines its own procedure, resulting in limitations on citizens' right for access to information.

Lists of information and information services, conditions of access should be provided for free to citizens or NGOs - this is the requirement of the law.

There are also obligations on holders of information data bases (information holders) to provide for public access to so-called raw information , e.g. documents, original analytical reports etc., in accordance with their charters or by-laws.

The time limit for provision (or refusal) of requested information to a citizen or NGO is one month. There are no additional terms established for extending this basic limit, although some variations exist in specific cases: authorities must respond within 15 days to a request from a deputy of the Parliament (Federal or a RF unit); and responses to public requests for opening of classified information may take up to three months.

Under the basic law "On protection of the environment" the bodies specially authorised to manage environmental information are: the Ministry of Natural Resources (including the Forest Department); Roshydromet (the Russian State Committee on hydrometeorology); the Ministry of Health's Department on sanitary-epidemiological supervision; the Ministry on Emergency Situations; the Water Committee. Their charters provide for detailed obligations to provide environmental information to public.

The time-limits for provision of requested information to a citizen or NGO is one month. There are no additional terms for extensions established. The same time-limit is set in cases of refusal. But for a request from a deputy of the Parliament (Federal or regional), a 15 day limit for the authorities to respond has been established. On the other hand, three months are set down for a response to a public request for opening classified information.

Local authorities also provide necessary environmental information which they possess to citizens and NGOs. A very important aspect of Principle 10 implementation is that these authorities have the right to request information about pollution of the environment from all the enterprises which are located on their territories.

According to the Federal law "On industrial safety", hazardous enterprises are obliged to declare their safety measures and emergency action plans and to apply for special permit. They must report on a regular basis to the sub-divisions of the Ministry of Natural Resources about their compliance with environmental requirements and standards (e.g., emissions into air and water discharges, waste disposal etc.).

Both individuals and NGOs, other legal entities, foreigners and persons without citizenship who are in the territory of Russia, have the right to request and obtain environmental information, and have access to public participation procedures. The public has the right to request and receive information in any form in which it exists.

GOOD PRACTICE

During the last seven years several alternative electronic networks have been created in Moscow, St. Petersburg, Nizhny Novgorod, and Novokuznetsk which actively disseminate environmental information from the Russian regions and from international and European environmental organisations and programmes (for example, Information Centre Eco-Accord, North-West network, the Association of Karelian Greens, the Newsletter from Novokuznetsk; the Bulletin on Russian draft legislation of the Centre of Wildlife Protection, Moscow and others). Many ministries have started to create their own websites (e.g., the web site of the Ministry of Natural Resources at *www. priroda.ru*), but because of economic constraints the information on these sites is often incomplete and not kept updated very well. NGOs have become more active in requesting environmental information from relevant governmental agencies.

In Moscow, Saratov, Samara, Nizhny Novgorod, Nizhny Tagil and Kaliningrad there are several projects on environmental public monitoring and control of hazardous industries.

Constraint: these activities mainly depend on support by foreign donors – the Government does not provide funds available to the public for these purposes.

Refusals

In current Russian legislation there are several bases for refusals:
- state secret;
- commercial secret;
- official secret;
- privacy information;
- information relating to preliminary criminal investigations.

A very important constitutional principle exists: the list of data which are classified as a state secret can be defined ONLY by a federal law. And only in 1997 was the Federal law "On State secret" adopted. Article 10 of this law established different categories of classified information:
1) many types of military data;
2) data from economic, scientific and technological areas which are very important for national safety and defence;
3) foreign policy and economy data;
4) intelligence service and criminal investigation information.

There are no clear details laid out for a procedure which leads to refusal in the existing legislation.

On 12 September 2001, the Russian Federation Supreme Court decided in favour of a group of human rights NGOs and acknowledged illegal a secret order of the Ministry of Defence 1996 which established a list of classified information. The order was never published and registered in the Ministry of Justice, but was actively used in several criminal cases against the now well-known environmental whistle-blowers, Alexander Nikitin and Grigoriy Pasko.

Although commercial secrets are defined by the Civil Code, there is a very crucial Decree of the Federal Government of 1991 which established that information about emissions into the environment and pollution data can never be a commercial or trade secret.

Personal confidential information (letters, diaries, personal archives, telephone calls etc.) is protected by Article 24 of the Constitution and by Article 11 of the Federal law "On information".

Requested information is often used for independent public environmental expertizas. Refusals are more often appealed into courts by NGOs - but not always successfully.

Unlawful refusals which have infringed a citizen's rights and freedoms and caused damage to a citizen are crimes under the Article 140 of the Russian Federation Criminal Code.

Analysis of the current legislation shows that there are some possibilities to apply public interest tests as shown in many laws and regulations, but the procedures are not clearly elaborated.

Constraints: The lack of deep democratic traditions, and of clear detailed procedures for democratic mechanisms, the growing trend for secrecy and the wide discretion for authorities leads to many conflicts and court cases, and even harassment of environmentalists.

The right of citizens and NGOs to receive environmental information directly from polluters

In accordance with legislation on trade unions, workers of enterprises have a right to know about their conditions of work directly from the administration. NGOs also have such a right, and this forms the legal basis for public environmental controls, or inspection. New procedures of for detailed environmental authorisations, environmental audits and declarations of industrial safety are also sources of environmental information on enterprises, both state and private. During privatisation procedures, environmental information is collected by the authorities and must be taken into account.

Issues of payment for provision of information

In Article 13 of the Federal law "On information", two variants on payment for information are provided: free information and information for payment which partly

covers expenses for the services. Lists of the free services and the fee-based services should be set by the Russian Federation Government, and be openly available for the general public to see.

Constraint: Until now there are no such lists. Only in emergency situations does the Government prescribe provision of free information.

Information services are financed from federal and regional budgets. Libraries are additional sources of information available without charge, under the Federal law "On Obligatory Samples [of Documents] in Libraries", which establishes an obligation for all governmental and private operators to submit all published editions to libraries.

Public participation

The public has the right to participate in environmental decision-making. The main laws and EIA Regulation of 2000 (see above) provide some elements of procedure: early notification; stages of public comments; the right to be heard; the possibility to review the final decision (access to justice). But to be further effective, these elements need improvement, and need to be more clear and detailed in line with modern international trends. To be realistic, public participation provisions must be correlated with provisions on capacity building and obligations on the State to provide financial and other types of support for public in the environmental area. Public participation in law and rule-making also needs to be more clear. The procedures for nominating and choosing experts into the Commission for state environmental expertiza should become more transparent and guarantee the independence of experts.

The Russian Federation was the first NIS country after disintegration of USSR to introduce such a unique procedure as the public environmental expertiza. Its conclusions become obligatory if it is approved by the Ministry of Natural Resources[42]. But this has almost never happened, although there were several precedents for huge public research projects and expertizas in recent years (e.g., the Rostov nuclear plant, the Karelia uranium mining project and the high-speed railway between Moscow and St. Petersburg).

The public participation procedure is another mechanism for obtaining necessary environmental information because authorities are obliged to provide all their information to the public if the public environmental procedure has started.

The same obligation falls to the investor who, under the EIA Regulation of 2000 and Article 28 of the Land Code, must carry out environmental impact assessment with the involvement of the public at a very early stage: at the point of applying to reserve a piece of land for future location of an object (plant, factory, enterprise). Materials relating to the public consultations must be submitted together with design documentation to the state environmental expertiza review. The public also has a right to nominate its representatives to be included in the state environmental expertiza commissions.

It is still very unclear what are the guarantees and procedures for public participation in licensing (permit) processes. This is a substantial hindrance to real public involvement and transparency of such decisions.

The foregoing discussion relates to future, planned activities, but there is no detailed procedure for public involvement in the issues and problems of existing enterprises, apart from some general declarations in the basic law "On environmental protection". The draft Regulation on public environmental control has still not been adopted.

Good practice

In 1996 an All-Russian Conference took place, with active involvement of Russian environmental NGOs, looking at the problem of environmental violations. At the conference a special resolution on priority measures and necessary improvements of relevant legislation and law enforcement was adopted. This was directed to the Parliament, the Federal Government, the Supreme Court of RF, the Highest Arbitration Court and the General Prosecutor.

In 1999 the All-Russian Environmental Protection Congress took place in Saratov. NGOs worked as partners with the Sate Committee on the Environment (Goscomecologia – the name of then Russian Federation Ministry of the Environment) to prepare the process and develop the main crucial documents for this Congress.

From time to time, the Committee on Environment of the RF Parliament carries out public hearings on crucial environmental legislative issues and collects public comments on drafts in progress. The National Environmental Action Plan had been drafted and developed with early and wide public involvement.

With the help and active participation of environmental NGOs, Goscomecologia elaborated and adopted in May 2000 a new Regulation on EIA which is obligatory for all investors and developers.

There have been cases where representatives of the public have been included in state commissions on environmental expertiza for important individual projects (e.g., the Moscow - St. Petersburg high-speed railway, chemical weapon elimination in Saratov, and others). About ten public environmental expertizas of big enterprises have been held during the last seven years.

Despite numerous constraints and lack of financial support, environmental NGOs in Russia are quite active in initiating and carrying out environmental referenda: e.g., in Kostroma against the location of a nuclear plant in 1996; in Krasnoyarsk in 1997 against construction of a nuclear waste processing plant; in Saratov, Volga River region and in Perm, Ural region, in 1997 against construction of a

[42] After the Presidential Order of 17 May 2000, this ministry fulfils the functions of an Environment Ministry in Russia.

chemical weapons destruction facility; in Moscow in 1997 against logging of timber for commercial construction; the all-Russian referendum initiative in 2000 against the import of nuclear waste.

Constraint: It is the usual case that public comments are not really taken into account by authorities, who can seem both blind and deaf to the "conversation". There are also a lot of "technical" constraints in place which hinder the initiation and registration of a referendum initiative group and the registration of questions for referendum.

By adopting amendments and changes to Article 50 of the basic law on Protection of the Environment (and contrary to the opinion of 93,5% of population according to a poll by the ROMIR sociological centre), the Russian Federation Parliament has violated both Principles 10 and 15. The amendments ignore public comments and the precautionary approach, by ignoring the state of public health on vast territories of Siberia where there are plans to dispose nuclear waste, and by ignoring possible negative direct and long-term impacts on the environment and on numerous future generations.

The same evaluation could be made of the consequences of the Presidential Order of 17 May 2000, by which the independent environmental protection agency (Goscomecologia) and the forest agency (Federal Forest Service) in the Russian Federation were abolished. Their controlling and supervisory functions and competencies have been transferred to the Ministry of Natural Resources - which issues permits for natural resources use.

Constraint: Extensive use of various natural resources in Russia is not balanced and effectively co-ordinated. There are no efficient mechanisms to settle inter-sectoral and transboundary environmental conflicts between the different stakeholders; without such procedures there is no way to real sustainable development.

Access to justice

During recent years in Russia, numerous environmental lawsuits and complaints have been filed in the courts at different levels concerning pollution, violation of rights of public access to environmental information and public participation, violation of rights to compensation for various types of damages. Several cases have been devoted to violations of the right to a wealthy environment and to violations of specially protected natural areas and their boundaries and management regimes.

Unfortunately, all the efforts by the public to settle conflicts using the administrative procedures for review of a decision have failed. So, it shows that this "way to justice" does not work and is not effective in Russia. There is no real personal liability for officials nor deep democratic traditions to guide the administrative review process.

Constraints:
A number of constraints exist: a lack of fair, equitable and timely access to justice (or to remedies); a lack of equitable and timely access to environmental information and to proofs (including to decisions and documents of other bodies); a lack of unbiased and objective approaches by judges to the issues of protection of citizens' environmental rights; and constraints on NGO involvement .

Corruption and ignorance of environmental law by public authorities, the non-independent court system, and a lack of "rule of law" traditions also create obstacles. And there is never real compensation for the mental and physical sufferings involved in spending years in difficult and time-consuming court investigations and review processes.

Financial barriers are also a problem. Under the existing Russian Civil Procedural Code there are no "contingency" cases, which means that a plaintiff (a citizen or group of citizens in our case) cannot invite a lawyer without paying the advocate's costs *before* the case has ended. The party which wins the case has the right to recover its expenses, but only "proved" ones, i.e. those which have been incurred already. This provision means that citizens lack access to qualified professional legal services, especially on environmental issues as there are only a few lawyers in Russia who specialise in them.

Without any state support to ensure capacity-building of the civil society, gaining access to justice in order to protect citizens' environmental rights is extremely hard, both in the Russian Federation and across the NIS region.

II. PRINCIPLE 15

Several federal laws and regulations and standards which were adopted during the last five years (including five normative acts during recent months), show a positive trend and have embodied Rio Principle 15 to some extent: e.g. the Federal law "On environmental expertiza"; a number of laws on safety; the Federal law "On State regulation of gene engineering activity"; regulations on EIA; sanitary standards and regulations; the instruction on environmental substantiation of economic and other activities. But in the main, the principle exists in its "prevention" aspect – both in the texts of legislation and in implementation and law enforcement practice.

Constraints: No clear definitions and regulations (criteria) on the implementation of the precautionary principle exist and consequently implementation is rather difficult.

Clearer guarantees for the realisation of citizens' rights to participate in decision-making releases of GMOs, including decisions on "contained uses" of GMOs, must be incorporated in the legislation.

An increase in public awareness and training of decision-makers and consumers could improve the situation.

Recommendations

While there are a lot of public participation and transparency ("glasnost") declarations and provisions in the existing legislation, effective implementation still needs greatly improved and detailed mechanisms.

Access to environmental information

A unified definition of environmental information based on modern democratic approaches (an open and non-exhaustive list) is needed. Also efficient procedures for timely access to full and adequate environmental information are a prerequisite for effective implementation of the Rio principles and good environmental governance.

From the latest regulations on state secrets it is obvious that the area of secrecy is growing, especially concerning the nuclear industry, and making protection of citizens' environmental rights more difficult. A crucial need is for incorporation into Russian legislation of a principle to allow the public interest to prevail - a so-called" public interest test" under which the burden of proof to withhold information should fall on the owner of the information. For these purposes a general law is needed with unified criteria for all governmental bodies and agencies.

The time limit for refusal (1 month) is too long in those cases where the authority intends to reject the request for information. This limits the time available to citizens to seek the necessary information through review or other channels and in many cases the information can becomes obsolete and useless. The time permitted for refusal should be decreased to 10 days.

All financial and organisational barriers (often complicated and huge) in the way of access to environmental information should be abolished. Prices for information services should be transparent and available, and a flexible system of discounts for citizens and NGOs should be developed and applied so that no-one is unable to copy the requested information or have access to existing data bases. A crucial improvement to help guarantee equal and timely access to modern environmental information will for the State to publish the most important pieces of environmental information on the Internet.

But to reach this target, the Russian Federation will need international support to overcome the poor economic situation and the lack of trained staff particularly at the local level.

