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“Aarhus” Environmental Rights in Eastern Europe

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I. Introduction?

Not so very long ago, industrialized societies, both East and West, faced a situation of continuing rapid environmental degradation even after the adoption of command-and-control type environmental laws. In Western countries, led by the United States (US), a series of legal and policy responses helped to stem the tide. So-called second generation environmental laws included the application of economic instruments, emphasis on pollution prevention and reduction instead of end-of-pipe solutions, improved environmental impact assessment accounting for multi-media effects, and greater empowerment of the public in decisionmaking. A similar critical self-evaluation was next to impossible in the East. There, the official doctrine included the notion that socialism provided all possibilities for a harmonious development between society and nature.^[1] And socialism, as it was practiced, diminished the status of rules and standards vis-à-vis economic goals of production, had no means for introduction of market-based economic tools, and discouraged involvement of anyone other than specialists in decisionmaking.^[2] The rigid hierarchical Byzantine Wheel was characterized by excessive privileges, closed information and specialization, and an illusion of responsibility and control. On the other hand, social equality in theory was coupled with a highly educated and concerned populace.

The nuclear accident at Chernobyl was the ‘second shot heard round the world.’^[3] It took 18 days for Soviet leader Mikhail Gorbachev to back down under intense domestic and international pressure and pledge to make information about the disaster public, reportedly provoking a revolution in thinking in the Soviet press.^[4] He used the prescient phrase that the Soviet people had a right to know. Yet, officialdom was so unaccustomed to the truth that ordinary citizens and bureaucrats alike turned to the existing *samizdat* network as a means of dissemination. The explosion of environmental information in the wake of Chernobyl blew a hole in the totalitarian state by exposing an epidemic of false reporting and failed responsibility. Soon it was evident that authorities operated in a shroud of secrecy and lies whose main purpose was to justify their positions and obscure their own failures. What the public found was a level of endemic environmental degradation and intentional concealment that brought into question the sum of purported accomplishments of scientific socialism.^[5] Chernobyl became the symbol of the ultimate failure of the Soviet system to solve the problems of environmental protection imposed by rapid and uncontrolled industrialization.

As stability in Eastern Europe unravelled in the face of shocking revelations of endemic societal

failures in the wake of the Chernobyl accident, individual states and the international community took action. The Soviet Union entered into an intensive period of self-examination that led to major, although in the light of momentous events ultimately ineffectual, reform in the late Soviet period. These included the establishment of the first environment ministry headed by the first non-Communist Party member to ever lead a ministry in the Union of Soviet Socialist Republics (USSR), adoption of ecological expertise laws, and additional powers and special functions for public organizations in the field of the environment. Meanwhile, the dying breaths of communism could be felt in the infamous October 1989 Environment Conference of the Council on Security and Cooperation in Europe. Only Ceausescu's Romania blocked the meeting from affirming the rights of individuals, groups and organizations concerned with environmental issues to express freely their views, to associate with others, to peacefully assemble, as well as to obtain, publish and distribute information on these issues, while in the streets of Sofia outside the conference environmentalist demonstrators were being attacked by police.

The new constitutions of the USSR's successor states prominently included provisions on the right to a healthy environment, access to environmental information and the right to compensation for environmental harm. The importance of environmental information and public participation to democratic transition in Central and Eastern Europe was also recognized by the United States (US), the European Commission and Hungary when in 1990 they established a special mission-driven regional organization - The Regional Environmental Center for Central and Eastern Europe. But responses occurred also outside the former Eastern Bloc - the European Union (EU) adopted a Commission directive on access to environmental information. Principle 10 of the Rio Declaration confirmed global acceptance of the principles of access to environmental information, public participation in decision making and access to administrative and judicial procedures as being fundamental towards achieving sustainable development.[6]

New parliamentary democracies gave priority to fundamental restructuring through privatization, decentralization, and bureaucratic reform in the 1990s, while societies embarked on a 'Wild East' no-rules scramble for power and money. The promise of political freedom held within it the expectation of improved environmental conditions and greater self-control over the daily lives of ordinary people. These expectations often were disappointed in the actual process of transition, which involved economic disruption, establishment of new power elites for whom environment was not a major concern, and continued problems with corruption. Efforts at reform were blocked by a general mistrust of institutions, especially those involved in law enforcement. The breakdown of security structures also allowed long-simmering national disputes to crop up, many of them tinged with environmentalism. The *Gabcikovo-Nagymaros* case[7] was an example of how peoples dealt with the inherent contradictions exposed after countries were freed from the fetters of foreign domination. The roots of this case can be easily seen to lie in the different national/environmental approaches taken to the social upheaval of the late 1980s and early 1990s. Continuously in the background, giving legal effect to environmental rights also played a role in transition. The gradually strengthening environmental and sustainable development policy of the EU helped to keep environmental issues at the forefront of the process of EU accession, even in a period of fundamental change. Other important reinforcing factors included the entry into force of the Espoo Convention and jurisprudence of the European Court of Human Rights relating to Article 8 of the European Convention on Human Rights.

