



The Public Participation Convention and Export Credit Agencies

Center for International Environmental Law (CIEL) Working Paper
By Claudia Saladin



What is the Public Participation Convention?



The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Public Participation Convention)¹ is an international treaty negotiated by the member countries of the United Nations Economic Commission for Europe (UNECE)². It was opened for signature at the UNECE Ministerial Conference "Environment for Europe" in June 1998. It currently has 40 signatories, but has not yet entered into force.



The Convention grows out of an international process to define the concept of public participation in the context of sustainable development. The Convention is organized around three pillars. Broadly stated, these pillars are:



- **access to information:** that the public should have access to environmental information, with limited, explicit exceptions;
- **access to decision-making:** that the public should have a right to participate in the environmental decision-making process and have that participation taken into account; and
- **access to justice:** that the public should ultimately have access to an independent and impartial review process, capable of binding public authorities, to allege their rights have been infringed.



The Convention basically requires that countries implement measures that would require basic transparency and accountability of their public authorities. Arguably these provisions should apply to export credit agencies as well. This paper will discuss the basic provisions of the Public Participation Convention and its potential applicability to export credit agencies (ECAs).

Access to Information

Articles 4 and 5 of the Convention concern access to information. Article 4 deals with access to environmental information and requires each Party to ensure that public authorities will make information available to the public when requested. The Convention lays out timeframes for responding to requests. It also stipulates that refusals to provide information should be in writing and should state the reasons for the refusal. Under the Convention a requestor need not show an interest - that is, an economic or other stake - in the information they are requesting. The Convention also allows public authorities to make reasonable charges for supplying information, subject to an established schedule.

Article 4 creates a presumption in favor of information disclosure. Public authorities can only deny a request for information on the basis of a list of specific grounds for refusal. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure. Some of the grounds for refusal are more limited than others. For example, a public authority has an unqualified right to deny a request for information where the public authority does not hold the requested information (art. 4.3(a)). In addition, a

public authority may refuse to disclose of information that would impair the ability of a person to receive a fair trial, or would adversely affect national defense or public security. In such cases, the only requirement imposed on public authorities is to interpret the restriction narrowly and to balance the interest to be protected against the public's interest in disclosure (arts. 4.4(c) & 4.4(b)).

Some grounds for refusal are qualified, however. Thus a public authority may only deny an information request that would adversely affect the confidentiality of commercial and industrial information "where such confidentiality is protected by law in order to protect a legitimate economic interest" (art 4.4(d)). Where the grounds for denying a request is that disclosure would adversely affect the confidentiality of the proceedings of public authorities, "such confidentiality [must be] provided for under national law" (art. 4.4(a)). Finally, a request for information may be refused if the material is in the course of completion or concerns internal communications of public authorities, "where such an exemption is provided for in national law or customary practice" (art. 4.3(c)). These qualifications demonstrate that these interests of public authorities are not absolute and should be strictly limited by domestic law. The goal is to ensure that the grounds for denial of information are clearly established in national law, and that the grounds for withholding information are not subverted into the means of providing a blanket refusal. Denials of requests for information must be subject to review consistent with the access to justice provisions of the Convention.

Article 5 of the Convention requires Parties to ensure that public authorities, collect, retain and disseminate information on the state of the environment. This article addresses such issues as having information for emergency preparedness and response in the event of an accident, publishing and disseminating regular reports on the state of the environment, and establish reporting systems for activities that may significantly affect the environment.

Access to Decision-Making

Environmental decision-making occurs at different levels and the Convention lays out slightly different procedures for the different types of decision-making. Article 6 addresses decisions on certain activities deemed likely to significantly affect to environment, for example whether to allow construction of a power plant. For these decisions it mandates the most comprehensive set of procedural requirements. Annex I lists those activities which must be subject to the requirements laid out in article 6, while leaving it to the discretion of the Parties whether to apply article 6 to decisions on other activities that may significantly impact the environment.

Article 7 address the adoption of policies, programs and plans relating to the environment Article 8 addresses the adoption of executive regulations and other generally applicable, legally binding normative instruments. Articles 7 and 8 provide fewer procedural standards than does article 6.