National integrated registers detailing emissions and transfers of pollutants (and harmonised with other European registers) would be very helpful in order to move towards greater efficiency and sustainable development and to improve realisation of public access to environmental information.

There is also a crucial need for federal and regional registers of activities such as development of plans, programmes and policies, rules and laws with environmental consequences, in order to provide for effective and equal public involvement at a very early stage when all alternatives are still open and there is still place for a precautionary approach. Future improvements to Russian legislation should be targeted to fill these gaps.

The authorities of the Russian Federation should undertake more efforts for capacity-building and provision of financial and organisational help to civil society in protecting citizens' environmental rights, and to improve public access to environmental information and public participation procedures. This could be done through the creation of special environmental funds which could organise and encourage social environmental projects at both federal and regional levels.

With growing public interest and increasing numbers of requests for environmental information plus a large number of "information" disputes and conflicts and an overloaded time-consuming and expensive court system, it would be very reasonable to establish a non-judicial review procedure such as an ombudsman's office which could help to settle the relevant disputes swiftly and efficiently.

A law on public participation in all types of environmental decision-making (including in rule-making, plans, programmes and policies) with clear procedural provisions is needed.

With its vast and very different territories and huge variety of ecosystems, social structures, history and traditions, the Russian Federation crucially needs to develop participatory democracy at the regional and local levels. Territorial management plans developed with wide public participation, the creation of recreation zones and networks of environmental citizens' organisations at the local level could help to shift to sustainable development more effectively.

Precautionary approach

During reform of the current Russian environmental legislation on GMOs, clear definitions and procedures should be incorporated into laws and regulations with respect to emissions of GMOs into the environment (both deliberate and accidental) and their presence in the products. GMO releases could also be included in national registers of pollutants.

Given the great lack of adequate control throughout the UNECE region, GMO products are very much moving into the Russian market and thus endangering existing ecosystems and biodiversity. Active support for programmes developing and protecting consumers' rights and for training and raising public awareness of environmental protection issues is crucial.

The definition of "deliberate release" of GMOs should include "placing on the market" and "contained uses" since contained uses very often have planned releases (e.g. in waste water streams) and accidental releases may also occur. There is a strong demand for public information relating to GMOs, including the labelling of derivatives and products which are produced using GMOs.

TURKMENISTAN

Olga Razbash, Attorney at law,
Chair of the Regional Public Centre, "For Human Rights and Environmental Defence"

General background

The transformation of the legal base is underway in Turkmenistan, and the process of harmonising national legislation with international legislation has also started.

The existing legislation of Turkmenistan does not formally contradict Rio Principles 10 and 15. Public participation is provided for in special laws on the protection of the environment; there are no limitations to the right to seek, obtain and disseminate information; there are also provisions for access to justice to protect citizens' rights; the state has an obligation (through specially authorised governmental bodies) to inform actively the public about the state of the environment via the mass media and dedicated publications.

The precautionary principle is declared in several normative acts in its "preventive" aspect. A special commission has been established to monitor fulfilment of international environmental obligations. Turkmenistan participates in a number of international programmes including the UN Commission on Sustainable Development.

The legal base

Article 3 of the Turkmenistan Constitution lays responsibility on the State to protect the lives of its citizens and their natural rights. Under Article 10 of the Constitution, the State is responsible for the preservation of nature and environment.

The competence of local authorities (Gengeshi) is also established (under Article 86), with responsibilities relating to:
1) defining the main paths of economic, social and cultural development of their territories;
2) defining measures for rational use of natural resources and protection of the environment.

In the context of the main topic of this research, the declaration of Turkmenistan with respect to its commitment to the supremacy of international law is unprecedented. Article 6 of the Constitution of 1992 (amended in 1995) declares that "Turkmenistan acknowledges the priority of the generally accepted norms of international law…". The same declarations have been made regarding the universal declaration on human rights and guarantees for their realisation. But still there are no special laws or regulations to implement international laws directly.

As neither Rio principles are legally binding norms, their implementation is possible in Turkmenistan only through ratification of international agreements and their incorporation into national legislation.

Turkmenistan has ratified some international environmental conventions. In 1999, under the Presidential Order the State Commission on implementation of international environmental conventions and programmes was established as a mechanism to realise Turkmenistan's international obligations. A wide range of specialists and members of NGOs are involved in the work of this Commission.

I. PRINCIPLE 10

Access to information

As noted above briefly, basic provisions concerning the pluralism of opinions, freedom of speech, and access to information are declared in the Constitution, the law on mass media and in several special laws.

Article 1 of the law "On press" guarantees the right of expression of opinions and convictions, and of access to information and its dissemination via the press and other mass media.

Article 10 of the law of Turkmenistan "On protection of state secrets" prohibits the classification of information which is connected with human rights and their realisation, and also "classification of information which will endanger personal safety and health of people".

Information about pollution of the environment, violation of labour safety rules, trade of products which damage public health, about damages and other violations of Turkmenistan legislation also cannot be kept secret according to Article 8 of the law "On commercial secret".

Public participation

Forms of public participation and guarantees of citizens' environmental rights are defined in several articles of the law "On Nature Protection". Thus, in Article 29 it is established that citizens of Turkmenistan may take part in nature protection to prevent environmental damage and to eliminate violations of environmental laws. Citizens may contribute to the environmental protection funds, may participate in the work of nature protection organisations and environmental NGOs, and may provide help to them in nature protection measures. The right of association and creation of environmental NGOs is established in the same law by Article 28. In the same article, other Turkmenistan citizens' rights relating to environmental matters are declared:
– for environmental education and "environmentally-oriented upbringing";
– for participation in nature conservation;

– for participation in discussion of draft legislation and rules which are put to public hearings;
– for appeals and complaints on environmental protection issues;
– to request and receive timely and adequate information on the state of the environment and measures for its protection;
– for participation in development of decisions which are targeted at restoring or improving environmental quality;
– for participation in public Environmental Impact Assessments;
– for recommendations to abolish decisions on location, planning, construction, reconstruction, exploitation by environmentally dangerous developments;
– to limit, temporarily or permanently, activities of legal entities which adversely affect environment and human health;
– to file lawsuits in the courts against legal persons and individuals to recover damages caused to health or property as the result of an adverse impact on the environment.

Under the law "On ambient air protection", the public has the right to receive from the specially authorised government agencies and other legal persons adequate information on air pollution and measures to protect air quality. In addition, special provisions on public participation in environmental reviews of sources of ambient air pollution can be found in this law, but no procedural mechanisms are elaborated.

The law "On consumers' rights" provides for consumers to receive information on the quality of goods and defines responsibility for damages and access to justice mechanisms.

The special law "On labour protection" sets a group of norms on access to information about labour conditions and protection of workers. The employer's responsibility is established for ensuring that workers receive timely information on conditions of labour and safety measures.

Public associations

The creation and functioning of NGOs is regulated by the law of Turkmenistan "On public associations" of 1991.

The law of Turkmenistan "On nature protection" states in Article 25 that: "Public control in the area of nature protection shall be carried out by NGOs, labour collectives, local people". Procedures for such control should be provided in the charters of NGOs, and by legislation governing NGOs and labour collectives. But there is no special regulation on public environmental control, which makes implementation unrealistic in practice.

Article 30 provides for NGOs rights in environmental matters. They have rights:
– to elaborate, approve and popularise their environmental protection programmes by radio, TV and press;
– to protect the rights and interests of the population in environmental matters, to promote and raise public awareness on environmental issues, and to involve volunteers;
– to create public environmental protection inspections;
– to restore and protect nature, involving citizens and their financial contributions;
– to participate in the inspections carried out by relevant governmental agencies, and to demand such inspections from governmental agencies;
– to create public funds for nature protection and use them for environmental protection;
– to demand organisation of governmental environmental expertiza (a type of EIA review process) on decisions to locate, construct, exploit, or to limit, temporary or fully stop developments and activities; and to take part in such expert groups;
– to demand timely, full and adequate information on the state of the environment, sources of pollution, about main governmental environmental protection plans, programmes and measures;
– to file lawsuits to courts or arbitration courts to recover damages caused to nature, health and property of citizens and NGOs, by legal persons and governmental bodies.

NGOs define their environmental protection activities according to their charters and relevant acting laws.

Government bodies have to help citizens and NGOs to realise their environmental rights. This includes proper consideration of public comments on nature protection and necessary provisions for transparency and availability of environmental information. They must also inform the population in a timely manner about any emergency situations and possible risks (Article 31 of the law "On nature protection"). The same article establishes the responsibility of officials who create obstacles which hinder citizens' or NGOs' enjoyment of their environmental rights, or who intentionally keep or hide environmental information. A special chapter in this basic environmental protection law is also devoted to the citizens' right to a "wealthy environment", thus implementing the Rio Declaration principles in general (Article 27).

The same law also establishes definition of environmental monitoring (Chapter 8), and also provides for obligatory environmental education (Article 33) and the undertaking of scientific research in order to collect better environmental information (Article 34).

Similar rights for the public are established in the Turkmenistan law "On specially protected natural areas".

In the law "On State environmental expertiza" (SEE), public participation is not provided. If independent experts are involved in the evaluation process, their conclusions are only recommendatory, as there is no obligation of the governmental commission to take into account these conclusions.

II. PRINCIPLE 15

The law "On State environmental expertiza" (SEE) is the basic law which regulates the balance between economic activities and environmental protection. This review procedure is obligatory for all investments in industry, agriculture or other types of activities which are connected

with impacts on the environment and is a mechanism to implement the precautionary principle to some extent. One of the declared targets of the SEE process is the prevention of possible negative impacts on the environment and its components, on conditions for life generally and for the health of the population. This expertiza should also define the level of risk and environmental danger of the planned activity which could in future directly or indirectly adversely influence the environment and / or public health.

Another example of the (indirect) precautionary approach can be found in Article 23 of the basic law "On nature protection" which provides for the possibility or requirement to proclaim geographical areas as zones of emergency and environmental disaster if adverse changes in environment endanger or could endanger health, the state of ecosystems, or of genetic funds of plants and wildlife.

Under Article 15 of the law "On enterprises", any plan of development or construction should get approval with the relevant executive bodies if there is a danger that these types of activity could cause environmental, social, demographic or other consequences and thus affect the interests of the population.

Two interesting recent laws on investments and foreign concessions also contain several "precautionary" and "preventive" provisions prohibiting any potentially environmentally dangerous activity.

A precautionary approach can also be seen in the provisions of the law "On mining", where Article 7 permits restrictions on the use of mineral resources if there is a danger to the environment or public health or lives.

Conclusions

1. The legal analysis shows that many basic provisions of the Rio Principles 10 and 15 have been embodied more or less in the national legislation of Turkmenistan.

2. Although there are no direct references to the concrete international norms in national legislation, the state has already created preconditions and concrete mechanisms to harmonise national and international norms.

3. The reasons for lack of implementation of national and international norms and approaches and any precedents in courts are defined by the specific features of the state regime in Turkmenistan and are beyond the scope of this research.

4. Crucially, the lack of procedural guarantees makes implementation of the two Rio Principles notional rather than actual.

UKRAINE

Dr. Irina Tustanovskaya, Attorney at law, NGO "Eco-Pravo Lviv", Lviv

During recent years in Ukraine there has been some progress in implementation of the Rio Declaration principles. In spite of gaps, in general, existing legislation is based on these principles. The public is one of the main forces in this process, becoming a partner in the formulation of state environmental policy. In the Decree of the Supreme Council of Ukraine "On recommendations of Parliamentary hearings concerning environmental law enforcement in Ukraine and realisation and improvement of environmental policy" of 7 December 2000, it is underlined that "environmental NGOs should become an equal partner of the State in the settlement of environmental and health protection problems".

I. PRINCIPLE 10

Existence of meaningful environmental data

Beginning in 1993, several efforts have been undertaken in Ukraine to create an effective system for environmental monitoring and data dissemination. Several related normative acts have been adopted and abolished. Such a system was covered in detail in the Governmental Decree "On Approval of the Regulation of the State System of Environmental Monitoring" of 30 March 1998, establishing part of a national information structure compatible with similar systems in other countries. There are regulations on monitoring of separate elements of the ecosystem.

Although there is a legal basis for public access to environmental information, there is still no comprehensive environmental monitoring system for gathering and using timely and adequate information, either with respect to supervising the state of the environment or monitoring technologies which may have adverse impacts. The main constraint is the lack of financial resources.

Active access to environmental information

In accordance with the Ukrainian law "On environmental protection" and Governmental Decree of 2 February1992, the Ministry of Environment and Natural Resources of Ukraine is responsible for the annual preparation of the State of the Environment Report. Such reports are compiled and published at national and at regional levels. But circulation of these publications is very limited because of financial constraints, so they are available only on request. In this way, the original principle of active dissemination of environmental information as one of the main governmental responsibilities is, in reality, transformed into "passive dissemination".

Ukrainian legislation provides for immediate dissemination of information about emergency situations and their consequences, including information on discharges and emissions of hazardous chemicals and nuclear substances into the environment. Liability (including criminal) is established for breach of these legal requirements and for concealing or distortion of environmental information or information on health and diseases. Usually - after the Chernobyl catastrophe - state bodies follow these rules strictly. Legislation also provides for publication of statements on the environmental consequences of construction or reconstruction of environmentally dangerous objects.

Currently there are various electronic lists of dissemination for environmental information, but they are supported not by governmental agencies but by NGOs. Environmental issues have become very popular in the mass media.

Drafts of environmental programmes or laws are sometimes published in national editions, but it is very rare at the local level. NGOs often publish draft legislation on their websites.

In general, there a continuing lack of legal regulation for active dissemination of information. But it is needed, in order to provide for: (1) obligatory regular dissemination in the mass media (both at national and local levels) of information on the state of the environment and on sources of pollution; (2) obligatory publication of draft programmes, development plans and concepts, laws and regulations (both at national and local levels); (3) development of electronic communication networks in the governmental bodies such as the creation of websites and web publication of environmental information.

Passive access to environmental information

This issue is regulated quite efficiently by Ukrainian legislation. The Constitution of Ukraine (Article 50) guarantees to each person full access to environmental information. The basic Environmental Protection Law of Ukraine and other environmental laws also provide for such a right. Procedural rules for obtaining environmental information are provided in the law "On information". The time for answering a request for official documents should not be more than one month. According to the law "On citizens' petitions" if authorities do not possess the requested information, in five days it must transfer the request to the competent body. But practical implementation of access to information provisions varies and depends on: (1) the region - the more environmental NGOs act professionally in the region the more precisely authorities answer requests; (2) the level of authorities - the lower the level of the authority the more difficult it is to obtain environmental information; (3) the type of environmental competence of an authority - governmental agencies which are responsible for environmental issues, e.g. Ministry of Environment and Natural Resources, are more willing to provide environmental information than

are bodies for which environmental issues are secondary ones (such as automobile inspection agencies). Recently, courts in Ukraine have started to consider cases about refusals to provide environmental information. Thus, in October 1999 the NGO Eco-Pravo Lviv filed a law suit in the Supreme Arbitration Court of Ukraine against the State Committee of geology and mining to acknowledge illegal rejection of the request to provide information on the exploitation of the Stenavsky oil field. The court hearings resulted in amicable agreement between the parties, in accordance with which the Committee provided all the requested information and paid all court fees. In another example (June 2001), Eco-Pravo Lviv requested information about approval of highway construction between Odessa, Ukraine and Reni, Moldova, issued by the State Committee of fire safety. The request had been rejected on the grounds that Eco-Pravo Lviv had not shown what interests it represented or how it was going to use such information. After Eco-Pravo Lviv filed the lawsuit the Committee immediately provided the requested information.