II. Environmental Advocacy

Progress was made in the advance of the rule of law and along with it, new rights and tools for access to justice in the environmental field appeared, so that in many cases, the conflicts resulting from disappointed expectations of environmental progress were played out in the courts or in administrative proceedings. The exercise of environmental rights requires from time to time the assistance and advice of professional lawyers. The presence of these rights in the new laws of the transitional countries in the 1990s gave rise to a small but dedicated environmental advocacy movement. Although working on the national level, lawyers shared experiences and tactics and gave

professional and moral support to each other through regional networks as early as 1994. This eventually led to the Guta Association,[8] named after the location in Ukraine where the first annual international conference on environmental advocacy was held in 1995. Shortly thereafter, environmental advocates were also supported through the extension to Eastern Europe of global networks such as Environmental Law Alliance Worldwide (ELAW).

The situation in Central and Eastern Europe (CEE) is in contrast to the situation in many 'old' EU member states, where expectations were not significantly raised and where long-term stability meant that the scope of legal action was better defined, simplifying the resolution of disputes. One reflection of the difference has been the greater prevalence of environmental public advocacy organizations or individual lawyers in the new member states in comparison with old member states, where such activities are still rare.

The use of environmental rights in the New Member States has been a magnet especially for dynamic lawyers young and old concerned with fundamental issues of restructuring societies, who are aware of the important role played by these rights in democratization and transition. It is no wonder that such advocates tend to think of their roles as going beyond mere lawyering to include training of various societal actors, including judges and prosecutors, in 'new' concepts. This crusade often extends also to law students since the number of environmental advocates rivals the number of environmental law professors in these countries. In-house legal counsel is extremely rare for environmental NGOs, supporting the development of environmental advocacy centers. These centers also are focal points for provision of international assistance, *inter alia*, for implementation of the United Nations Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).[9]

III. The Aarhus Convention

The coming into force of the Aarhus Convention in 2001 was a major milestone in the transformation of CEE societies, standing alongside membership in the Council of Europe, North Atlantic Treaty Organization (NATO) and the EU. The Aarhus Convention differs from the extension of those human rights, security and economic umbrellas, however, in that it was born from the ashes of our more recent history. Moreover, as a UN/ECE convention, the Aarhus Convention has the broadest geographical scope of any of these, and therefore the greatest potential to unite peoples from East and West. It is the pan-European law and policy response to the exposed failures of a system that held much of Europe in its sway for most of the twentieth century, failures which could be pinpointed in the three pillars of the Convention – information, participation and justice.

The Aarhus Convention was not the impetus behind the adoption of laws relating to information, participation and justice in environmental matters in the countries emerging from Soviet domination. In many cases laws containing such provisions were among the first adopted by new parliaments. The Aarhus Convention is more significant, rather, in that it was the first international agreement that derived substantially from the circumstances of transition. This is implicit in the description of the Convention as an 'ambitious venture in the area of "environmental democracy."'[10] It is thus a model for other parts of the world where issues such as 'environmental democracy' are relevant towards opening up democratic processes more generally. The Convention marked a different kind of turning point in respect of pan-European environmental law development. Transition for Central and Eastern Europe has on the surface involved an extension of certain political principles and institutional arrangements from West to East. Yet, not far under the surface is the realization that certain lessons learned from transition can be applied in the other direction. Issues around which initiatives have been formed include everything from strategic environmental assessment to packaging, from food security and safety to urban transportation and sprawl. The Aarhus Convention is a stark example of the distillation of lessons learned from the history of Eastern Europe that is leading to reforms in the EU as well.

The Convention has had a comparatively bigger impact on the legislation of Western Europe than that of Eastern Europe. Several European Community (EC) Directives have had to be amended to be brought into conformity with it. The open standing rules common in CITs will soon be applicable throughout the EU. The pace of ratifications has confirmed the greater difficulty of Western states to adjust their legislation to the convention requirements.[11] On the international level, the Aarhus Convention through its clear connection between environment and human rights, has extended the general recognition of NGOs as international legal persons in the field of international human rights law[12] to the environment as well. The Aarhus Convention Compliance Committee, in which members serve in their personal capacity, is the first environmental compliance mechanism based on human rights models.

