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**OVERVIEW OF PUBLIC PARTICIPATION, INCLUDING
OBSERVER STATUS, AT DIFFERENT INTERNATIONAL
INSTITUTIONS**

Final draft

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THE REGIONAL ENVIRONMENTAL CENTER
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EXECUTIVE SUMMARY

In order to get a better idea of options and opportunities for public participation that may be used to improve its rules and procedures for public participation, including observership, the International Commission on the Protection of the Danube River (ICPDR) has requested the Consortium of New York University School of Law, Resources for the Future and the Regional Environmental Center for Central and Eastern Europe to provide examples of public input and participation in other relevant institutions, including River Basin Commissions. This report was prepared in response to ICPDR's request.

The institutions investigated cover a range of opportunities for public input and participation. This varies from very stringently formulated participation opportunities (for example through observership to an institution) for a few precisely defined categories of entities (most often NGOs and sometimes other entities) to opportunities for a wide range of entities, often indicated with the broad term 'the public' (including but not limited to individuals, groups of individuals and NGOs).

After an introduction, the second section describes the ICPDR rules and policies on public participation, including observership. The third section of the report consist of descriptions of 9 different institutions and their rules and policies on public participation, including observership: three other Water Basin Commissions (for the rivers Rhine, Meuse and Sava), two other water related institutions (Great Lakes and OSPAR) and four other relevant international institutions and regimes (the Border Environment Cooperation Commission, the North American Commission for Environmental Cooperation, Aarhus Convention and the European Commission Proposal for a Regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies).

The aim of sections two and three is to review each set of rules and policies of each institution in its entirety so that clear linkages between different elements within these sets of rules and policies are distinguished in their specific institutional context. The various elements of an institution's public participation regime (including its rules and policies, as well as practices) must be examined not only singly, but as a whole, in order to assess the extent to which public involvement is allowed or encouraged in the institution's activities and decision making.

The fourth section of the report deconstructs the different institutions' regimes into separate aspects of participation and compares the regimes for these aspects, in order to identify similarities and differences in approach. The aspects investigated include:

- the categories of entities that can participate (individuals, States, intergovernmental organizations, non-governmental organizations etc.);
- the different forms of participation that exist;
- limitations in time for participation;

- rights of participants, including: in which meetings and/or activities they may participate, which documents they receive from the institutions, whether they can make oral and written statements, whether participants have a right to vote;
- the obligations (administrative, with regard to activities etc.) imposed by the institutions on participants;
- the way the institutions use or have to use the input provided by participants;
- assistance provided to participants for participation or capacity building;

A table following the executive summary provides an overview of the regimes investigated in terms of the main aspects of public participation addressed in this report.

Some regimes only allow for participation by non-Member States, intergovernmental organizations (IGOs) and non-governmental organizations (NGOs). Other regimes take a much wider approach and also allow the public (which in their definition often includes NGOs) to participate. Generally, those regimes that allow for participation of well (even narrowly) defined groups of entities, also have specific requirements that need to be fulfilled before an entity can participate. These requirements range from the way the entity is organized to its behavior at meetings and its willingness to support the goals and objectives of the institution. Some of these regimes also only allow participation for a specific time limit. The regimes that take the more general approach and allow for participation of ‘the public’ generally do not have as many ‘entry requirements’.

However, although some regimes allow for participation by a large number of different groups or entities, the intensity or extent of such participation is not always the same for these different entities. The regimes identified show a wide range of possibilities. Some have categories of participants who can only sit in and listen during meetings, others can actively take part in meetings but only if they have the permission of the institution in question or only with regard to certain specific meetings, while yet others have the right to actively participate in almost all meetings without many explicit limitations at all. A similar range of possibilities exists for other aspects of participation, such as whether or not an entity automatically receives documents relevant to its participation from the institution, whether it has to ask for these documents or whether it is supposed to get such documents itself from, for example, a website. With regard to opportunities for participants to send in documents for consideration by the institution, we identified a wide spectrum of rules and practices, ranging from the situation where participants can only send in what is directly relevant to a specific meeting and the institution decides whether or not to disseminate, discuss or otherwise make use of the documents, to the situation where participants may send in any material they choose and the institution is obliged to take that material into account in a given meeting and/or activity. The rules of most of the institutions studied do not specify whether documents presented or oral statements made by participants will be taken into account in decision making or other activities. Those institutions that *do* see some role for such documents and statements mostly have general, unspecific rules or policies.

But, however wide the opportunities for participation, none of the regimes investigated goes as far as allowing the participating public or observers to take part in voting on

decisions. The only regimes that come close to such an approach are ones (such as CEC and BECC) that have members of the public as members of their institutions' bodies.

One other aspect to which most of the institutions investigated do not pay much explicit attention in their rules and policies, is providing assistance for participation and capacity building. Although lack of funds is a well known reason why NGOs, community groups and the public, are limited in their opportunities to contribute as participants, few institutions have picked this up by providing funds for this. Only the Aarhus draft Guidelines for international forums and the CEC explicitly provide for such assistance in their rules and policies on public participation.