Analysis of legislation and its implementation in this area leads to the following recommendations:
– procedures should be elaborated for obtaining environmental information from the private business sector;
– it is necessary to provide for administrative liability for violations of rights to access to environmental information;
– it is necessary to raise awareness among officials and indeed among the public about the legal requirements with respect to provision of environmental information. Citizens and NGOs have rights to obtain environmental information and to access to justice in cases of violation of these rights.

Public participation in environmental decision-making on individual decision-making

Ukrainian legislation (e.g., the Constitution of Ukraine, the laws "On environmental protection", "On referendum", "On citizens' petitions" and "On environmental expertiza") provides for public participation in environmental decision-making. Most of the norms are substantial, not procedural and need some improvement, but it is obvious that the legislature has acknowledged the right of people to be heard by authorities. Thus, on 28 May 2001, in accordance with an Order of the President of Ukraine, authorities of Odessa Oblast had started a huge highway construction project. The works were started with numerous violations of Ukrainian legislation: there was no comprehensive investment expertiza (which has to include environmental expertiza, sanitary-hygienic and other types of expertiza); there was no permit for land use; the works took place on the sites of specially protected natural areas etc. Only after interference by the public was the construction stopped.

Public participation in rule-making (plans, programmes, legislation)

Meanwhile public participation in discussion of environmental plans, programs and legislation is not only norms of laws, but also reality. Ukrainian NGOs actively took part in elaboration of the Concept for sustainable development in Ukraine. Many NGOs (Eco-Pravo in Lviv, Kiev and Kharkiv, Mama-86) commented or were involved in writing the texts of draft laws, such as "On charity and charitable organisations", "On wastes", "On drinking water", "On environmental business" , "On governmental environmental funds", and "On handling genetically modified organisms". Because of public lobbying, the Supreme Council of Ukraine rejected the draft law on GMOs, which had been elaborated in favour of transnational corporations and opened up possibilities for almost uncontrolled use of GMOs in Ukraine. Today, environmental NGOs are working on their own proposals for this draft law.

Capacity building for public participation

Most NGOs in Ukraine are informed about the procedures and forms of public participation in environmental decision-making, but this is not the case if we consider individuals.

Here is a positive example of active dissemination of environmental information which has made public participation real. Lviv Oblast Department of Environment and Natural Resources provides Eco-Pravo Lviv with information about all the projects submitted to governmental environmental expertiza. And Eco-Pravo Lviv puts a brief description of the projects on its boards in the very popular city park, and also on its website.

In general there are good trends in the changing attitude of authorities to the public in recent years, even if often the main reasons for such "improvements" are political ones. The climate still depends greatly on the personalities who have power. For example, the new Minister of Environment and Natural Resources appointed in spring 2001 is a former member of an environmental NGO, and so the Ministry has become more open to the public.

Access to information on individual projects

As an example of co-operation between the state and the public we could consider the written invitation of the Ministry of Environment and Natural Resources which was sent to several environmental NGOs inviting participation in the Environmental Impact Assessment procedure concerning construction of new blocks at the Khmelnitskaya and Rovenskaya nuclear plants. At a more local level, Lviv City Council also demonstrates good practice and directed a draft regulation on acoustics environment in Lviv to the NGO Eco-Pravo Lviv.

Financial and procedural help to environmental NGOs

It is very rare when governmental bodies provide for financial help to environmental NGOs because of poor financial situation of authorities themselves.

But still some environmental projects carried out by NGOs and valuable for both State and public were supported from the governmental environmental funds. For example, the administration of Lviv Oblast provided financial support for an environmental NGO to improve and update the web-site of the Lviv Department of Environment and

Natural Resources. More and more often authorities are asking NGOs to participate in joint projects and inviting representatives of NGOs to participate as experts in EIAs.

General procedural help to citizens or NGOs for public participation

In 1999 for closer co-operation the Ministry of Environment and Natural Resources of Ukraine created the Public Councils which include members of the public. On 7 December 2000, the Supreme Council of Ukraine made a recommendation to start considering a draft national programme of systematic capacity building for environmental NGOs in Ukraine (in the Decree "On recommendations of Parliamentary hearings concerning environmental law enforcement in Ukraine and realisation and improvement of environmental policy").

In general, public participation becomes real under the pressure of NGOs which use relevant provisions of both Ukrainian and international legislation. But the lack of procedural norms makes the dialogue between the State and the public very difficult. That is why it is necessary to elaborate laws or regulations with procedural provisions on public participation in environmental decision-making. These should include procedures of notification of the public at a very early stage, procedures for public hearings and for public participation in law and rule-making (plans, programmes, policies, distribution of environmental funds).

We can conclude that the level of implementation of the Principle 10 is relatively high in the Ukraine, and it was obtained by public pressure on environmental issues.

II. PRINCIPLE 15

The Constitution of Ukraine and other legislative acts do not provide for the precautionary principle as such, although it is incorporated in other principles acknowledged in Ukraine. Particularly, there is the principle of environmental safety (e.g., Articles 16 and 50 of the Constitution, Article 3 of the law of Ukraine "On environmental protection" and other environmental laws). Another general principle on which Ukrainian legislation is based is the principle of prevention measures to protect environment (Article 3 of the law "On environmental protection").

As is well-known, the precautionary principle is embodied in many international legal instruments and which are the part of the national Ukrainian legislation according to Article 9 of the Constitution.

Court and administrative practice and the precautionary principle

There is no implementation of Principle 15 in the known court and administrative decisions.

The Ukrainian public has used the precautionary principle while formulating the official position of Ukraine for the Conference of the Parties to the UN Convention on Climate Change in negotiations on mechanisms of Kyoto Protocol. Ukrainian environmental NGOs have also based arguments on the precautionary principle when lobbying for the public interests in the Supreme Council consideration of the draft law on GMOs. So it is the public who uses the precautionary principle to substantiate its position more often than governmental bodies.

Precautionary principle in the special legal and environmental publications

Environmental publications often mention the precautionary principle. As a rule, it is in the scientific literature and is not at the centre of attention of officials in environmental policy. And although legislation is elaborated not only by lawyers, specialist legal literature still pays little attention to Principle 15. In the context of national legislation this principle is considered as a part of the principle of environmental safety. It is considered more precisely in the international environmental law researches.

Precautionary principle and environmental plans and programmes

The main conceptual documents in the area of Ukrainian environmental policy are the Basic Trends in the state environmental, natural resources use and environmental safety policy, and the Concept of Sustainable Development. But neither of these documents, nor in other environmental acts, contain provisions of the precautionary principle.

Conclusion

Not enough attention is paid to the implementation of the precautionary principle. It is crucial to embody it both in the basic documents and in good practice of the decision-makers.

UZBEKISTAN

Olga Razbash, Attorney at law, Chair of the Regional Public Centre, "For Human Rights and Environmental Defence"

Uzbekistan did not participate in the UN Conference on Environment and Development in Rio de Janeiro in 1992, although later on Uzbekistan became a member of the UN Commission on Sustainable Development and for some time actively participated in its work. But many provisions of the Rio Declaration have not been directly incorporated in Uzbekistan legislation - only a few of them can be found in several normative acts. This is also true for the Rio Principles 10 and 15. The Constitution of Uzbekistan can serve as an example of this. It was adopted on 8 December, 1992 at the 11th session of the Supreme Council of the Republic of Uzbekistan, then amended on 28 December, 1993, one year after the Rio Summit.

I. PRINCIPLE 10

The preamble to the Constitution declares a number of commitments: to the concept of human rights, to a high level of responsibility to both present and future generations, to the ideals of democracy and social justice, and to the priority of international legal norms. But the text of the following chapters has no mention of the basic rights of people – the right to a healthy environment. "Environment" is mentioned only once in Article 54 ("use of assets should not damage the environment").

However, such a right is embodied in Article 12 of the law "On environmental protection" of 9 December, 1992 (with changes and amendments of 1995, 1997, 1998): "Residents of Uzbekistan have the right to live in an environment favourable for their health and the health of future generations, and for protection of health from adverse environmental impacts."

Some parts of Principle 10 on public participation and access to information, including environmental information, are reflected in the national legislation rather widely.

Foremost is the law "On guarantees and freedom of access to information" of 24 April, 1997. Article 3 provides for the State to protect the rights of individuals to seek, to receive and disseminate information. This law also declares the principle of transparency, and freedom of access to adequate information. Article 11 establishes the responsibility of the mass media for the trustworthiness of published information. Articles 12 and 13 provide for access to justice in cases of refusal to supply information, but with no detailed mechanisms of such procedures. In reality, this is a serious constraint to real protection of the right to information.

The public of Uzbekistan have the right to create environmental public associations. Both individuals and NGOs have the right to request and obtain relevant information on the state of the environment (Article 12 of the law "On environmental protection"); similar provisions are in a number of other laws, such as the law "On radioactive safety" of 2000 (Article 5), and the law "On protection of population and territories from emergency situations of natural and technogenic origin" of 1999 (Articles 4, 5, 13). The law "On protection of consumers' rights" (Articles 4, 24, 29, 30) also establishes access to justice procedures to protect consumers' rights.

The law "On environmental expertiza[43]" of 25 May, 2000, provides for the possibility (rather than for an obligation) of openness and transparency of expert procedures. An investor may publish information (in the mass media) about the beginning of an expertiza. In such a case, the results should be published within a month after the end of the process. The law establishes the list of objects and types of activity for which such expertiza are obligatory. Under Article 6 it is obligatory to notify the public of the expertiza process and to publish the results through the mass media. But in reality these provisions are only a declaration - there are no instances of such publication in Uzbekistan newspapers or other press materials, nor could this reporter find a published list of the objects and types of activities for which public notification is obligatory. It might exist as a ministerial regulation and be unavailable for the wider public. In the law itself (Article 25), the list of objects and types of activities for which environmental expertiza is obligatory consists of:

- drafts of governmental programmes, concepts, main directions and schemes of location for industries and business;
- materials or designs for construction objects;
- programmes of research connected with evaluation of the state of the environment and use of natural resources;
- draft of instructions and regulations which regulate activities involving the use of natural resources;
- documentation for new equipment, technologies, materials and substances, including those imported, and standards for products;
- import and export production;
- chemicals;
- state of the environment reports and assessments for separate regions, objects and places;
- enterprises and other activities and developments which negatively influence the environment.

[43] "Expertiza" is a type of environmental impact assessment procedure.

It is expressly prohibited to start any activity without a positive conclusion of the state environmental expertiza.

It is important to mention that the same law provides for the possibility to carry out a public environmental expertiza, but only if the public pays the cost (Articles 10, 23) which makes this provision absolutely unrealistic. The conclusions of such expertiza are only of recommendatory character and the law contains no word about taking into account public comments. But it is prohibited to create obstacles for the public who wish to initiate, organise and carry out a public environmental expertiza.

Provisions for public involvement (both citizens and NGOs) in the field of nature protection exist in several laws; e.g., the laws "On radioactive safety" (Art. 8), "On protection and use of plants" (1997, Art. 27), "On protection and use of wildlife" (1997, Art. 5) (which permits the public to raise the issue of compensation for or repair of damage caused to wildlife and habitats); "On ambient air protection" (1996, Art. 28), and some others.

In some provisions special norms establish possibilities for the public to protect nature themselves, to prevent emergency situations, or to raise public awareness in the field of environmental protection. For example, in the law "On water and water usage" (1993), Article 10 provides for public participation in decisions on the rational use and protection of water resources. Governmental agencies should take into account public comments (Art. 9). In the law "On specially protected natural areas" (1993), Article 9 gives the concerned public and individuals the right to help governmental agencies in protection and use of such territories, and agencies must take into account public recommendations. Similar provisions are in the law "On water and water use" (Art. 10), and the law "On protection of population and territories from emergency situations of natural and technogenic origin"(Art. 13). Under Article 19 of this last-mentioned law, authorities and relevant NGOs have to disseminate actively information and train the public to prevent accidents and minimise possible damage. Some rights are established for municipal authorities. For example in the law "On mining" of 23 September, 1994, their competence (Art. 9) includes participation in the elaboration and realisation of state programmes for mining, protection of mineral resources, their rational and comprehensive use and control, and the termination of mining in case of violation of the law. The same competence is established for local authorities concerning waters and forests.

At the same time, in many laws which are basic for environmental protection and the safety of citizens, principle 10 has not been incorporated: there are no public participation provisions in the laws "On forest" (1999), "On safety of water equipment" (1999), "On state land cadaster" (1998) and others.

In general one has to acknowledge that in practice Rio principle 10 does not work in Uzbekistan. There are various reasons for this, but the main one is the lack of mutual trust between civil society and public. Citizens are afraid to request information, the State does not feel necessary to inform them. The lack of democratic tradition is reflected in the fact that Uzbekistan still did not accede to the Aarhus Convention.

There are no examples of public participation in environmental decision making. There have been very shy public attempts to protest against the construction of an oil processing plant in Bukhara Oblast, but they were too late as the local residents learned about the construction only after the work started. This is typical - no examples could be found about public environmental expertiza as information about the planned activities is usually received only at the time of the beginning of any works.

II. PRINCIPLE 15

Rio Principle 15 is reflected even more weakly in the legislation of Uzbekistan. Some elements of this approach could be found in the law "On radioactive safety" (2000) in Article 4; and in the law "On environmental expertiza" (2000) in Article 5, where the main principles of environmental expertiza are - among others – an obligation to take into account requirements of environmental safety, a presumption of potential danger to the environment of any type of planned activity, and the necessity for a comprehensive Environmental Impact Assessment.

Similar approaches are found in the ministerial regulations and standards such as those establishing norms and regulations for construction.

Conclusion

Neither of the Rio principles under consideration here have been sufficiently incorporated into the national legislation of Uzbekistan, and implementation is very poor. In spite of membership in the UN CSD there is only very low interest in the concepts and practice of sustainable development among high level officials in the country. And accession to the basic international environmental agreements (conventions) has not lead to higher activity by the Uzbekistan Government. Although Uzbekistan has been one of the first countries to sign and ratify conventions important for sustainable development (including the UN Convention on Combating Desertification (1994), the Climate Change Convention (1993), the Vienna Convention on Ozone Layer Protection and the Montreal Protocol (1993), the Basel Convention (1995) and UN Convention on Biodiversity (1995), the Convention on International Trade in Endangered Species 1997), the Pan-European Biological and Landscape Diversity Strategy etc.), there is a great lack of special national legislation to implement all the international environmental legal provisions.