The Aarhus Convention was negotiated between 1996 and 1998 and adopted at the Fourth Ministerial Conference 'Environment for Europe' in Aarhus, Denmark that same year, a period of uncertainty and change throughout the countries in transition. Early in the negotiations, Western governments generally were unprepared for Eastern European governments having recently adopted framework environmental laws that included rather highly developed provisions on information and participation. The Russian Federation delegation even expressed concern that the convention might actually have the effect of *reducing* the rights of its own citizens.[13] In the debate concerning the inclusion of references to a basic right to a healthy environment proposed by Belgium, general agreement was heard from Eastern European countries with new constitutions, whereas many Western European countries that had not revised their constitutions for some time could not automatically support such provisions. Many Eastern European countries also had less difficulty than some Western European countries in supporting short time frames for responding to information requests. During negotiations, those countries singled out by Non Governmental Organizations (NGOs) as taking conservative stances included the Russian Federation, Germany, France, Italy and the United Kingdom.[14] While the negotiations were underway Germany, for example, was defending itself before the European Court of Justice (ECJ) for improper application of the uncompleted proceedings' exception to EC Directive 90/313 on Access to Environmental Information.[15] Those taking 'progressive' stances included Albania, Belgium, Poland and the Nordic countries.[16] The countries in transition, in particular those from Central and Eastern Europe, also had a larger proportion of NGO representatives as members of the official delegations.

The negotiations gave voice to several debates on fundamental issues related to environment, democracy and basic rights and illuminated differences in outlooks and values. The NGO Coalition delegation, consisting of two representatives of Western NGOs and two of Eastern ones,[17] several times failed to articulate single positions where understandings differed. An example was its position on the public nature of documents, horizontal (i.e., covering all areas of administration) information accessibility, and access to environmental information specifically. Western European NGOs who relied upon the EC Directive pushed for very specific advances through the Convention. CEE NGOs looked at the Convention as it related to horizontal information laws as well, while NIS/EECCA NGOs did not wish to be limited by too strict adherence to EU norms. Another debate related to the 'ownership' of information held by authorities in the public service, having an impact on whether access to information meant access to raw data or to processed information. Certain countries also struggled with the subject matter of the Convention.[18]

IV. Access to Justice

Of the three pillars the most difficult to deal with on an international level is access to justice. The Second Meeting of the Signatories of the Aarhus Convention established a Task Force on Access to Justice at its second meeting in Cavtat, Croatia, on 5 July 2000.[19] Estonia served as lead country. Indicative of the sensitivities of states with regard to discussing access to justice in international fora, the mandate of the Task Force was limited at the behest of several countries. Whereas typically task forces may be charged with the development of standards, guidelines and other instruments to aid in compliance with and implementation of provisions under international agreements, the Access to Justice Task Force was given the task to :

‘focus on means of practical implementation ... rather than engage in efforts to extend or refine the legal framework provided by the Convention. It should gather information on good practices and provide a forum for exchange of experience An effort should be made to provide models, concrete solutions, and problem-solving approaches in the implementation of article 9.’[20]

The main output of this first task force on access to justice led by Estonia[21] was the ‘Handbook on Access to Justice under the Aarhus Convention.’[22] The idea of the Handbook was to collect cases from ECE Member States to illustrate the types of issues that could be raised under the Convention, to share experience on how cases had been handled by national justice systems, and to draw upon these cases to provide commentary and analysis on issues related to access to justice under the Convention. Although systematic, the collection of cases for the Handbook was not comprehensive. Most cases were collected following announcements through various existing networks, including the network of governmental Aarhus Convention focal points and networks and databases of public interest environmental lawyers. A number of cases from Central and Eastern Europe (at that time including eight countries that became New Member States of the EU) and the Commonwealth of Independent States, were generated through a Sub-Regional Case Study Development Meeting, held in Lviv, Ukraine, June 4-5, 2001. Finally, several cases were identified through research by the authors. Naturally, as the cases occurred prior to the coming into force of the Aarhus Convention, they relate to matters covered by the subject matter of the Convention, rather than its application.

The results of this compilation and the attendant analysis support the conclusion that the types of environmental cases brought in the new Member States and other transitional societies differ significantly from cases brought in the current Member States. In particular, the issues at the heart of the Aarhus Convention are closely related to the everyday disputes in countries in transition about the directions that their societies are moving in. Highlights of some of the cases from the Handbook, and from the activities of environmental advocacy organizations, provide illustrations.