There are certain common elements for all types of decisions. Notice of the pending decision-making process should come early enough for effective participation, i.e. when options are still open. The public should be able to provide comments or input into the process. All three articles on decision-making require public authorities to take public participation into account in the final decision.

Article 6 lays out in a fair amount of detail the type of information to be included in the notice to the concerned public. Notice must also be made in a way reasonably calculated to reach the public in general, but more importantly that portion of the public most directly interested in and affected by the decision to be made ("the public concerned") (art. 6.2). Final decisions be in writing and state the reasons for the decision (art 6.9). Failure to take

public input into consideration is a basis for challenging the outcome of the decision-making process under the access to justice provisions of the Convention (art. 9.2).

Access to Justice The Convention requires three types of access to justice (art. 9):

- enforceability of the access to information provisions;
- enforceability of the decision-making provisions; and
- enforceability of substantive environmental law.

In order for the right of access to justice to be truly effective, the rules on standing - the criteria a potential plaintiff must meet in order to be allowed to sue to enforce a particular right - should be sufficient to allow any member of the public having an interest in a matter or being affected or potentially affected by a matter to have standing. Ideally an international instrument purporting to implement the right of access to justice would ensure that overly restrictive standing requirements do not vitiate the right of access to justice. Unfortunately the Convention only partially realizes this element of the right of access to justice, as discussed more fully below.

The Convention is unequivocal in providing the right to challenge denials of access to information (art. 9.1). It is equally unequivocal in the right to challenge the substantive and procedural legality of decisions on the specific activities listed in annex I to the Convention (art. 9.2)³. With respect to challenging such decisions, the Convention lays out fairly liberal criteria for standing - determining who will have access to the review procedure. Members of the public must either have an interest or allege impairment of a right and any standing criteria in national law must be interpreted consistently with the objective of giving the public wide access to justice (arts. 9.2(a) & (b)). Moreover, non-governmental organizations (NGOs), properly established in accordance with national law, are deemed to have a sufficient interest and rights capable of being impaired (art. 9.2, referring to art. 2.5).

The ability of members of the public to challenge violations of national environmental law by private parties or public authorities is potentially more limited, however (art 9.3). While the provisions on challenging the substantive and pro-cedural legality of decisions on specific activities lay out minimum standing requirements, the provisions with respect to challenging violations of general envi-ronmental law do not establish a low standing threshold. In this case the mem-bers of the public must meet the criteria laid down in national law, including re-strictive standing requirements. Narrowly drawn standing criteria could di-lute access to justice in these matters, as nothing in the Convention requires Parties to liberalize their standing require-ments with respect to these types of cases.

Article 9 requires access to an independent and impartial review body. The decision of such a review body must be binding on the public authority. Final decisions should be in writing and pub-licly accessible. The process should be timely and inexpensive and the procedures established in law. The Party must also ensure that adequate remedies - including injunctive relief - are available. ***Does the Convention apply to export credit agencies?***

The obligations created by the Convention are duties that must be carried out by "public authorities." The Convention defines public authorities as follows:

"(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibility or functions, or providing public services, in relation to the environment, under the control of a body or person falling

within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 [i.e. the European Community] which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity[(art. 2.2).]"

ECAs are government agencies. To the extent that their activities impact the environment, especially where they are making a decision to finance, insure, or guarantee projects involving activities listed in Annex I to the Convention, the provision of the Convention should apply.

Does "the public" and the "the public concerned" include project-affected peoples?

The Convention confers participation rights on "the public" and in the articles referring to access to decision making speaks of the need to reach "the public concerned." The Convention defines both "the public" and "the public concerned" without reference to nationality (although in the case of NGOs it refers to national law, presumably the national law governing the formation of NGOs). The public is defined as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups" (art 2.4). The "public concerned" is defined as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" (art. 2.5). Arguably persons affected by projects supported by ECAs fall within the Convention's definition of the "public" and "public concerned" and ought to be granted participation rights under the Convention.

Does the Convention apply to multilateral development banks and investment guarantee agencies?