THE EUROPEAN UNION AND THE UNITED KINGDOM

Mary Taylor, Friends of the Earth, London

I. PRINCIPLE 10

European Union

The UK and EU legislation and policies are of course closely inter-twined, and the EU itself has to be considered at two different levels: that of the international Community institutions themselves (the Commission, Council and Parliament), and with respect to the laws that are agreed by the Member States collectively but destined for national implementation. This section does not look at all of these aspects exhaustively, but notes some recent developments, particularly since the Aarhus Convention will have an impact at both levels. The European Community is a signatory to the Convention. As the European Commission noted, the Convention is the first international instrument (beyond EU law itself) which applies to the Community institutions and called it a *"major political and legal development"*[44].

Access to information

The lack of transparency and openness of Community institutions and decision-making therein has long been regarded as a problem affecting the very credibility of the EU. Article 255 of the Treaty of Amsterdam supposedly gives citizens' rights of access to EU documents (not just in the environment sphere). Decision 94/90/EC on public access to Commission documents adopted a code of practice, but with a number of exemptions ("where disclosure could undermine" a number of areas, including commercial interests) which cause problems in practice. Bad practice is also seen in the clause which interprets failure to reply as a refusal. Regrettably, the experience of citizens and NGOs has underlined the perception of a democratic deficit and the remoteness of the Community institutions.

The EU has recently taken steps to increase access to Parliament, Council and Commission documents but a number of exemptions may still weaken the access regime (Decision 1049/2001). Reasons to withhold documents include "sensitivity", internal documents, commercial confidentiality, court proceedings and legal advice, although, after severe criticism of the Commission's initial proposal, these exemptions are now subject to a test of "overriding public interest". It remains to be seen how well this will work in practice.

With respect to legislation for adoption by Member States, the 1990 Directive on freedom of access to information on the environment (90/313) has generally been the driving force for access regimes in the Member States of the EU. This important legislation has pushed many countries, albeit slowly in some cases, towards greater openness and democracy. Beginning in 1996, the European Commission reviewed its implementation across EU countries, as required by the Directive itself. The final report noted a number of deficiencies and problems[45], many of which had been the subject of NGO complaints over the years. According to complaints submitted to the Commission, the main problems were:

- Definitions of environmental information
- Definition of public authorities
- Interpretation of the exceptions
- Interpretation of the word "respond"
- Exceeding time-limits
- Failure to respond
- High costs and long delays for review
- Cost of information itself
- Definition of "bodies with public responsibilities for the environment", often interpreted to exclude private or quasi-private bodies that had taken over traditionally state functions.

Further deficiencies that were noted by NGOs and others are also worth mentioning, including:

- The need for a declaration of access to information as a "right"
- Lack of definition of "practical arrangements", which could be more explicitly stated in new legislation
- The lack of a strong public interest test to challenge use (abuse) of exceptions
- The exclusion of legislative bodies (even when only part of the role)
- The need to require administrative review before proceeding (if necessary) to judicial review
- Too long a time-limit (even when respected)
- A need to reflect (and support) advances in information technology

As we see in other reports, once again many of these problems have both a legal dimension and/or a cultural dimension – the law may have been transposed correctly (although not always), but be being applied incorrectly, or with varying amounts of willingness.

By the time of the negotiations to establish the Aarhus Convention, both the successes and the limitations of the EU Directive were increasingly apparent, and the

[44] European Commission press statement, 23 June 1998

[45] Commission Report to the Council and the European Parliament on Experience Gained in the Application of Council Directive 90/313/EEC, of 7 June 1990, on freedom of access to information on the environment. COM(2000) 400 final. Brussels, 29.06.2000.

experience certainly influenced the Convention, improving it in a number of ways. The Convention is now feeding back into improvement of the Directive 90/313 (and other Directives), but at the time of writing the new Directive is not yet final. It will at least meet the requirements of the Convention (or will be challenged if it does not), but how far beyond this it goes is still a question. As is noted in the UK section below, there are some pressures to remain unambitious in this respect.

DEFINING A "REASONABLE COST"

It would now appear to be unreasonable to charge fees for information at a level which would have the effect of restricting access. In a case brought by the European Commission against Germany, the judgement declared[46]:

"Consequently, any interpretation of what constitutes 'a reasonable cost' for the purposes of Article 5 of the Directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to the information must be rejected.

"Consequently, the term 'reasonable' for the purposes of Article 5 of the Directive must be understood as meaning that it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search."

Public participation

Public participation provisions have increasingly been incorporated into EU law, at least at the level of consultation. Environmental impact assessment requirements are considered to fulfil Article 6 of the Aarhus Convention, but further work is needed to implement Article 7 on public participation in plans and programmes.

The recent Strategic Environmental Assessment Directive (2001/42/EC) and water framework Directive (2000/60/EC) are in line with the Aarhus Convention already. But some, mainly older, environment-related Directives will need amendment to improve or include public participation provisions in the preparation of plans and programmes (such as waste plans). The EIA Directive (85/337/EEC amended by 97/11/EEC) and IPPC Directive (96/61/EEC) need amending; some earlier Directives, such as the hazardous waste Directive (91/689) and the packaging Directive (94/62/EEC), and recent landfill Directive (99/31) need to incorporate fully the procedures detailed in the second pillar of the Aarhus Convention[47].

The Commission points out the "soft" nature of the Aarhus Convention with respect to public participation in the preparation of policies (states should "endeavour to provide opportunities…") and has ruled out legislation. But this is an area where the EC/Member States should advance beyond the Convention.

Access to justice

Appeals to the European Ombudsman are possible, without cost. The office can review decisions to refuse access to information for example. Friends of the Earth in the UK found this successful in seeking access to copies of independent studies commissioned by the European Commission on the UK's compliance with habitat and waste directives. The documents were released in this case. However, the Commission does not necessarily have to follow the Ombudsman's recommendation, since it is not legally binding (although it carries weight).

However, NGOs and citizens do not have standing at the European Court of Justice, which would need amendment of the Treaty, this needing agreement by an inter-governmental conference. NGOs pressed the issue at the Amsterdam summit (1997) but with no progress. In 1998, in Greenpeace v Commission[48], it was ruled that the environmental NGO did not have a direction connection to a Commission decision on grant-aid for a project without an environmental impact assessment in the Canary Islands, and so did not have standing to challenge the decision.

So currently, this situation severely hampers environmental protection causes, and unduly favours business interests. The Aarhus Convention *ought* to change this situation since, despite wording about "in accordance with national law", it has an "objective of giving the public concerned wide access to justice" (Article 9(2)) and environment NGOs are deemed to be part of the "public concerned" (Article 2(5)) – but prospects for change look distant. Indeed, the EC is considering entering a reservation on this matter when it ratifies the Convention.

The question of improving access to justice at national levels also arises. It has been suggested that a directive could harmonise best practice across the EU states, and, in so doing, would override possible weaknesses in the Aarhus Convention (such as the references to national requirements). However, there is likely to be considerable debate in the future about this and it remains to be seen how this will develop. In the meantime, access to justice for environmental protection purposes remains an aspiration.

United Kingdom (England and Wales[49])

Access to information

Current situation

In the UK, access to environmental information has been very much framed by the EU Directive 90/313 (which of course pre-dates the Rio Declaration), although earlier legislation had provided for public registers of specific information, such as monitoring data on effluent discharges to water (begun in 1984) and drinking water quality (1990). An open government "Code of Practice" was also introduced in 1994, but environmental information is mainly affected by the EU Directive.

[46] European Court of Justice, Case C-301/95
[47] European Commission proposal, COM(2000) 839 final
[48] European Court of Justice, Case C-321/95P
[49] Scotland and Northern Ireland have different legislation, so comments here cannot be assumed to be representative of the entire UK

The Regulations implementing the Directive were imperfect[50]. For example, they extended the scope of the discretionary restrictions on disclosure beyond that in the Directive *(see box)*, reflecting a strong tendency to minimise the impacts of Directives as far as possible. It was not until 1998 that the appropriate amendment occurred - after NGO complaints – to more closely follow the wording of the Directive.

The Regulations transposing the access to environmental information Directive detail grounds for a number of discretionary exemptions, using wording such as "information *relating to* matters affecting international relations…" (Regulation 4(2)). But "relating to" went further than the Directive, and the Regulations were later amended to wording such as "would *affect* international relations…" etc, a more restrictive construct.

The meaning of the term "legal and other proceedings" was also defined with very broad scope. Thus documents relating to a public inquiry could be withheld according to this piece of law! In correspondence in 1994, the Scottish Fisheries Protection Agency even considered any information that could *potentially* be used in legal proceedings as confidential. The definition was dropped in the 1998 amendment.

The Regulations were widely used and tested by environmental NGOs. In a review of their experience[51], Friends of the Earth noted a number of problems, such as that with the transposition covered above, but many of which come down to a question of attitude. Many refusals to disclose information were an abuse of the legal exemptions, and these could be hard to argue against when the requester could not of course see the content of the information *(and see Access to Justice section below)*.

Problems noted included:
- Delays (reluctance to part with information, lack of staff nominated to deal with the enquiry)
- High charges levied for information (too high / arbitrary)
- Limited views of the definition of environmental information - e.g., tending to be interpreted to exclude financial information
- Exemptions for unfinished documents and internal communications, which could be too easily abused
- Abuse of the volunteered information exemption (including that supplied in applications for permits!)
- Lack of practical arrangements (e.g., indexes, photocopying facilities)
- Privatisation of public services

A particular problem worth further mention has been the privatisation of formerly public sector services, including water and gas providers, power generators (including nuclear power) and research bodies. Whilst still public bodies, it seems highly likely that many of the requests for information would have been automatically granted. But the mere fact of privatisation had the effect of stopping the flow of some information. This creates very unequal access rights from one country to another (including between England / Wales and Scotland where for example water services have not been privatised), depending on the level of privatisation.

Commercial confidentiality is another difficult area: matters affecting commercial interests may be exempted from disclosure, and there is no test of public interest. This is unfortunate – public authorities are much more likely to fear that a decision to release information will be challenged by business interests than by an NGO or individual. An earlier Act (Environmental Protection Act 1990) had introduced a qualification that withholding information was justified if disclosure "would prejudice to an unreasonable degree the commercial interests…" but this was not reflected in the Environmental Information Regulations.

High and / or arbitrary costs for supply of information have often been a problem – and often create an inequitable situation between commercial bodies and those seeking to defend the public interest. Although costs should be "reasonable", charges for items such as staff time and high charges for photocopies have created problems for NGOs and individuals in some cases.

HAZARDOUS SUBSTANCES

The right of a community to know about hazardous substances is partly fulfilled. There are a number of statutory sources of information on hazardous substances and GMOs in England and Wales, including:
- The Pollution Inventory, a PRTR covering major industries and their annual emissions to air and water of around 150 substances. Wastes are also reported in just two categories (waste and hazardous ("special") waste). This is published on the Internet[52].
- Register of Hazardous Substances Consents (applications and permits to handle specified hazardous substances).
- Register of GMO farm-scale trial sites, available on the Internet[53].

From a practical point of view, an extensive body of information exists with a number of agencies (and private bodies) holding a wide range of data and analyses, research documents, plans etc. The statutory body, the Environment Agency (England and Wales), has produced some 10,000 reports on both its statutory obligations and its research programmes. A certain amount of information is made available through the agency website, although many reports must still be requested individually. Many agencies and councils have websites now, although the depth of information available can vary very much.

[50] Statutory Instrument 1992 / 3240, amended by SI 1998 / 1447
[51] Friends of the Earth (1996). Insisting on our Right to Know. FOE, London. ISBN 1 85750 275 2
[52] www.environment-agency.gov.uk
[53] www.defra.gov.uk / environment / fse / index.htm

The future

The UK has not yet ratified the Aarhus Convention, but the necessary legal changes, at least for the access to information and public participation regime, are under discussion. The Government has considered that the Convention will make few changes to the regime, but some improvements should result. In some cases, NGOs at least consider that the UK (and indeed the EU) should go *beyond* the Aarhus Convention and remedy some of the weaknesses of the Convention. These weaknesses are worth pointing out since it shows some of the holes in access to information regimes. However, the final Regulations have yet to be published (and the EU revision of Directive 90/313 is not yet final) and so there is some uncertainty about the outcome. The following discussion reflects the situation perceived by the author in the summer of 2001.

Some improvements are likely. Time limits for supply of information will be shortened in line with Aarhus, but could be further improved in line with the new Freedom of Information Act 2000 in the UK. This Act stipulates 20 working days for responses, with no possible extensions, rather than 1 month with the possibility of extension to 2 months. This compares even less favourably with the Dutch system, where only two weeks are permitted for responses.

The definition of "environmental information" should be improved, since the Convention is more explicit about this. The explicit inclusion of human health and safety information, GMOs and cost-benefit/financial analyses for example should be of benefit.

A public interest test is likely to be introduced – but the Convention text is weak - "taking into account" public interest (Art 4(4)). A stronger balancing test should be introduced, leading to disclosure where public interest outweighs any harm caused by the disclosure. The Commission has proposed wording "adversely affects" which would be an improvement.

On the other hand, there are some regrettable aspects of the Convention which may not improve matters. One unfortunate aspect is the prospect that advance payments for information could be requested: this is a backward step from the existing regime at EU level. The European Commission is of the opinion that option of advance payment should not be part of the revised Directive, but the UK seems to want to align with the Convention more closely[54]. Charging for copies of information is likely to stay, but NGOs and the Commission regard that inspection at least should be free of charge. This is thought to be the general position in the UK, but there have been some problems. One inquirer was charged 34 GBP for every 30 minutes spent inspecting files at a council office[55].

The government's consultation document did not discuss increasing efforts for pro-active dissemination in regard to its own domestic initiative. Moreover, it regarded the Commission's proposal to require more effort for Internet publication as "unwelcome". This is an unfortunate attitude - the availability of information on websites – in advance of requests – has revolutionised access to information, forcing better organisation of data and providing virtually 24 hour access at a moment's notice to requesters. However, it seems likely that the final revised Directive will at least encourage better organisation and electronic dissemination of information. It is likely that there will be progress in electronic information in the UK whatever the legal situation is, and it would seem that reasonable legal obligations to make progress should not be too burdensome here.

Public participation

There is no general right of public participation in the UK, but much legislation allows for consultation, for example in planning procedures and environmental permitting. It has been described as a *"culture of containment"*, where *"public participation is something which is invited or permitted by government, and is strictly limited… to consultation"*[56].