V. Access to Information cases

A group of access to information cases from Ukraine serve to illustrate some of the typical examples of cases in this area from countries in transition. As early as 1995 advocates made use of the provisions of the environmental law to request information from authorities on environmental matters. That year, a case related to the potential health effects of the illegal and uncontrolled burning of chemicals as a cheap substitute for pesticides resulted in the first recorded satisfaction of an environmental information request, made to a regional health inspectorate. This followed the failure of the lower body to answer a similar request within the time specified by law.

Other cases required access to courts rather than to higher administrative authorities. In a case in Hungary, *Kovari v. Environmental Inspectorate of Northern Hungary*, a citizen sought information related to air and noise emissions of a metal waste reprocessing plant. The request was initially denied on the grounds that the plaintiff did not have standing in any decision making relating to the company’s emissions. Based on Hungarian law,[23] the plaintiff argued that information was required to be available to anyone acting in the public interest, not only those with legal standing in a related matter. The City Court of Miskolc found in favour of the plaintiff. The defendant appealed on the grounds that the requested information formed the basis for making administrative decisions, and thus the preparatory nature of the information prevented its disclosure. The County Court upheld the decision of the lower court.

In the *Reznikov* case, a citizen who had requested environmental health information concerning the construction of a petrol station on the banks of a river in Khmelnytsky had to go to court to get an order that the information be provided. Yet, the plaintiff faced an additional hurdle in that the City Court clerk originally refused to register his complaint for consideration. Only media attention resulted in the court taking action.

One reason that courts may be reluctant to take such cases is that a determination that a particular

authority has not complied with a legal requirement, for example to provide information, may give rise to disciplinary actions against that authority and the imposition of financial penalties. Where information requests are rare and a practice has not been developed, courts are reluctant to punish otherwise responsible officials. In the case of *Ecopravo-lviv v. State Geology Committee*, an NGO requested geological information and copies of a licensing agreement to be able to participate in decision making concerning construction of an oilfield in a protected water reservoir area. The State Geology Committee ignored or denied repeated requests. Before the court the defendant made certain submissions concerning its denial of the information request. The court ruled that the information should be provided, but urged the defendant to provide the information 'of its own free will' prior to a judgment in order to avoid a disciplinary penalty. The defendant 'reluctantly' complied and only had to pay court costs.

Many cases include the issue of 'ownership' of information. As state institutes faced budget cuts many attempted to charge fees for the provision of information that would normally be considered in the public domain. Private enterprises also often use ownership arguments to attempt to restrict access to information held by them. In fact, public bodies have sometimes refused to disclose information about emissions and other environmental information on the grounds that it was submitted by a private enterprise. The unclear status of formerly state-run enterprises that may have substantial state control and strategic value contributes to the confusion. In the case of *Ecopravo-lviv v. Brodyvodocanal*, an NGO appealed the denial of an information request from a communal enterprise on the boundaries and sanitary protection zones of groundwater intake, plans for providing good quality water, plans for systematic laboratory control of water quality, and the state of relevant water resources. The enterprise argued that the information was commercial rather than environmental. The decision also turned on whether the NGO had to state its interest in receiving the information. The court accepted the plaintiff's arguments that it did not need to show an interest, that the requested information was within the scope of the Water Code and the Law on Environmental Protection of Ukraine, and that information related to permits for specific water usage or contained on submissions for mandatory reporting requirements to authorities could not be considered commercial secrets. The defendant was ordered to provide the requested information.

The right of an environmental NGO to criticize public officials was recently upheld in a decision of the European Court of Human Rights (ECtHR). The ECtHR found that a Latvian court decision allowing a mayor to sustain an action for defamation against an environmental NGO that accused him of presiding over a series of illegal decisions was a violation of Article 10 of the European Convention on Human Rights (ECHR) on freedom of expression. After Latvian courts had held that the NGO had not proved its charges and ordered it to publish an official apology and pay damages, it took the case to the ECHR. In the case of *Vides Aizsardzibas Klubs v. Latvia*, Case No. 57829/00, the Court noted that the NGO carried out the role of a watchdog on environmental matters, an essential function in a democratic society. To play its role effectively, the NGO needed to be able to impart information of public interest and give its assessment to shed light on the activities of public authorities.