The last section of the report discusses the benefits and drawbacks of the various approaches and options for participation examined in the report. Two general themes emerge in this discussion.

The first theme is control. The more control an institution wishes to have with regard to who is participating and how these entities are participating, the more detailed the rules and policies should be. Benefits of full control are that less desirable entities can be kept out of the door, and the desirable ones in. Also, only those issues that according to the organization can benefit from participation by 'outsiders' can be opened for participation. In addition, differences in economic or political power between entities wishing to participate can be leveled out through exercising control. However, a high level of control can also have negative impacts. By limiting participation an institution can filter out unwanted external comments, leaving the organization with a possibly distorted impression that it has public support for its actions and plans. Also, those entities that are less organized and less familiar with the idea of public participation, may end up not participating because the well controlled process of the institution is simply too difficult and cumbersome for them.

The second theme is the one of efficiency vs. wide participation. The benefits and drawbacks of either approach are obvious: the larger the number of entities participating in the activities, processes and meetings of international institutions, the wider and more varied the external input is on these activities, processes and meetings. At the same time, such wide participation may make the process of effectively using such participation long, cumbersome and costly.

[a section with recommendations will be added to this report after discussion with ICPDR]

	Danube	Rhine	Meuse	Sava ¹	Great Lakes	OSPAR	BECC	CEC	Aarhus, principles for Member States ²	Aarhus for international forums ³	Aarhus requirements for participation in Aarhus institutions ⁴	EU Aarhus implementation proposal
Different categories of participants	Yes	Yes	No	Yes	Yes	No	No	No	Yes	No	Yes	No
Participation as observers	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	Yes	No
Public participation by the public	No	No	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
Time limit on participation status	Both limited and unlimited are possible	No	Yes	Permanent or <i>ad hoc</i>	No	No	No	No	No	No	No	No
Possibility to attend meetings	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-
Receiving announcements, agenda, documents for meetings	Yes	-	Yes	Yes	Yes	-	-	Yes	Yes	Yes	Yes	-
Participation through oral statements at	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-

¹ The reference to ‘Sava’ in this table includes both the available legal documents originating from the Sava Commission, and the Sava draft Stakeholder Strategy.

² Here we refer to articles 6, 7, and 8 of the Aarhus Convention. These articles are directed towards Aarhus Member States. They provide basic rights for public participation that should be implemented in the national law making and decision making rules of these Member States. Although their exact wording shows that they are directed towards Member States and should be implemented in national legislation, they are founded on basic principles that can be applied to a much wider range of institutions, including organizations such as ICPDR. This will be explained in much greater detail below in section IV.C.3.a.

³ These Guidelines are a first attempt to apply the basic Aarhus principles for public participation to international forums outside an Aarhus context. This will be explained in much greater detail below in section IV.C.3.b.

⁴ This is an example of how the Aarhus regime applies its own basic principles for public participation to itself. This will be explained in much greater detail below in section IV.C.3.c.

meetings and submission of documents including comments												
Consultations	No	Yes	Yes	-	-	No	Yes	Yes	-	Yes	-	-
Right to vote	No	No	No	-	-	No	No	No	-	No	No	No
Explicit intent of institution to use participation inputs	Yes	-	-	-	-		-	Yes	Yes	Yes	-	Yes
Obligations for participants (e.g. administrative requirements)	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	No	-	Yes	-
Providing assistance to participants	No	No	No	No	No	No	No	Yes	No	Yes	No	No
Other possibilities for involvement of non-Member State entities	Yes	Yes	Yes	Yes	-	No	Yes	Yes	No	Yes	No	No

Note 1: this table simplifies and generalizes the public participation aspects of the different regimes investigated in this report. The actual report provides the details of the different regimes.

Note 2: in this table ‘Yes’ means that the available legal and policy instruments explicitly provide for this aspect of public participation, or that the presence of this aspect follows inevitably from these instruments. ‘No’ means the aspect is clearly not present and does not follow from the context either. ‘-’ means that the available instruments do not seem to pay attention to this aspect.

I INTRODUCTION

The International Commission on the Protection of the Danube River (ICPDR) is considering how it might improve its rules and procedures for public participation, including observership, in the context of the Danube River Protection Convention. In order to get a better idea of options and opportunities for public participation, ICPDR has requested the Consortium of New York University School of Law, Resources for the Future and the Regional Environmental Center for Central and Eastern Europe to provide examples of public input and participation in other River Basin Commissions and in, other water and non-water related international institutions whose legal and policy instruments have public participation features worth examining. This ICPDR request was made together with another request to the Consortium to assist it in its effort to improve public access to the information in its records and files. The Consortium's report to ICPDR on public access to information is contained in a separate document, entitled, "ICPDR Information Access: report and recommendations".