There is no real involvement directly in decision-making at national level, other than through elected representatives. Decisions can be challenged in the courts (but not easily – see below), and in any case this adversarial approach is at odds with the notion of a more participatory decision-making process. There are opportunities to provide opinions and/or expertise to decision-makers though, for example through consultation processes, contributions to hearings or to committees, including parliamentary committees, or through membership of advisory groups.

[54] Department of Transport, Regions and the Environment (2000). Proposals for a Revised Public Access to Environmental Information Regime Consultation Paper.
[55] The ENDS Report 307, August 2000
[56] John Dunkley in Regional Environmental Centre (1998) "Doors to Democracy", REC, Hungary.

PUBLIC PARTICIPATION IN COMMUNITY STRATEGIES

In the UK, all local authorities have been involved with Local Agenda 21 strategies. Although review is still under way, early indications are that the schemes have helped develop public participation methods and more inclusive decision-making processes[57]. The new "Community Strategies", required under the Local Government Act 2000, will further develop community plans which integrate economic, social and environmental issues, and the law requires authorities to consult and seek public participation. The official guidance to local authorities places considerable emphasis on involvement of local people and organisations[58].

Ultimately there will be constraints on the *content* of the Community Strategies due to central government policies and the limitations of local powers and resources, so local decision-making will not be able to control every aspect of a community's life. Nevertheless, if the process of developing the strategy succeeds in seriously engaging the public, this should also increase people's understanding of the inter-play of local and national powers, further empowering those who wish to contribute to decision-making at all levels.

It is not expected that the Aarhus Convention will have much impact in the UK, although, in line with European Commission proposals, it is likely that there will be some "fine-tuning" of legislation. Once again though, there appears to be an attitude of minimising any administrative impact, rather than supporting public participation procedures, and the discussion has not proposed public consultation on the matter!

Access to justice

A serious constraint in the UK has been the lack of an affordable and speedy review mechanism. Judicial review has been the main option (after internal administrative review), but this is highly unsatisfactory. It tends generally to look only at procedure rather than the substance of the matter, and is a potentially very expensive option. In the UK, a losing side usually has to pay the other side's costs in addition to its own expenses, and with no cap on lawyers' costs, the charges can easily amount to tens of thousands GBP. We would argue that there should be a possibility for the "loser pays" rule to be waived when challenges are mounted in the public interest (as in environmental protection issues).

As a relatively large organisation, the NGO Friends of the Earth has had the resources (including experience, confidence and persistence) to enable it (at times) to seek judicial review of refusals to supply information. Interestingly enough, the mere threat of this often results in disclosure before a case ends up in court, clearly demonstrating that bodies try to withhold information that could be public. It also seems likely that the holders of information are not keen for court judgements (and the establishment of precedent) to go against them. However, smaller NGOs or individuals will inevitably find it much more difficult to risk the time and costs of threatening and bringing court action.

The new Freedom of Information Act 2000 (which generally applies to information other than environmental information) has created the "Information Commissioner". The post is not functioning yet, but it is envisaged that it will be able to review decisions at low cost . However, it is not clear at the moment that this post will meet all the requirements of the Aarhus Convention in practice. The enacting legislation appears to offer considerable scope for challenge of decisions, while Aarhus requires a review procedure which can make binding decisions. Further assessment of this will be necessary.

II. PRINCIPLE 15

The EC Treaty has incorporated the precautionary principle since 1992 (Treaty of Maastricht) but it is not there defined *(see box)*. However, its incorporation into the Treaty is of great significance, and, as recently noted by the European Commission, *"applying the precautionary principle is a key tenet of [Community] policy"*[59]. In 1999, the Council of Ministers adopted a Resolution urging "even more" determination to be guided by the principle – (leading us to infer that some conflicts and weaknesses had become apparent!) - further emphasising acceptance of its place in EU policy and law.

THE PRECAUTIONARY PRINCIPLE IN THE TREATY

1992: Maastricht Treaty (now the Amsterdam Treaty, Art 174(2)):
"Community policy on the environment shall aim at a high level of protection taking into account the diversity of the situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

While the Maastricht Treaty states the precautionary principle in connection with environment policy, the precautionary principle has clearly extended into issues of human health – and in any case we would argue that environment and health issues are very closely linked anyway. For example, a European Court of Justice ruling on emergency measures taken during the "mad cow" crisis

[57] Andrew Ross (2000). LA21 evaluation: are there lessons for community strategies? eg November/December 2000, 6-8; C Church and S Young (2000). The future for LA21 after the Local Government Act 2000: a discussion paper, EPRU Paper 1/00, University of Manchester.
[58] DETR (now DEFRA) (2000): Preparing Community Strategies - Government Guidance to Local Authorities.
[59] Communication from the Commission on the Precautionary Principle. COM (2000) 1 final. Brussels, 2.2.2000.

(banning the export of British beef) did not invoke the precautionary principle *per se*, but noted:

> *"…Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent."*

The court also noted: *"that environmental protection requirements must be integrated into the definition and implementation of other Community policies"*

The principle has been incorporated into various EU directives, including the drinking water Directive (98/83/EC)) *(see box)*, and the Integrated Pollution Prevention and Control Directive (96/61/EEC)[45]. However, its overall interpretation and implementation is not crystal clear and the Commission has had to consider the principle more thoughtfully.

THE PRECAUTIONARY PRINCIPLE AND DRINKING WATER

The EU's drinking water Directive provides an interesting case: as long ago as1980 the law restricted pesticide concentrations to a "surrogate zero" i.e. a standard set at the limit of detection. For some specific pesticides, this is a much more stringent standard than regarded as strictly necessary by the WHO, but the EU standard recognises the non-essential nature of pesticides in drinking water (i.e. they are not used in its production, and are there as a by-product of other activities) and uncertainty about the long-term effects. Pesticide manufacturers on the other hand have argued for "scientifically based" standards[61], while the Commission has maintained the precautionary line, pointing out that our knowledge about the effects of pesticides is limited[62].

On the other hand, by the time of the review of the drinking water Directive, the possibility of endocrine-disrupting chemicals (EDCs) being present in the water supply was being considered, but (apart from those instances where pesticides themselves are regarded as EDCs) there are no specific limit values set. However, there is reference to the concern in the preamble.

1998: Council Directive 98/83/EC on drinking water quality
Preamble (13): Whereas the parametric values are based on the scientific knowledge available and the precautionary principle has also been taken into account; whereas those values have been selected to ensure that water intended for human consumption can be consumed safely on a life-long basis, and thus represent a high level of health protection.

Preamble (15): Whereas there is at present insufficient evidence on which to base parametric values for endocrine-disrupting chemicals at Community level, yet there is increasing concern regarding the potential impact on humans and wildlife of the effects of substances harmful to health;…

In 2000, a Communication from the Commission attempted to set out an approach and guidelines to using and applying the principle[63]. This was partly in response to accusations of "arbitrary" decision-making, since the use of the precautionary principle is seen by some non-EU countries (the US in particular) as restricting trade, and there is potential for conflict even between EU countries if there is no common acceptance of how to interpret the principle. A key argument for the Commission was that World Trade Organisation rules incorporate the precautionary principle[64] recognising the *"independent right"* of countries *"to determine the level of environmental or health protection they consider appropriate"*.

The Commission's paper has however turned out to be controversial. The Commission has proposed that risk assessment and management is central to the concept and that invoking the principle has to start with a scientific evaluation, albeit one which should be explicit about any uncertainties. Hazard alone cannot trigger the principle according to the Commission. Given the problems with risk assessment in chemicals control *(see box)*, environmentalists view this as a weak start and are concerned at the emphasis on risk assessment and also cost-benefit analysis.

The Commission noted that precautionary action should be based on cost-benefit analysis, with the proviso that non-economic factors could be taken into account. But it is feared that this may turn to the advantage of economic interests which can quantify their costs more easily. Sweden has argued that it should be about cost-effectiveness, and not cost-benefit analysis[65], which accords more with environmentalists' views: that Principle 15 should be interpreted as finding the cost-effective way of taking action once the decision to act has been taken, and NOT about using cost-benefit analysis to decide whether to act or not.

The uncertainties present when considering invoking the precautionary principle inevitably mean that some decisions will inevitably have a political dimension - at a very minimum this should emphasise the need for transparency and public participation. Ironically, environmental groups noted that the Commission's paper had been produced without public consultation.

[60] Annex IV: "…bearing in mind the likely costs and benefits of a measure and the principles of precaution and prevention"
[61] European Crop Protection Association (1993). Industry statement to the European Community's Conference on Drinking Water, September 23/24,1993.
[62] CEC (1995). Proposal for a Council Directive concerning the quality of water intended for human consumption. COM(94).
[63] Communication from the Commission on the Precautionary Principle. COM (2000) 1 final. Brussels, 2.2.2000.
[64] The Communication specifically referred to the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade.
[65] "Non-hazardous products ? Proposals for implementation of new guidelines on chemicals policy" (SOU 2000:53). June 2000, Swedish Committee on New Guidelines on Chemicals Policy.

EU CHEMICALS POLICY: RISK ASSESSMENT VS PRECAUTIONARY APPROACH

Increasing worries about the long term effects of chemicals have focused attention on control of chemicals in recent years. The initial response was to initiate a risk assessment process, reviewing safety data (where available!), and coming up with risk management programmes for individual chemicals. The first group of chemicals to enter the programme were 2500 high production volume chemicals out of the so-called "existing chemicals" list i.e. around 100,000 chemicals registered prior to 1981[66]. It became apparent that not only was considerable basic safety data missing (chemicals were un-tested in various aspects but remained on the market – hardly precautionary) but the whole process has been very slow –out of 141 chemicals that have emerged as priority substances, only 15 have proposed risk reduction strategies (a further 8 are considered to not need them), 8 years after beginning the work[67]. The lack of information and pace of this work has really emphasised the past lack of precautionary action on chemicals, leading NGOs to propose a five-point charter, based on precautionary grounds, and calling for:

- a full right to know, including which chemicals are present in products
- a deadline by which all chemicals must have had their safety independently assessed, with a positive approval system for uses of a chemical, and which should be shown to be safe beyond reasonable doubt
- a phase out of persistent or bioaccumulative chemicals
- a requirement to substitute less safe chemicals with safer alternatives
- a commitment to stop all releases to the environment of hazardous substances by 2020.

The debate continues, but the Commission's paper on the precautionary principle stated that it "cannot be made a general rule" to place the burden of proof upon a producer, manufacturer or importer.

United Kingdom

Given that the precautionary principle is embedded in the Treaty, how does this affect national policy making? Unfortunately, the answer seems to be that it is not necessarily absorbed at national levels. In 1994, a High Court decision found that UK Ministers were not under any obligation to incorporate the precautionary principle into national policy[68]. While the principle should be a fundamental part of Community policy, the judge stated that it was not intended that *"a statement of policy or still less a statement of principles which will underlie a policy should in itself create an obligation upon a Member State to take specific action"*. So, while some specific EU laws have incorporated use of the principle, in other areas it would seem that national policies and law may still avoid the questions that the precautionary principle implies.

Recognising uncertainty and the need for transparency

It is hard to consider the precautionary principle in the UK without paying some attention to the catastrophe of bovine spongiform encephalopathy, BSE, estimated to have cost some 4 billion GBP in all. And of course it is still not known how many people will contract the fatal disease new variant-Creutzfeldt-Jakob Disease (vCJD), now strongly suspected of a link with BSE. Precautionary measures were taken, such as the early withdrawal of (visibly) affected animals from the food chain before any evidence of human pathogenesis, but no doubt there are many points during the long saga at which it could be easily argued that a more precautionary approach could have been taken. For example, the very fact of feeding mammalian meat and bone meal to cattle for one seems rather non-precautionary, given the potential for spreading disease through the stock in this way.

The disaster has its origins fifteen years ago – BSE was first recognised in 1986. By 1988, there were already considerable worries about the infective agent causing disease in humans but it was not until 1996 that a link between eating beef and vCJD was officially admitted, although still not proven without doubt. This triggered further measures: an EU ban on world-wide UK exports of beef and a more extensive cull of British cattle. The ban was challenged by the UK arguing that it was economically motivated, but the Commission decision was declared legal. Interestingly enough, the European Court of Justice made specific reference to what we would call the precautionary principle, but without naming it as such[69].

Two particular points are worth noting. The initial review of the situation, led by an eminent scientist, concluded that it was most unlikely that BSE would have any implications for human health but also contained a warning:

> *"Nevertheless, if our assessment of these likelihoods are incorrect, the implications would be extremely serious."*

As the official BSE Inquiry noted, this warning was "lost from sight"[70]:

> *"Unfortunately, this warning and the tentative nature of the Working Party's conclusions were not appreciated or were lost sight of. Right up to 1996 the* Southwood Report *was cited as if it demonstrated as a matter of scientific certainty, rather than provisional opinion, that any risk to humans from BSE was remote."*

This leads us to the conclusion that it can be very difficult to focus on the extent of the unknown after consideration of the available evidence, and a culture that tries to respond to the uncertainties has to be nurtured.

The BSE Inquiry Committee also concluded that a lack of openness and transparency had contributed to the crisis. Re-assurances from government, an unwillingness to discuss the uncertainties, emphasis on the "lack of

[66] The EU's European Inventory of Existing Commercial Substances
[67] European Chemicals Bureau Newsletter, July 2001
[68] ENDS Report 237, October 1994
[69] European Court of Justice, Case C-180/96 and C-157/96
[70] The Report of the BSE Inquiry (www.bseinquiry.gov.uk)

evidence" of harm to human health meant that in some cases measures that were put in place (such as in slaughter houses) were not as well implemented as they might have been had citizens better understood the rationale for the decisions. Thus public participation and access to information as an important role to play in implementing the precautionary principle.

If there is a positive note to this story, then it is that food safety issues have very high profile now and it seems likely that it will be easier to invoke the precautionary principle in future. For example, the consumer Commissioner has stated that the Commission would favour early action in the event of food safety scares[71].

Cost effectiveness?

The precautionary approach to pesticide residues in drinking water is mentioned in the section on the EU. In the UK, which has transposed and implemented the Directive, the question also arises as to whether the solution to pesticides in drinking water was cost-effective. Environmentalists long argued that source protection (involving pesticide exclusion zones or more comprehensive bans) was the longer term answer. But, at least in the UK, part of the answer has been to install very expensive pesticide removal equipment, estimated at one billion GBP in capital expenditure alone. Testing for pesticides costs further millions. These costs fall to consumers rather than the sellers or users of pesticides. Yet a cost-benefit analysis for the Department of the Environment in 1995 concluded that pesticide exclusion zones would be a cheaper method of protecting water sources[72].