VI. Public Participation Cases

Standing has proven to be a major topic of jurisprudence relating to public participation in environmental decisionmaking in Central and Eastern Europe. Whereas western countries have had many years to develop the law and practice related to standing, formerly socialist countries had broad, but relatively meaningless, standing provisions until recently. That is, public organizations had possibilities to participate in decision making and appeals, but without effective formal legal guarantees. The standing of environmental NGOs to participate in decisionmaking was denied in a series of cases in Czech Republic, Hungary and Slovakia. In the Czech Republic, an NGO challenged a logging permit that allowed an exception to the Landscape and Nature Protection Act by permitting logging in an area with a species protection regime. The High Court in Prague held that the NGO did not have standing to challenge the decision 'because NGOs have no substantive rights in similar administrative processes.' It should be noted that this decision could not be sustained after the

coming into force of the Aarhus Convention for Czech Republic. Incidentally, the actions of the permitting authority were later found to be illegal by the National Environmental Monitoring Agency.

The Constitutional Court of Slovenia, meanwhile, recognized the standing of an environmental NGO and individuals to challenge the legality of a development plan, basing its decision in part on the right to a healthy environment and the corresponding duty to protect the environment. Article 4(3) of the Environmental Protection Act provides that protection of the environment is, *inter alia*, the responsibility of professional and other NGOs for environmental protection. The standing of the individual was based on Article 72 of the Constitution pertaining to the right to a healthy environment. The court held that every person has an interest in protecting the environment, and that this interest is not limited to the environment close to the place where he/she lives or to the prevention of imminent harm. The court invalidated the development plan in question.

Several cases have resulted in the invalidation of EIAs on procedural or substantive grounds, sometimes requiring construction to be halted or operations to cease while new ones are carried out. Many other cases have dealt with the construction of motorways. Such cases have arisen in Czech Republic, Hungary and Poland. In *Somogy Nature Conservation Organization v. Ministry of Traffic, Telecommunication and Water Management of Hungary*, for example, an NGO sought court review of the decision of a ministry to deny it standing to challenge the issuance of a permit for a motorway in Southwestern Hungary that would route it through a forest. The Ministry had held that, although the state environmental authorities had participated in the decisionmaking, the case was not an 'environmental' one as defined by the Hungarian Environmental Protection Act. Ultimately the Hungarian Supreme Court decided that environmental NGOs had no standing to challenge government decisions in matters not explicitly authorized under Hungarian environmental law (i.e., Environmental Impact Assessments (EIAs) or environmental audits).

Czech NGOs challenged procedures relating to the permitting of the construction of the D8 motorway through a protected area and a nature park. Having failed at challenging alleged deficiencies during EIA procedures for sections of the highway, the NGOs also sought to challenge a determination by the Ministry of Environment and the District Planning Office that the planned route could be permitted. In each case judicial review was denied on the grounds that only a final permit could be challenged. In Poland, residents of the Muchobor Maly housing estate next to a planned highway construction succeeded in obtaining a Supreme Administrative Court ruling that the local building and land management conditions in the plans to build the highway were illegal. However, construction continued since under Polish law the invalidation of the conditions did not automatically invalidate prior permits issued on the basis of the conditions.

Some courts have failed to distinguish between procedural and substantive law. In Bulgaria a group of NGOs challenged a positive EIA determination of the Ministry of Environment and Waters with respect to a proposed ski development in a national park. The Ministry had approved the EIA conditionally upon certain amendments. The NGOs challenged the final approval of the Ministry on the grounds that the amended version of the plan and EIA had not been submitted to public discussion as required by Article 23a of the Environmental Protection Act. The court in its decision reiterated that the original EIA had been submitted for public discussion, and embarked upon a substantive review of the project, noting, for example, that the project would not result in the destruction of an entire species and clear-cutting would be minimal. The decision was upheld on appeal. Meanwhile, the NGOs have focussed their efforts on additional EIAs that have been undertaken with respect to elements of the project. In another Bulgarian case – *Petrov v. Blaguiev* – a court of first instance failed to consider the lack of an EIA in relation to a decision of the Ministry of Environment and Waters to issue a permit for the disposal of copper mine tailings using stabilized sewage sludge.

A surprising number of cases in countries in transition have had to do with illegal construction of offices, churches, villas or hotels in formerly protected parklands, often in urban centers. Members of the public have attempted to require legal procedures to be followed, in particular environmental impact assessment. Due to the vested interests involved, some of these attempts have failed. Armenia, Georgia and Moldova are three countries where such cases have been found. Construction