The Convention does not apply directly to international institutions like multilateral development banks (MDBs). The Convention does, however, oblige the Parties to "promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment" (art 3.7). Thus while the Convention does not apply directly to international institutions, Parties to the Convention will be under an obligation to promote the principles of access to information, access to decision-making and access to justice in MDBs and other international institutions and processes in which they participate.⁴

Who is a Party to the Convention?

So far, no State is a Party, because the Convention is not yet in force. The Convention is open to members of the UNECE and States having consultative status with the UNECE. Currently 40 countries, including the European Community, have signed the Convention.⁵ None of these countries has yet ratified. As of March 15, 1999, Denmark, Germany, and the United Kingdom have entered reservations. The European Community made a declaration on signing that it would apply the provisions of the convention to its own institutions. States not members of or in consultative status with the UNECE may also become Parties to the Convention if approved by the meeting of the Parties (art 19.3).⁶ Notably absent from this list of signatories are the United States and Canada.

When does the Convention enter into force?

The Convention will enter into force after 16 countries have ratified the Convention. The Convention enters into force for a particular Party only if it has ratified.

What is the significance of the Convention not being in force?

The Convention does not have international legal force until it has entered into force. In addition, the Convention will in most cases require implementation through national legislation or regulations. Nonetheless, even prior to ratification, signatories to the Convention have an obligation under international law not to take actions contrary to its purpose.

Can a State withdraw from the Convention?

The Convention provides that a Party may withdraw after three years from the date on which the Convention came into force with respect to the Party. This implies at least that Parties cannot withdraw prior to that time.

Can a State enter a reservation to the Convention excluding their export credit agencies?

When a State agrees to be bound by a treaty, it may take a "reservation" to certain of the treaty's obligations, which means it agrees to be bound by the treaty except for those specified obligations. A State can enter a reservation to an international treaty either when it signs a convention, or when it submits its instrument of ratification. Unlike some treaties, the Public Participation Convention does not restrict the type of reservations that States can enter. Generally under international law, a State cannot enter a reservation that is contrary to the purpose of the treaty. Arguably, excluding specific public authorities from the application of the Public Participation Convention runs contrary to its purpose. To date, no State has made reservation excluding their export credit agencies.

How is implementation of and compliance with the Convention monitored?

Once the Convention enters into force, meetings of the Parties will be held every two years. The meetings of the Parties are responsible under the Convention for monitoring implementation of the Convention based on reports submitted by the Parties. Review of compliance under the Convention is extremely weak. The Convention provides that the Parties "shall establish, on a consensus basis, optional arrangement of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of [the] Convention" (art 15). The provision requires that the arrangements be both on a consensus basis and optional. Thus, a country could break consensus, and then opt out of the arrangements, leaving the countries opting into the arrangements with a weaker compliance review procedure than they might otherwise wish. Thus, if issues of non-compliance arise, the compliance review procedure may prove a poor mechanism for examining and addressing those issues.

¹ U.N. Doc. ECE/CEP/43 (21 April 1998). The text can be downloaded from the UNECE website at <http://www.unece.org/env/europe/ppconven.htm> in English, French or Russian.

² These include the countries of Western and Eastern Europe, the former Soviet Union, Canada, Israel and the United States of America.

³ Challenging the procedural and substantive legality of adoption of policies, plans and programmes, or of administrative regulations and other legally binding normative acts is limited by the provisions of national law.

⁴ For a more in depth discussion of the application of the Convention internationally and a

comparison of the provisions of the Convention to the policies of the European Union, the Economic and Social Council of the UN, the European Bank for Reconstruction and Development, and the World Trade Organization, see Saladin & Van Dyke, Implementing the Principles of the Public Participation Convention in International Organizations (June 1998), at http://www.participate.org/publications/implementing_frames.htm.

⁵. The signatories to the Public Participation Convention as of March 15, 1999 are Albania, Armenia, Austria, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community, Finland, France, Georgia, Germany, Hungary, Greece, Iceland, Ireland, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovenia, Spain, Sweden, Switzerland, Ukraine, and United Kingdom.

⁶. The first meeting of the Parties will not be until after the entry into force of the Convention.