There is emerging consensus amongst the NGO community that the precautionary principle should embrace a number of components:

- transparency and public participation
- respect of societal (non-scientific) values
- reversal of the burden of proof
- consideration of a wide range of alternatives (including the possibility of not undertaking a proposed development)
- early preventive action in response to reasonable suspicion of harm
- recognition that lack of evidence is not the same as evidence of no harm
- recognition of the limits of scientific knowledge and understanding.[73]

[71] ENDS Daily 3/2/2000

[72] The ENDS Report 242, March 1995

[73] For example, Kriebel et al (2001). Environmental Health Perspectives 109, 871-875; European Environmental Bureau (1999): Position Paper on the Precautionary Principle.

THE NETHERLANDS

Joost Rutteman, Zuid-Hollandse Milieufederatie, Rotterdam, The Netherlands

I. PRINCIPLE 10

Access to information

Broadly, as part of the EU of course, Dutch law on access to with respect to environmental information , the level of access and reasons for refusal corresponds to the provisions of European dDirective 90/313 on freedom of access to environmental information on the environment. With respect to aAccess to information this is in general is covered by the Law on Publicity of Government. This law also applies to environmental information. It specifies that in principle all documents resting with public authorities can be reviewed and copies obtained. The only constraints are that information containing commercial secrets, information that might endanger the safety of the state, or information concerning cases where criminal prosecution takes place can be refused.

A request for information can be made by everyone, without showing any particular interest. The government is obliged to answer every request within two weeks. If no answer is received within two weeks this is considered to be a (deemed) refusal. A refusal (real or deemed) can be challenged in court as any other government decision *(see below, access to justice).*

Important parts of access to environmental information are also covered by specific laws, that have the ascendancy over the general law on Publicity of Government. The most important example of these is the Environmental Management Law (EML). This law gives more specific and wider access to environmentally relevant data. It is in particular important in guaranteeing access to information that is supplied in the process of permitting of industrial activities and discharges into surface water. The law specifies the information that should be supplied in applications for permits, and furthermore that if part of the documents supplied contain secret information a second version should be prepared that contains all information that is necessary to allow the public to get a sufficiently clear picture of the environmental impact of the activity. Applications (and the attached documents) for a permit are published as part of the permitting procedure and remain public information after the permit has been issued.

The Environmental Management Law also obliges some three hundred of the largest industrial enterprises of the Netherlands to make an environmental report every year. An extensive technical report with data about emissions and other relevant data like plans for future improvements of environmental performance is submitted to the government. For use by the public at large a more popular version should be prepared. This report may be less comprehensive than the government report but may not contain misleading information. Both versions are public, though the government version has to be requested on the basis of the Law on the Publicity of Government. Though these reports have to give 'reliable and representative' information, there are no very clear provisions about what information should be in the reports, making it possible that important information like that about specific substances or activities of the plant may be lacking and that there is little uniformity.

Another example of a specific regime is the Pesticides Act 1962 that contains specific provisions on information that has to be kept secret and information that may never be kept secret. The Dutch law here follows the system of the European directive 91/414 (section 14) on the marketing of agricultural pesticides. An interesting feature of this system is (in both the directive and in Dutch national law) that it is on the one hand more restrictive as some information has to be kept secret, but on the other hand also access to part of the information is guaranteed. Like the Environmental Management Law the Pesticides Act 1962 makes clear what information should be present with public authorities. A very detailed 'Handbook on Registration of Pesticides' that is regularly updated stipulates in much detail which reports should be submitted. These reports are public unless secrecy is specifically requested and well motivated.

The examples make it clear that in environmental law it is seldom enough to look at the general Law on the Publicity of Government. More often than not a specific regime applies that may be more or less restrictive and has ascendancy over the general law. A further complication is that a comparably complex European system of general and specific regulations applies to the publicity of environmental data. As in the Netherlands the legislator strictly keeps strictly to Dutch 'logic' of legislation it is not always clear whether implementation of European directives is correct and some additional research of the European regimes of access to information is often necessary to interpret the Dutch legislation in this respect.

Conclusions

Though Dutchy legislation on access to information is at least in theory reasonably liberal and much information is available, it also contains grounds for refusal that might support a very illiberal practice. Experience shows that policies may differ significantly according to the government agency responsible or the subject about which information is requested. For example much information about properties of chemical substances in products and energy performance of enterprises is jealously guarded. Sometimes government even expressly tries ruses to keep the information out of reach of the Law on the Publicity of Government. So for example data on the energy performance of some companies were stored with a government- and industry- sponsored private organisation where the government had access to them, but no physical

possession. As a result the government could not give access to the documents. Fortunately, tThe courts refused to accept this construction. Nervousness about giving access to information is especially shown in those fields where there is little experience with supplying information. Thus there is a striking difference between the liberal attitude of public authorities responsible for issuing permits to industrial enterprises and the very forbidding attitude of the Pesticides Registration Board.

The experience of environmental NGOs is that in every 'new' field where information is requested access has in fact to be gained by litigation all over again.

Public participation

There is no general right for the public to participate in the preparation of government decisions. However through specific laws, and provisions in the more general Administrative Code, there is in fact a right to participate in the preparation of most decisions that have an impact on the environment. The Administrative Code (title 4.1) contains provisions on the preparation of decisions that include a right to participate for third parties. This regime is obligatory only if the decision has 'legal impact' and a 'concrete subject or object' (or group of subjects or objects). This means that it is not obligatory if the decision is of a 'general regulatory' nature (e.g., like for example a regulation applying to 'all bakeries'. The regime of title 4.1 is also not applied if in a specific law or decision the regime of title 3.5 of the Administrative Code applies. Whether the regime of title 3.5 applies is stipulated in specific laws. Both regimes in principle give a right to participate only to 'interested' persons, though title 3.5 extends this right to 'everyone' with respect to decisions taken upon a request (section 3.32 Administrative Code). This last provision in fact makes public participation possible for 'everyone' in most decisions that have an environmental impact, as this category includes the issuing of a permit upon request, by far the most important category of decisions with an environmental impact.

Again the specific regimes can be found in specific laws, like the Environmental Management Law. These laws may specify nothing at all, stipulate that the regime of title 3.5 of the Administrative Code applies, or specify a special regime themselves. Though it is not really an Environmental Law Code, and some important decisions remain outside its scope, the Environmental Management Law covers most government decisions with respect to activities that have an impact on the environment. It covers decisions like environmental management (policy) plans (on national, provincial and municipal levels of government), requirements for environmental impact assessments, licensing procedures for industrial installations (from large chemical plants to hotel and catering industry or greenhouses) and discharges into surface water. It also regulates the disposal of waste.

With respect to most of these decisions a more or less specific regime for public participation in the preparation of these decisions is required. For example section 4.4 obliges the ministers who prepare the nNational environmental management plan to consult (*inter alia*) organisations that they consider to have an interest. This is a rather vague provision that does not establish clearly who has a right to participate in the preparation of this plan. However it is considered to mean that at least the most important environmental NGOs should be consulted, but not 'the public at large'. In comparison the law is more detailed in specifying who should be consulted in the preparation of a provincial environmental management plan, where environmental protection organisations are specifically mentioned as interested parties who should be consulted. These eEnvironmental management plans are very important in the Netherlands as the law itself usually gives only competences and general standards of performance. There is little about concrete targets that should be reached or environmental standards that should be met; these details are explained in the plans. These are in fact all explained in 'Plans' that in this way set the standard for applying environmental laws.

With respect to Environmental Impact Assessments (EIA) and licensing procedures, the regulations for public participation are much more precise. With respect to EIAs, the EML itself stipulates public participation procedures: 'eEveryone' should be given an opportunity to make comments. This opportunity is given in several stages: when the 'guidelines' are prepared and when the final document is published.

The same applies to licensing procedures for industrial installations and discharges into surface water. Section 8.6 EML declares title 3.5 of the Administrative Code applicable. As decisions about licenses are only taken after an application has been made on the basis section 3.32 of the Administrative Code 'everyone' can make comments.

Conclusions

There are of course exceptions. One of them is (again) the Pesticides Law. Titles 3.5 and 4.1 of the Administrative Code do not apply to decisions based on this law, a registration decision being for some reason not sufficiently 'concrete and addressed to a limited group of persons' but on the other hand also not sufficiently 'general' to make it a 'regulation of a general nature' (at least until a court decides upon this problem). The result is that there is no opportunity for public participation in the preparation of these decisions and participation in fact only starts with appealing against a registration decision.

Though the progressive expansion of the Administrative Code during the nineties has done much to streamline public participation by replacing specific and differing regimes, with their different delays and criteria this system is not yet complete and in isolated cases opportunities for participation are strangely lacking. In practice public participation is possible in the preparation of most environmentally relevant decisions. The provisions are best however with respect to the decisions like permitting of industrial activities where there is a tradition of participation by third parties. With respect to other decisions, regarding for example the marketing of chemical substances or pesticides, procedures are less developed and one can still easily get lost in the intricacies of the law.

Access to Justice

Most activities that have an adverse impact on the environment are not allowed in the Netherlands without explicit authorisation by a government body. Such authorisation can take several forms, like a permit for an industrial activity or transportation of waste, or registration of pesticides in order to allow sale, storage and use thereof. In general in the Netherlands the Administrative Code (*Algemene wet bestuursrecht*) gives every interested person a right to challenge a government decision. Specific laws may widen or limit this general access. In environmental law the most important specific provision can be found in the Environmental Management Law, which gives access to justice to everyone who made commented upon a concept of a decision. This is in fact an *actio popularis* as according to section 3.32 of the Administrative Code everyone, without the need to show an interest, may comment upon concept-decisions made upon request. So for an important part of environmental decision-makings, permits issued upon a request, an *actio popularis* exists. The only requirement is that one should have made (timely) comments during the public participation procedure. Access may be less liberal when it concerns other decisions, as in principle the Administrative Code requires an interest, and decisions based on other specific laws may not extend access to other groups of people.

It is also important to look at the nature of the decision or 'action', as the Administrative Code sometimes rules out access to an administrative tribunal. Access is denied if it concerns:

– An action by a private party, which is not a government action and thus outside the scope of administrative law. This also applies if the government acts as if it were a private party, e.g. operates a polluting plant, or cuts trees without permit on its own land.
– A government action that is executed without any underlying decision. Dutch administrative law only applies to written decisions of a government body that 'intend to have some legal effect'. So if some municipal workmen suddenly start to break up the road or cut down a tree (in a public place) this action in itself cannot be challenged in an administrative court.
– A 'formal' law (by the legislator (government and parliament) or a government decision that is by its nature a 'regulation'. This means that it is not limited in scope to specific persons or objects and is of a general nature, comparable to a law. An example would be a ministerial decision that sets environmental standards for all bakeries with a capacity less than x, or all bicycle repair shops.
– Cases about compensation between private parties or between a private party and government if there is no underlying government decision that can be challenged in an administrative court. An example of these is the government seeking compensation for the cleaning up of polluted sites. As compensation is a rather specific matter, no more will be said of it here.

It is possible to challenge these 'activities' or 'decisions of a general nature', but not in an administrative court. They have to be challenged in a civil court as being a 'wrongful act' under the Civil Code. In fact most litigation taking place in civil courts that is started by environmental NGOs is injunction litigation about compliance, seeking an order to stop an activity and/or enforcement of the law. . If someone acts counter to a government decision like a permit or regulation, or without a permit, it is possible to ask a civil court for an injunction ordering this person to stop the action immediately under threat of a fine. In a situation like this one could also ask the government to enforce the law. This should lead to a decision to enforce (or not to do so) that can be challenged in an administrative court. Trying to make the government enforce the law however rarely stops the activity itself so it is much more effective to ask an injunction against the person (this may also be the government) who is actually undertaking the harmful activity.

Both in administrative and civil law 'interest' is interpreted broadly. If real people ('natural persons' we would call that) are involved, interest is seen as one of the more traditional interests like property or integrity of the body, but if 'legal' persons are involved interest is also present if an organisation has the (statutory) purpose to protect certain values, like the quality of the environment. Environmental NGOs are thus by all courts accepted as interested parties. In cases where there is an *actio popularis* the question of 'interest' does not arise. An important limit to access to a civil court is that it will deny access if the same result can be obtained through litigation in an administrative court. The administrative procedure however should offer 'sufficient guarantees'. This limitation of access to a civil court is a consequence that it is really a kind of last resort if all else fails. It is clear that one has to go to a civil court if there is no administrative procedure available. Another reason to grant access is that the administrative procedure does not offer sufficient guarantees. This occurs in particular with respect to compliance. Though compliance can be ensured through administrative law, it is incomparably less effective in ensuring real compliance than asking a civil law injunction directly against a trespasser.

There are some important differences between administrative and civil procedures that are also relevant for the level of access to justice that is in fact offered. These differences concern the cost of litigation, recovery of cost of litigation by the opposing party and the nature of the review of the case.

With respect to the cost of litigation it is important that in an administrative court no legal representation is required. Every person can make an appeal and plead a case. But iIn a civil court one has to engage a lawyer who is 'acknowledged' somewhere in the Netherlands. This makes it much more expensive to go to a civil court. In an administrative court the only cost that has to be made is the fee for making an appeal which is fixed at Euro 220,– for organisations (legal persons) and Euro 110,- natural persons. If one has to engage a lawyer in a case of some substance the cost will soon rise to something in the order of magnitude of at least 3000 to 4000 Euro. The cost of engaging a lawyer can of course vary greatly, but, with economy, the cost may still be less than 30.000 Euro. . There are very high paid specialised lawyers that are much more expensive (and may be more effective, so a balance has to be struck). The figures here are thus only approximate and

presuppose that maximum economy has been observed. They mean little more than that the cost should not be 30.000 Euro.

In administrative litigation the defendant is always the government. If the government is successful in its defence however, the Administrative Code rules out recovery of the cost of litigation by the government. Only the court fee is lost by the applicant. If the court engages experts the cost of these is born by the court. If the applicant is successful, he recovers the court fee and can also claim the cost of legal assistance. Third interested parties cannot recover their costs. None of the parties can recover cost of experts engaged. The financial risk of bringing an administrative appeal is thus small and within the means of even fairly small NGOs.

In a civil law suit the situation is rather different. Here the party that loses has to pay the cost of litigation of the opposing party. However this risk is somewhat manageable because the courts never award real costs, but standard damages that are much lower than the real cost of litigation. Though losing a lawsuit is never pleasant the cost of it is reasonably foreseeable and will be in the order of magnitude (depending on the kind of procedure and complex character of the case) of several thousand Euro. Though estimates are always very difficult to make, the financial risk of going to a civil court may be limited, including the cost of a lawyer, but excluding the cost of technical expertise, to something like Euro 10.000 - 15.000 if the case is lost. An appeal would probably cost the same. The cost will start to rise significantly if the case proceeds to the Supreme Court, and a specially recognised lawyer has to be engaged, or if significant technical research is necessary and the court engages experts. On the other hand the party that wins the case will never recover the cost of litigation. As a result civil litigation is relatively expensive. Though the cost is not forbidding always prohibitive to larger NGOs they can only go to court sparingly.