of a hotel complex in Yerevan's Victory Park could not be stopped through legal channels, as courts dismissed lawsuits on technical grounds without hearing the merits. A similar project in Vake Park in Tbilisi was at least interrupted when a court issued a temporary injunction suspending a permit to build a hotel. However, the individual plaintiff, supported by Friends of the Earth, refused to prosecute the case further after his family was threatened. In Chisinau, Moldova, construction of a parking lot in a city park was temporarily halted by a legal challenge. Ultimately the courts found that there was no basis to halt construction since plaintiffs had based their arguments on a Land Code that had not yet come into force at the time the municipality's permit was issued. In parallel, they appealed informally to the Ministry of Environment which determined that the land in question should remain part of the green space area of Chisinau under the Law on Green Spaces. Construction continued after this determination, however. Finally, NGOs and residents of a district near Neskuchnyi Sad park in Moscow succeeded in using the courts to invalidate decrees of the Moscow City Government reducing the area of the park and transferring ownership of a portion of land to a development company on the basis that no environmental information had been provided and no EIA had been conducted as required by law, and generally on the right to a healthy environment. After the lower courts decided against the residents, the Supreme Court of the Russian Federation on appeal ordered a rehearing by a different city court panel, citing bias. After the second city court panel ruled in a similar fashion, the Supreme Court, again on appeal, ordered a third hearing. The Moscow City Court then ruled in favour of the NGOs and residents, stating that the decrees of the Moscow City Government were illegal. An appeal by the construction company was rejected by the Supreme Court.

Cases interpreting the right to a healthy environment have also arisen in the New Member States. The decision of the Constitutional Court of Slovenia stating that the right to a healthy environment means at least the right to go to court is just one example. Another significant one is the decision of the Constitutional Court of Hungary in the *Protected Forests* case. This case interpreted the Hungarian Constitution to require authorities to guarantee an objectively high level of protection of the environment. Considering the liberal standing provisions of the Constitutional Court, this ruling gives the possibility for citizens and NGOs to challenge legislative and other acts that diminish established standards of environmental protection.

VII. Fundamentals of Justice

The cases reviewed in the Handbook lead to the conclusion that several obstacles need to be surmounted for access to justice to be effective and widely used. While New Member States of the EU may be more advanced than Eastern and Southern neighbors, problems still remain. The use of injunctive relief is still comparatively rare, sometimes resulting in the destruction of the subject of the dispute. The execution of court decisions and their relationship to collateral matters is not well developed and may lead to a similar result as administrative bodies or private persons fail to follow court decisions. In some countries the courts have tended to side with authorities, perpetuating the perception that they are not truly independent and therefore not a place for real justice. The incestuous relationship between courts and executive authorities is especially pernicious on the local level, to the extent that lower courts sometimes show contempt for higher court decisions.

Financial barriers also play a role. The requirement that plaintiffs pay a sum into court when requesting it to order the cessation of construction is a major barrier to the use of legal tools by citizens and NGOs to challenge illegal permits. Bonding requirements are imposed even where the action complained of is an illegal act by authorities in permitting. Citizens, courts and sympathetic authorities are all stymied by a general lack of resources, especially when required to substantiate claims based on complex determinations of a technical nature, such as when seemingly simple cases of illegal procedures are turned on the substantive merits of projects. Finally, even in the most stable societies, various forms of intimidation can force conscientious citizens off their course. In less stable situations, intimidation can take very serious forms.

These obstacles are increasingly being overcome. A major factor in the development of law and

practice is its internationalization through the Aarhus Convention and the jurisprudence of constitutional courts and the ECJ. Networks of environmental advocates also play their role in sharing unreported court decisions, tactics and strategies. The standards set by the Convention, rooted in the circumstances of transitional societies, serve as the benchmark against which reformed countries in transition can be measured.

VIII. Cases before the Aarhus Convention Compliance Committee

The establishment of a Compliance Committee was mandated under Article 15 of the Aarhus Convention. It was formally established by a decision taken at the first meeting of the parties in Lucca, Italy in October 2002. Members (8) serve in a personal capacity and include jurists, independent NGO representatives and governmental authorities. They must be nationals of a state party. Although elected by the Parties, they can be nominated by observers, including NGOs.

The Compliance Committee considers a range of matters from various sources. Parties can make submissions concerning their own compliance or that of another Party. The Secretariat can refer matters to the Committee when a Party does not respond to inquiries, and the Committee can receive communications from members of the public. Concerning the latter, the members of the public bringing action have a right to participate in the hearing, and a Party has five months to respond.

While typically the MOP decides on cases of non-compliance, the Committee does hold certain important powers, including information-gathering, the use of experts, the power to report to the MOP, the right to provide advice and facilitate assistance. Beyond these inherent powers, the Committee has additional powers when the subject Party agrees, to make recommendations on steps to be taken to achieve compliance and to request the Party to submit a compliance strategy. On the basis of a report by the Committee, the MOP may take any of the measures referred to above relating to the powers of the Committee, and may also, as appropriate, declare non-compliance, issue a caution, suspend a Party, or take “other measures.”

Cases brought to the Compliance Committee should be analyzed on the basis of certain criteria in determining whether action should be taken. These include whether there is a “problem of non-compliance,” the course of consultation or agreement with the Party, the urgency of the case, and the cause, frequency and degree of non-compliance. Authoritative references used by the Committee include the Aarhus Implementation Guide and scientific articles.

October 23, 2003 was the first date upon which the public had the opportunity to make communications to the Committee. Prior to this date, five submissions were made, and all were rejected, because they were made early, and also were made with respect to states that were not parties to the Convention. The fourth meeting of the Compliance Committee, in May 2004, was the first in which communications from the public were considered. Between the third and fourth meetings, five submissions were received from the public, involving alleged non-compliance of Kazakhstan (2 cases), Ukraine, Hungary and Turkmenistan. Interestingly, the complaint against Turkmenistan was lodged by a Moldovan NGO. Four additional communications from the public were received prior to the fifth meeting (September 2004), concerning Kazakhstan, Poland, and Armenia (2 cases).

The cases under consideration so far by the Compliance Committee have covered a wide range of issues under the Convention. Many are procedural, for example relating to the failure to provide information upon request,^[24] and opportunities for participation in decision-making relating to permitting,^[25] covered by Article 6 of the Convention, and urban planning and zoning, covered by Article 7 of the Convention, and tendering.^[26] The Aarhus Convention’s requirements to grant standing to environmental NGOs under certain conditions have also not been respected, according to some complaints from the public.^[27] The treatment by a government of civil society organizations

has also come under attack in a complaint lodged against Turkmenistan,[28] which questions the validity of the Law on Public Associations of 2003. This law established a new regime for registration, operation and termination of non-governmental organizations that alleging is in breach of Aarhus treaty obligations found in Article 3, paragraphs 4 and 9.

Others relate to fundamental requirements for justice, which in a sense mirrors certain aspects of the work of the European Court of Human Rights. An example is Communication ACCC/C/2004/06 (Kazakhstan), which deals with failures of the judicial system to provide due process. In that case the court allegedly postponed a lawsuit without sufficient reason, resumed consideration of the case without notifying the plaintiffs of the hearing, and failed to supply the plaintiffs with the decision taken in their absence. The same case deals with whether a plaintiff can make a claim based on the alleged failure by the public authorities to act.

It is also interesting to note that all the cases submitted so far (as well as the one case submitted by a Party – Romania with respect to Ukraine) involve countries that at least until recently were called “Countries in Transition.” Two of the cases relate to EU Member States, but these are among the so-called New Member States that were a part of the Eastern Bloc and the CEE region prior to their accession. Consistent with the results of the Handbook case survey, one of these cases involves highway construction, a major post-socialist issue in the New Member States.[29]

IX. Conclusion

The last fifteen years in Central and Eastern Europe have been dominated by the transfer of experience and concepts from West to East to achieve social and institutional reform – in particular in relation to the membership of many of the countries in the EU. Often lost in the shuffle are the valuable lessons that may be learned from the region that are of potential relevance on the pan-European or even global level. As the daunting tasks of membership become more and more urgent, the minor attention paid to the ‘laboratory’ of ideas and values in CEE has faded even farther into the mist. However, now that EU membership is a *fait accompli*, a pressure valve has been released, and the bubbling cauldron of competing values, shared history, and varied traditions will rise again to the surface.

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[1] See, G. P. van den Berg, *A comment to the 1993 Constitution of the Russian Federation* (1996, draft) (available in electronic form from Institute for Eastern European and Russian Studies, Leiden University) at [42.I].

[2] The most ambitious environmental law reform of any Eastern Bloc country during this period took place in Poland, where the 1980 environmental law included provisions for enhanced powers and responsibilities of officially-recognized, syndicate-type public organizations. Environmental Protection Act of 1980 (EPA, 1980), OJ 1980 Nr 3, item 80 (Dz. U. nr 3, poz. 80) 31.01.1980.

[3] In history, ‘the shot heard round the world’ referred to the charge shot off from the ship *Avrova* in Petrograd harbour in 1917 that signalled the start of the Russian Revolution and was supposed to lead to global communism.

[4] An insightful article on the fifth anniversary of the disaster noted that Chernobyl ‘finally destroyed -- both in the Soviet Union itself and for outsiders -- the myth of Soviet technological

infallibility, and any remaining belief in the honesty of Soviet officialdom.’ ‘Not Just a Nuclear Explosion’, *The Economist*, 27 April 1991, p 19.