With respect to costs there is also the risk of being held liable for the damage caused by injunctions. If the an injunction is issued by an administrative court there is no risk is not present. In fact tThe injunction is considered to be a government decision and if in a later stage another decision is made by the court it does not make the person who asked for the injunction liable. This is different if the injunction is asked from a civil court. In that case if one obtains an injunction it is executed on at one's own peril. Thus if in a later stage the injunction turns out to have been unjustified it could mean that one becomes liable for all the damage stemming from this. It is arguable whether such liability would also arise if the civil injunction is dependent on administrative law and only serves to uphold an administrative law injunction that in the end turns out to be unjustified. As the 'rightness' of the administrative injunction is outside the scope of the civil law one can argue that the civil law injunction was justified while the administrative injunction stood. Experience up till now shows this possibility of liability is not an important deterrent for environmental organisations to go to a civil court.

AN NGO GOES TO COURT

An 'classic' example of a civil law injunction case was the 'CNC'-case in the early nineties. CNC, a plant treating refuse from mushroom growing, caused an intolerable smell, and violated its permit. Environmental NGOs and neighbours asked the civil court for an injunction, ordering CNC to comply with its permit, under threat of a fine. When the NGOs and neighbours proved that CNC consistently violated its permit the injunction order was issued. CNC continued to violate its permit and therefore an execution procedure was started to collect the fines. In the end a settlement was reached with CNC paying part of the fine (100.000 Euro) and taking measures to reduce the smell. After deduction of costs this left the NGOs with a substantial 'war chest'.

A third important difference between administrative and civil courts is the thoroughness of the review they make. This is especially conspicuous if the civil court has to decide about a government decision, which happens if the decision is a law or has a 'general' nature. In environmental cases the competent administrative court is highly specialised and usually hears many environmental cases. Which court is competent depends on the kind of decision. Decisions based on the Environmental Management Law or the Clean Water Act are for example heard by the Council of State. Though the Council of State hears most environmental cases there are exceptions. For example if a decision is based on the Pesticides Law appeals are heard by the Board of Commerce and Industry. Their specialisation makes that administrative courts are very well aware of the relevant legislation and government policies and feel sufficiently at ease to make very thorough reviews of the cases they hear. This review is not restricted to the legal merits of the case. The Council of State on a regular basis engages an expert advisor who only works for the administrative courts and often makes a complete technical counter-expertise in preparation of the hearing in court, all this without cost to the applicant.

The routine with civil courts is strikingly different. To begin with a civil court never feels at ease in administrative law issues. It therefore tends towards a 'marginal' review which means that it will only overturn a government decision if it is manifestly against the law. In practice it means that they take most information from government at face value. If the government declares that a certain interest was 'taken into account', they will seldom investigate whether this really happened. It also means that civil courts tend to follow government interpretation of facts and circumstances, unless this is 'manifestly' not true.

LACK OF SUBSTANTIVE REVIEW

In 1996 the minister of the environment issued a regulation with respect to environmental performance of greenhouses (a very important industry in the Netherlands and in particular north of Rotterdam). This regulation, though an administrative decision, could not be challenged in an administrative court as it is of a 'general' nature: the circle of persons it addresses is not sufficiently known, being not only the existing greenhouses but also future greenhouses. Therefore the regulation was challenged in a civil court. The most important argument was that the regulation was not in accordance with the law as measures prescribed were not 'state of the art', which could be proved because the Council of State had not accepted similar provisions in individual permits for greenhouses. All this did not convince the court however: in the explanatory note that accompanied the regulation the minister said that due attention had been paid to protection of the environment. The High Court of the Hague decided that, being a civil court, it could only make an 'extremely marginal' review of a government decision. As the minister said he had paid due attention to protection of the environment the court made no further investigation of the facts of the case. This is indeed an 'extreme' example but it shows the restraint civil courts feel when it comes to reviewing a case of an essentially administrative nature, and the difficulty of getting substantive review of the issues.

The civil courts operate much more freely if there is no government decision involved or if the government decision itself is not the issue. This happens for example if the question before the court is only whether a government decision is complied with. As in the Netherlands most activities with environmental impact are covered by a government decision this category of civil law suit is most important in environmental litigation by civilians and environmental NGOs. Though enforcement of standards can also be sought through administrative courts this tends to be a cumbersome procedure. The purpose of administrative litigation would be to force an unwilling government to enforce standards, and though this is in theory possible the practice is not encouraging. For this reason civil courts, that usually would consider themselves incompetent if a result could also be obtained through administrative law, in compliance cases consider themselves competent. The reason is that the administrative remedies, though present, are not 'effective'. The effectiveness of a civil law injunction, reinforced with the threat of a substantial fine, is often preferred to the discouraging series of administrative procedures and injunctions necessary to make a reluctant government uphold the law. The relatively high cost is accepted.

Conclusions

Summarizing, access to justice in the Netherlands is good, though relatively expensive if a civil court is involved. Another drawback is that civil courts take a rather restricted view of their competence if it comes to reviewing government decisions (and the cost of litigation makes it not very easy to start a lot of litigation to make them change their mind). As a result access to justice is excellent if permits of larger industrial enterprises are concerned, or if the decisions concern 'concrete objects' like buildings, (to be registered) pesticides or substances, or concrete requests for information. Access to justice is limited however if the problem concerns 'government decisions of a general nature'. As the environmental standard of performance for many of the smaller enterprises is regulated by 'decisions of a general nature' this means that in fact remedies against setting lax standards for many environmentally harmful activities are not really available. With respect to compliance the administrative procedures available to ensure enforcement are not very effective, which in fact forces private persons and environmental NGOs to seek enforcement through directly asking an injunction in a civil court. Though this is an effective procedure it is also costly. Though the cost is not prohibitive necessarily, it is a deterrent to action.

SPAIN

Fe Sanchis Moreno, Terra Environmental Policy Centre, Madrid

I. PRINCIPLE 10

Situation at the time of the Rio Conference

At the time of the Rio Conference, the possibilities for Spanish citizens to access environmental information, participate in decision-making processes on environmental issues, and access justice on environmental matters were rather limited.

No specific legislation existed regarding access to environmental information held by public authorities. The general administrative law regulating access to information held by public authorities established the key concept of "interested party", interpreted as "affected person". Only a person fitting that description had the possibility of obtaining information, the scope of which was also limited. Soon after the Rio Summit, and accompanied by a change in social awareness and several decisions of the Supreme Court, new administrative legislation was adopted that allowed a broader interpretation of "interested party", which thus came to include environmental NGOs[74]. Despite this, the scope and conditions of the provision of access to information held by authorities were still quite restrictive. It was not until 1995, after the initiation of an infringement proceeding against Spain by the European Commission, that the Directive on freedom of access to information on the environment[75] was transposed through the adoption of a specific national law[76] which brought into the Spanish legal system a more friendly approach to the right to access to environmental information. Besides this development, two autonomous regions – Murcia and the Basque Country – also included provisions in this respect in two regional environmental laws also transposing the aforementioned Directive[77].

Public participation in decision-making processes affecting environmental issues should cover all the different types of decisions, i.e. the authorisation of projects and activities, the adoption of legislation, and the approval of plans, programmes and policies. The democratic regime in Spain dates only from 1978, and this is why although the Spanish legal system allowed different degrees and forms of public participation in decision-making processes at that time, participation was quite restricted due to the conditions that were imposed and because of the lack of a participatory culture[78]. One of the main restrictions was again the narrow interpretation of the concept of "interested party".

This was not the case for legislation on environmental impact assessment (EIA) covering different projects[79]. Although there was legal room for public participation, in practice implementation was quite inefficient, as was highlighted in a European Commission report on the implementation of Directive 85/337/EEC[80]. A look at some of the issues detected by the Commission can help to give a general picture of Spanish enforcement of EIA legislation:

- absence of non-technical summaries, a mandatory requirement and key element of the public participation process for the correct understanding of both the project and the environmental impact study;
- "...there are no specific legal provisions for publishing environmental impact studies or making them available to the public. During the public participation period they must be consulted in the offices of the administration, and in practice it is not common to provide copies of these documents";
- alternatives were not "seriously considered" in many cases;
- authorities complained about the little feedback received from the public, while NGOs complained that their comments were treated simply as "paperwork";
- the environmental authority lacks independence from the sectoral authority responsible for providing final authorisation;
- the responsible environmental authorities did not have sufficient resources to carry out their tasks, leading to excessive delays in the completion of the process, and as a consequence it was detected that some sectoral authorities decided to "go ahead without the Environmental Impact Declaration".

According to the existing regulation on access to information and public participation, access to judicial proceedings regarding these issues was also very limited at that time. Very few cases were brought before the courts because of the unreasonable costs involved, the excessive length of procedures, the lack of environmental awareness

[74] Law 30/1992 of 26 November, on the legal regime of public administrations and the common administrative procedure.
[75] Directive 90/313/EEC of 7 June, on the freedom of access to information on the environment.
[76] Law 38/1995 of 12 December, on the right of access to information on the environment
[77] Law 1/1995, of 8 March, on protection of the environment in Murcia region; and Law 3/1998, of 27 February, on protection of the environment in the Basque Country.
[78] For more detailed information see Sanchis, F. and others. 1998. *Doors to democracy. Current trends and practices in public participation in environmental decision-making in Western Europe.* The Regional Environmental Center for Central and Eastern Europe. Szentendre, Hungary. ISBN 963 8454 58X.
[79] Order in Council 1302/1986, of 28 June, on environmental impact assessment. This represented the Spanish transposition of Directive 85/337/EEC on environmental impact assessment.
[80] Commission Report on the implementation of Directive 85/337/EEC. COM (93) 28 Final, vol. 5. Brussels April 2, 1993.

of judges, and the limitations of existing legislation. Most of the few cases brought before the courts referred to the interpretation of "interested party". Most requests to judicial bodies to enforce environmental legislation were also limited because of the latter's restrictive interpretation of "interested party".

Progress made in past years

Principle 10 of the Rio Declaration was the result of great concern about the need to promote public involvement in environmental issues. At the same time, it became a helping hand to promote a number of changes in many Western European countries, who saw its implementation as a step towards the co-responsibility principle.

The evolution of principle 10 in Spain has been determined by European Union developments in this field and has also been influenced by the ratification of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Spain signed the Aarhus Convention, a direct consequence of principle 10 in Europe, on June 25, 1998, and it was ratified by the national parliament May 17, 2001. Currently (August 2001), the ratification procedure is almost complete, only pending the order from the executive to deposit the ratification instrument.

Access to information

Although delayed and incorrect, transposition of the EU Directive on freedom of access to information on the environment in 1995 was a crucial turning point in improving public access to environmental information. However, the poor transposition that was made gave rise to many difficulties[81]. The new legislation granted the right to access in the same terms established by the Directive, except for the following issues:

– not everybody was allowed to request environmental information;
– the lack of response to a request was to be interpreted as "negative administrative silence", i.e. it was possible to reject the right to access without providing a reason;
– no provision was included about the costs charged to requesters, insofar as these should be reasonable and not impede the requested access; and finally,
– the appeal provided was only judicial; no administrative review was established.

At the end of 1999, four years after the adoption of this regulation, and thanks to the ongoing infringement proceeding opened by the European Commission, an amendment to the national law was approved[82]. Strangely, this amendment was included in the Law of measures accompanying the Government's annual Budget estimate. It solved some of the problems detected in the transposition, but not all of them. Besides, it created a new problem, i.e. since then the lack of response (within two months) is considered a positive answer, i.e., the request is granted – in theory. The result is that the requester receives a positive answer to the request but no information is really supplied. Thus a judicial appeal could be necessary to challenge this and make the authority physically provide the information to the requester. In some cases this will be impossible because the information requested might not even exist!

A very positive outcome of this legislation was to help environmental authorities to become aware of the need to set up regular systems for collecting and treating meaningful environmental data. This was already a mandatory obligation of the different sectoral environmental legislation in force, but had not been properly enforced. Recent years have shown a clearer commitment to fulfil these obligations. More resources are being allocated and more measures taken to assure the collection and treatment of meaningful environmental data. New advances in telecommunication technologies, especially the development of the Internet, and the possibilities that these advances offer for processing, sorting and transmitting information with a speed and efficiency that could not be imagined a few years ago, have also played a key role in this trend. Many environmental authorities use these new advances to actively provide information through web pages, some of which are even updated quite regularly.

However, many gaps and malfunctions continue to exist, especially in terms of lack of regularity in the collection of data and of bad co-ordination between different responsible environmental authorities at central and regional levels. Besides, it has even been observed sometimes that, when the data collected reflects very poor environmental quality in a specific field, the criteria used to collect or treat the data may be altered, resulting in apparent changes but without there being any change in the environmental management. As a result, it is still difficult to have 100% comparable and detailed data collected by all the different administrations responsible at regional and central levels. And therefore, although improving, we do not have yet a proper picture of the situation in different important environmental aspects.

Public participation

The legislative framework on public participation was improved during the 1990s[83], involving public participation not only in environmental impact assessment procedures and the issuing of permits and licences for several activities and installations[84], but also in the legislative process and other matters such as the management of protected areas, water planning and permits, waste management, etc.

[81] For more detailed information see "Practical Experience" in Sanchis, F. 1996. Access to environmental information in Spain. In: R.E. Hallo (Ed.) Access to Environmental Information in Europe. The Implementation and Implications of Directive 90/313/EEC. Kluwer Law International. The Hague.

[82] Law 55/1999, of 29 December, on fiscal, administrative and social measures.

[83] For more detailed information see Sanchis, F. and others. 1998. Doors to democracy. Current trends and practices in public participation in environmental decision-making in Western Europe. The Regional Environmental Center for Central and Eastern Europe. Szentendre, Hungary. ISBN 963 8454 58X.

[84] Decree 2414/1961, 30 of November, which approves the regulation of annoying, unhealthy, harmful and dangerous activities.

Though some of the legislation mentioned above is quite restrictive or imprecise to adequately guarantee proper participation, the existence of greater public awareness and involvement in relation with the environment helped to encourage a more participatory attitude of the public. At this point it is also important to mention the development of Local Agenda 21 processes in several places as playing a key role in improving a more open attitude towards public participation.

There follow some considerations on practices in different areas of public participation:

The environmental impact assessment procedure has been totally accepted and incorporated in recent years. Together with the national legislation, recently amended to include delayed transposition of the new provisions on EIA set out by Directive 97/11/EC[85], at the end of the 80s and during the 90s almost all the autonomous regions adopted their own EIA legislation to deal with the projects under their responsibility[86]. Most of this regional legislation has been more progressive that the national legislation, and to a certain extent has contributed to correcting the poor implementation made at central level[87]. It should be highlighted that although public participation has been formally incorporated as mandatory in the authorisation process, and there are very few cases in which the consultation of the public is omitted, full attention is not paid to achieving effective participation[88]. This creates many problems, i.e. unnecessary expenses and delays because the reaction of the public occurs when the project is already under execution.