[5] ‘ A society long given to the use of self-descriptive superlatives came to see itself not as the world’s best but as the most polluted, most incapacitated . . . Its self-inflicted social and ecological wounds, compounding and compounded by its economic and political failures, sapped Soviet military strength and undermined Moscow’s pretense to global influence.’ M. Feshbach and A. Friendly, *Ecocide in the USSR* (New York: BasicBooks, 1992), at 11.

[6] UNCED, 1992, Rio Declaration on Environment and Development

[7] Case Concerning the Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia.*), (1998) 37 *International Legal Materials* 162[, 162.

[8] Environmental Law Association of Central and Eastern Europe and the Newly Independent States (Guta Association).

[9] Aarhus (Denmark), 25 June 1998 (entered into force 30 Oct. 2001), (1999) 38 *International Legal Materials* 3, 517.

[10] Kofi A. Annan, Foreword, at v, in United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (New York and Geneva: United Nations, 2000).

[11] Published on the Internet at www.aarhusconvention.org.

[12] See Ph. Sands, ‘Enforcing Environmental Security’, in Ph. Sands (ed.), *Greening International Law* (London: Earthscan, 1993) 50-64, 55.

[13] This was in part due to the unclear effect of provisions that the convention established a ‘floor’ beyond which parties were free to go. See S. Stec, ‘Access to Information and Public Participation in Environmental Decision-Making in the Commonwealth of Independent States,’ (1997) 23 *Review of Central and East European Law*, 355 at 359-60.

[14] See J. Wates, ‘The Public Participation Convention – Progress Report on the Negotiation,’ *Environmental Law Network International*, ELNI, 1:97, 29-32, at 30.

[15] Case C-217/97, Commission of the European Communities v Federal Republic of Germany. Failure of a Member State to fulfil obligations under Directive 90/313/EEC, http://www.europa.eu.int/eur-lex/en/search/search_case.html

[16] Ibid.

[17] The author was legal advisor to the NGO Coalition delegation during the first eight negotiating sessions.

[18] A thorough study of the positions of the Russian Federation during the two years of negotiations – a period of intense restructuring – would be particularly illuminating due to its obvious relationship to the historical precedents of the Aarhus Convention. As mentioned above, at times it seemed to take a progressive view with respect to the rights of its citizens. But it always remained sceptical of the ‘internationalization’ of what it considered national matters, unless the benefits to Russia were clear. One example is illustrative. At one point the Russian Federation sought a convention that would allow only citizens of states parties to gain access to environmental information from each others’ authorities. The Russian government planned to use this regime to gain access to valuable information held by other states parties, including what might be considered in the Russian context to be state secrets. The Russian government also planned to avoid reciprocity on two grounds. The first was the narrower definition of state secrets under the laws of most western democracies. The second was the existence of a special Russian Federation law governing the status of foreigners.

Under this law the activities of foreigners, including access to state structures and state information, are restricted. The government believed that the *lex specialis* would control whether a foreigner could have access to specific information, regardless of the provisions of the Convention. Portions of the above are taken from conversations with members of the Russian Delegation, Geneva, 1996-97. To this end, the delegation continually took the position that provisions must be ‘ in accordance with national legislation,’ in order to preserve the status of the *lex specialis* on status of foreigners beyond any doubt.

[19] UN Doc. CEP/WG.5/2000/2 (19 July 2000), par. 46.

[20] UN Doc. CEP/WG.5/2000/2 (19 July 2000), par. 47.

[21] See UN Doc. MP.PP/WG.1/2003/3 (26 June 2003), par. 49. This task force was eventually superseded by a similar task force established by the First Meeting of the Parties. See UN Doc. ECE/MP.PP/2/Add.6 (2 April 2004).

[22] S. Stec (ed.), *Handbook On Access To Justice Under The Aarhus Convention* Szentendre (The Regional Environmental Center), 2003 (hereinafter, ‘ Handbook’).

[23] Act No. LXIII of 1992 on Protection of Personal Data and Disclosure of Data of Public Interest, 1 May 1993; <http://www.obh.hu/adatved/indexek/AVTV-EN.htm>,

[24] See, e.g., Communication ACCC/C/2004/01 (Kazakhstan); Communication ACCC/C/2004/09 (Armenia).

[25] Communication ACCC/C/2004/02 (Kazakhstan); Communication ACCC/C/2004/03 (Ukraine)

[26] See, e.g., Communication ACCC/C/2004/08 (Armenia).

[27] See, e.g., Communication ACCC/C/2004/01 (Kazakhstan)

[28] Communication ACCC/C/2004/05.

[29] See Communication ACCC/C/2004/04 (Hungary)