Participation is also provided in the adoption of environmental legislation, plans and programmes, mainly through the participation of NGOs in several consultative bodies. This occurs both at national and regional level. The situation will probably improve at the end of 2004 when transposition of Directive 2001/42/EC on assessment of the effects of certain plans and programmes on the environment is accomplished[89]. This type of participation is still something of a novelty in Spain and is not always provided with budgetary means to support its development, either with regard to institutional support or in terms of capacity building and resources to support NGO participation. A very interesting example in this respect is the case of the National Environmental Advisory Committee created in 1994 to allow public participation in the preparation of national environmental legislation, policies and programmes. This body failed to live up to expectations and most of the environmental NGO members, after being actively involved, came to see it as merely a cosmetic exercise and resigned almost two years after its creation. However, the Ministry of the Environment continues to mention this as the body which assures public involvement in the adoption of new legislation, policies and programmes, even though it has no representation of the main environmental NGOs and has not met for more than two years. On the other hand, at regional level it is possible to find some examples of better mechanisms and experiences due to a more positive political will to channel resources towards public participation.

Finally, and in connection with the principle of integration, it is worth mentioning another example related with public participation in the use of the Structural Funds. This participation is mentioned at Community level in the Regulation which sets out general provisions on the Structural Funds[90]. There are provisions regarding the need to incorporate social and economic actors as partners in the use of the funds, in application of the partnership principle. There are also provisions on the need to integrate the environment in fulfilment of the principle of compatibility, i.e. that the operations of the funds have to be adapted, among other things, to the protection and improvement of the environment. In Spain these provisions are being translated into practice at central level through the designation of the Economic and Social Council and the Network of Environmental Authorities as partners in the process. Neither of these bodies involves the participation of environmental NGOs, who have been completely left out. Moreover, from the Economic and Social Council's analysis of its own participation we can conclude that this is far from adequate. It was not involved in any of the preparatory process of the plans and it was only informed and requested to issue an opinion once the plans were finalised, with such short notice "*that it was impossible to make an analysis of the breadth and depth that this issue merits*"[91].

Access to justice

The adoption of new legislation regarding access to information and public participation has set the grounds for more fluent access to justice, at least in formal terms. However, the lack of widespread information on the rights to access to information and to participate, together with the already mentioned unreasonable costs involved, excessive length of procedures and lack of environmental awareness of judges, in practice access has been and still is very poor.

[85] Royal Decree Law 9/2000, 6 of October; and Order in Council 1302/1986, of 28 June, amending Order in Council 1302/1986, of 28 June, on environmental impact assessment.
[86] Commission's review on the implementation of Directive 85/337/EEC, from 1990 to the end of 1996. http://europa.eu.int/comm/environment/eia/eia-support.htm
[87] Already subject to an infringement proceeding opened by the European Commission.
[88] Commission's review on the implementation of Directive 85/337/EEC, from 1990 to the end of 1996. http://europa.eu.int/comm/environment/eia/eia-support.htm
[89] Directive 2001/42/EC of 27 June, on the assessment of the effects of certain plans and programmes on the environment.
[90] Council Regulation (EC) no. 1260/1999.
[91] For more detailed information see: Case study: Fisheries, Transparency and Participation. In: Proceedings of Fishing in the Dark: A Symposium on Access to Environmental Information and Government Accountability in Fishing Subsidy Programmes: 45-64. Ed.: WWF. Brussels (Belgium).

Dealing with some of these constraints we can give an explanatory example: in a case involving a request for access to environmental information on the state of a nuclear facility which was rejected by the Spanish nuclear regulatory body, the final decision from the competent court was issued almost 6 years after the first appeal was made[92]. Very few NGOs dare to face the cost of bringing cases before the courts in such conditions, because even if they succeed in obtaining a favourable decision, the information obtained more than 6 years after it was requested would probably be of no value to them. The current judicial system for appealing against refusals of access to information is so lengthy and costly that very few cases are brought before the Courts. People are simply not lodging appeals against refusals. Instead, they try alternative means, such as submitting a complaint to the European Commission or to the competent ombudsman in the hope that this they will lead to a positive decision in their interest. Although not so effective, in terms of enforceable decisions, these "alternative means" are cost-free and often not as lengthy as judicial procedures.

Cases have also been brought before the courts in relation with the public participation procedure in EIA. The key issue here is that there are no very specific legal provisions regarding the quality or minimum requirements to guarantee proper participation. Therefore, the courts have not been examining the content of the procedure but only checking whether public consultation is being carried out. If not, the EIA procedure is required to start again, even when the project has almost finalised. Cases of EIAs subject to judicial review also take a long time and final decisions are often made once the project has already been executed. The question of bonds is crucial in this field. To lodge an injunctive relief to halt the execution of a project until the court gives its final decision is prohibitively expensive. The courts tend to order an estimation of the costs involved for the promoters if the work stops until the decision is made. That figure is then imposed as the bond for the party requesting the works to be halted. Astonishingly, no evaluation is sought on the environmental damage caused if the final decision confirms that a poor EIA has been carried out. The result is clear: the project is not halted and by the time the final decision is made it makes no sense or is impossible to restore things to the previous situation.

Conclusions

Access to information[93]

As is underlined in the Commission's report on experience gained in the application of the Directive, numerous obstacles are detected in the Member States when analysing the experience gained in application of the Directive[94]. In Spain the following are particularly worthy of mention:

– lack of information to applicants regarding which body is competent to supply the information,
– non-compliance with the time limit established for resolving requests,
– the numerous cases of administrative silence that have been detected,
– the difficulty in accessing information in supposedly "sensitive" cases, which are liable to obtain a high level of social response,
– the lack of "available information" on matters in which the competent authority is obliged to compile data and information,
– the broad interpretation of some of the exceptions that are established, without internal criteria regarding interpretation or application, leading to different decisions even within the same department,
– the type of appeal established,
– the lack of sufficient training and information on the applicable legislation to the responsible authorities, especially those not considered "environmental authorities" but who are also obliged to provide environmental information, and finally
– the difficulties, within the responsible bodies themselves, to adequately provide the services requested or to respond to demands for information. At times the delay in responding or the lack of response is more a question of internal organisation or relationships between bodies with different competencies or territorial areas than the non-existence of information.

Public participation

Most of the constraints detected refer to lack of experience in the public participation process and lack of trust in its utility. Governments see it more as impeding or hindering their daily activities or usual way of doing things. And people see it as worthless, because in their experience their effort will at best lead to minor changes in the decision already taken. Specifically, the following constraints can be mentioned[95]:

– people are not aware or well informed about the available public participation procedures, their nature, possible outcomes and timescales;
– legislation dealing with public participation in environmental issues needs to be improved. On the one hand, all decision-making processes should involve public participation, i.e. the preparation and adoption of legislation, plans, programmes and policies. On the other

[92] For more detailed information see Sanchis, F. 2001. Case Access to Information on Nuclear Facilities in: Access to Justice Handbook. Ed.: REC. Hungary. (Pending publication).
[93] Text extracted from Sanchis, F. 2001. Case study: Fisheries, Transparency and Participation. In: Proceedings of Fishing in the Dark: A Symposium on Access to Environmental Information and Government Accountability in Fishing Subsidy Programmes: 45-64. Ed.: WWF. Brussels (Belgium).
[94] Commission Report to the Council and the European Parliament on Experience Gained in the Application of Council Directive 90/313/EEC, of 7 June 1990, on freedom of access to information on the environment. COM(2000) 400 final. Brussels, 29.06.2000.
[95] Regarding the issue of constraints see also Department of the Environment, Transport and the Regions. 2000. Public Participation in Making Local Environmental Decisions. The Aarhus Convention Newcastle Workshop. Good Practice Handbook. DETR. UK.

hand, legislation should be more precise and detailed, setting out minimum conditions required to achieve a proper public participation process, including:
  – identification of all public concerned,
  – adequate access and flow of useful and uderstandable information, early in the decision-making process, and including the background information used to base the proposed decision;
  – improvement of notification tools;
  – sufficient time limits to allow the preparation of sound comments;
  – sufficient technical support to participants;
  – need to explicitly incorporate the comments received in the final decision; and,
  – proper publication of the final decision made.
– lack of training of authorities leading or co-ordinating the public participation procedure;
– lack of capacity-building for environmental NGOs, consumers, neighbourhood and other actively interested community associations;
– lack of means and resources for facilitating real participatory processes in the environmental decision-making process.

Access to justice

As has already been noted, the constraints regarding access to justice are:
– the costs involved in accessing justice are unaffordable for most citizens and NGOs;
– the excessive length of procedures discourages potentially interested parties from starting a judicial procedure;
– the lack of environmental awareness and training of judges on environmental issues; and,
– the lack of resources for the courts to access technical support for cases subject to a judicial decision when they involve complex environmental issues such as air, water pollution, evaluation of environmental damage, assessment of possible environmental restoration, etc.

Possible solutions

Many of the constraints already seen above are connected with the need to improve the legal existing framework. As has already been mentioned, many of these needed changes would come through the incorporation of the Aarhus Convention provisions, once formally ratified; and through the transposition of different EU Directives, adapting and in some cases even improving the Aarhus Convention to Community environmental legislation. It is important to note that these provisions need to be incorporated not only at central but also at regional and local level; otherwise the effect in practice will never be accomplished.

Apart from this there is much scope for improvement in reality. As has been explained, the lack of legal background is not always the reason for failing to provide access to information, public participation and access to justice. Too often the key issue is the political will to enforce the existing legislation and to change minds and cultural behaviour in relation to these three issues. The attitude towards principle 10 is crucial to achieve a real improvement.

So, what can be done in this respect?

1) Preparation and dissemination of information about the advantages of implementing principle 10. This can be done thorough the publication of good explanatory examples.
2) Preparation and dissemination of information to the public on their rights and mechanisms for participation and access to justice on environmental matters.
3) Long-term training programmes to adequately prepare all authorities dealing with these issues.
4) Capacity-building programmes to assure the best conditions for potential parties to exercise these rights.
5) Allocation of sufficient funds within the annual budgets of the different administrations involved at all levels.
6) Preparation of regular reports, preferably annual, to identify legal and practical barriers and assess the best measures to overcome them.
7) Inclusion of evaluation reports on the results obtained and lessons learned from implementation of Principle 10 of the Rio Declaration in the annual reports on the state of the environment.

II. PRINCIPLE 15

The precautionary principle is not receiving serious analysis, debate or special attention in Spain. The development of the precautionary principle has followed the path set out by the European Union. Thus, until now its implementation has concentrated on the adoption of environmental legislation arising out of the precautionary approach at international level and within the Community framework.

This situation may improve thanks to the Commission's activity regarding clarification of the interpretation adopted when implementing the precautionary principle[96].

The precautionary principle is not often explicitly mentioned in our legislation or in environmental decision-making processes, even though it is tacitly used. Spain signs and ratifies environmental conventions and adopts legislation arising out of the precautionary principle concept. As an indicative example, the precautionary principle underlies the legislation adopted in relation with:
– Protection of the seas and management of fisheries. Spain has ratified different conventions dealing with this issue, including the United Nation Convention on the Law of the Sea[97], and a new Law on Fishery which tacitly incorporates the precautionary approach has very recently been approved[98].
– Protection of the ozone layer. Spain is a party to both the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol[99].

[96] Communication from the Commission on the Precautionary Principle. COM (2000) 1 final. Brussels, 2.2.2000.
[97] Ratified in December 1982.
[98] Law 3/2001, of 26 March, regulating fishery.
[99] In force in Spain since October 1988 and January 1989 respectively.

– Protection of biodiversity. Spain is also a party to the Convention on Biological Diversity, the Ramsar Convention[100], the CITES Convention[101], and other international agreements dealing with the protection of habitats and species[102]. It is also transposing, though with some delay, Community legislation dealing with the protection of habitats and species[103].
– Genetically modified organisms. Spain adopted several Community Directives through the Law 15/1994, of 3 June, on the legal framework on the contained use, deliberate release into the environment, and commercialisation of genetically modified organisms, aimed at preventing potential damage to human health and the environment[104].

In this new century the precautionary principle should be incorporated in all environmental policy. Scientific and technical progress allows the production and release of substances and living organisms whose effects on our environment are impossible to evaluate in due time. Previously the general principle was that almost everything was permitted to so-called human development until effective or potential damage was fully proven, and the burden of proof was on those suffering the adverse effect. At that time the Earth was seen as being capable of withstanding almost anything. This situation has changed a lot in recent years. The Rio Summit demonstrated that there are limits to unsustainable growth. The Earth is in danger, and thus environmental policy should not wait for irreversible effects to occur damaging human health and the environment. The precautionary principle approach should be fully applicable and the burden of proof should be imposed on those who promote potentially harming activities.

[100] Instrument of ratification dated 18 March 1982. Spain designated new sites in 1986.
[101] In force in Spain since August 1986.
[102] For instance Spain ratified the Protocol on Special Protected Areas and Biological Diversity in the Mediterranean Sea and its Annexes adopted in Barcelona on 10 June 1995 and Montecarlo on 24 November 1996.
[103] Law 40/1997 and Law 41/1997, of 5 November; amending the existing Law 4/1989 on the Conservation of Natural Spaces and Wild Flora and Fauna. And Royal Decree 1997/1995, of 7 December, on natural spaces that set out measures to assure biodiversity through the preservation of natural habitats and of wild flora and fauna.
[104] This law transposed Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms and Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms.

The European ECO Forum
(Pan-European Coalition of Environmental Citizens' Organisations)

The European ECO Forum is a broad, inclusive and open-ended coalition of sustainable development NGOs (environmental citizens' organisations as well as NGOs with related scope such as human rights, health organisations etc). All are interested in participating in the official 'Environment for Europe' processes, with the final goal of promoting sustainable development in Europe and globally. The goal of the coalition is to serve the NGO community and to facilitate the participation in these processes in order to strengthen our voice, whilst recognising valuable work done by individual organisations.

A number of specialised issue groups operate within the ECO Forum, including the Public Participation Campaigns Committee (PPCC) which co-ordinates ECO input into the Aarhus Convention processes (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters).

The European ECO Forum has a Coordination Board, a number of more specialised "Issue Groups", and a Coordination Unit (composed of the Secretariat and an Information Centre), based at ECO-Accord, Moscow, Russia. The main decision-making organ are plenary sessions at conferences. The meetings of all bodies as well as all working papers and the process of elaboration of positions are to open to the public (not only members).

ECO Forum website: www.eco-forum.org
E-mail: eco-forum@eco-forum.org
Chair: Victoria Elias (ECO-Accord, Moscow, velias@mail.ru)
Treasurer Mara Silina (EEB, Belgium, mara.silina@eeb.org)

Public Participation Campaign issue group:
Website: www.participate.org
Chair: John Hontelez (EEB, Belgium, hontelez@eeb.org)

Design by Juris Martins