In response to ICPDR's request on public input and participation, the following report has been prepared. It is important to clarify right at the outset of this report that the institutions investigated cover a range of opportunities for public input and participation. This participation varies from very stringently formulated opportunities, through for example observership, for a few precisely defined categories of entities (most often NGOs and sometimes other entities) to opportunities for a wide range of entities, often indicated with the broad term 'the public' (including but not limited to individuals, groups of individuals and NGOs).

This report in its current form is explicitly meant to be an information document. It does not necessarily have to be read in its entirety, but, if needed, can be read section-by-section. The following descriptions of the different sections should facilitate such selective reading.

In section II, the report examines the opportunities for public input and participation, including observership, provided under ICPDR's current rules and procedures.

In section III, the report surveys public input and participation rules and mechanisms, including observership, in use at a selected number of other international institutions, including several European river basin commissions, other water-related international institutions, and other (non-water related) international institutions or regimes. This survey is not intended to comprehensively examine all international organizations, legal regimes or public participation processes; rather it is meant to selectively examine those most likely to be relevant to the issues and circumstances of ICPDR, while at the same time showing the variety and level of detail of how public input and participation, including observership, can be shaped.

Section IV analyses the major issues regarding observership and other forms of public participation that are raised by these examples and identifies similarities and differences of approach among the institutions surveyed, where ever possible. These include:

- Which categories of entities can participate (individuals, NGOs, States, IGOs etc.)?
- What different forms of participation are there?
- Is participation limited in time?
- Which are the rights of participants, including: in which meetings and/or activities may participants participate, which documents do participants receive from the institutions, can participants make oral and written statements, do participants have a right to vote?
- Which are the obligations of participants?
- How is the input by participants used by the institutions?
- Is assistance provided for participation or capacity building of participants?

Section V, the last section of the report, provides a general discussion of benefits and drawbacks of the participation regimes investigated, in terms of the key issues identified above.

The full text of relevant provisions of the legal and policy instruments in force in the institutions and regimes surveyed is provided in the annexes to this report.

II EXISTING PUBLIC PARTICIPATION OPPORTUNITIES, INCLUDING OBSERVERSHIP, UNDER CURRENT ICPDR LEGAL AND POLICY INSTRUMENTS

ICPDR has been established pursuant to the Convention on cooperation for the protection and sustainable use of the river Danube (or ‘Danube River Protection Convention’ or DRPC).⁵ Parties to the Convention are Austria, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Moldova, Romania, Serbia and Montenegro, Slovakia, Slovenia, Ukraine and EU.

The legal basis for the participation in decision making in the context of the work of ICPDR and its subsidiary bodies can be found in the DRPC, in the Rules of Procedure of ICPDR,⁶ in the “Legal Status of the Signatory Parties, Participants with Consultative Status and Observers to the Danube River Protection Convention”⁷ and in the “Detailed Guiding Criteria for granting Observer Status”.⁸ The relevant articles of these legal instruments are quoted in Annex I.

In the summer of 2003 the “Danube river basin strategy for public participation in river basin management planning (2003-2009)” (version 4.0) was prepared and presented to

⁵ See Official Journal of the European Communities 12 December 1997, L 342/19.

⁶ http://www.icpdr.org/pls/danubis/danubis_db.dyn_navigator.show

⁷ http://www.icpdr.org/pls/danubis/danubis_db.dyn_navigator.show

⁸ http://www.icpdr.org/pls/danubis/danubis_db.dyn_navigator.show

the ICPDR Standing Working Group.⁹ This document provides activities and structures related to public participation in a WFD context, at four levels:

- the international level (roof level) of the Danube River Basin;
- the national level;
- the sub-basin level;
- the local level.

Since ICPDR is the institution central to our report, the level most directly relevant for our survey is the roof level (the other three levels mainly address other authorities, such as national, sub-basin and local authorities). Annex I to the Strategy contains the ICPDR Operational Plan for the roof level. For the four phases of the Strategy, the Operational Report distinguished three types of public involvement-related activities to be undertaken by ICPDR: Provision of information; consultation; and active involvement. Provision of information by ICPDR is primarily addressed in the Consortium's report on access to information; however, some aspects of this issue (in as far as they relate to information provided and requested in the context of participation) are also addressed here. The Operational Plan identifies the following tasks relating to consultation and/or active involvement:

- Stakeholder analysis on a regional level (Phase I);
- Review of structures and mechanisms to facilitate public participation within ICPDR (Phase I);
- Development of criteria for accreditation of stakeholders to participate (developed for the different levels of involvement) (Phase I);
- Development of a consultation mechanism (Phase II);
- Detailed stakeholder analysis (who to involve, when and why) (Phase II);
- Development of the regional framework for water councils (Phases III, IV);
- Development of a mechanism to support, harmonize and fund the activities on a national and sub basin level to support the information dissemination and consultation process (Phase III and IV);
- Evaluation of the PP process and preparation of recommendations for the next phase (phase IV).

The tasks identified in the Operational Plan provide a good indication of where ICPDR will be heading in the near future with regard to public input and participation, including observership. Thus, the Public Participation Strategy and Operational Plan have been factors of importance in guiding our selection of institutions in section III of this report.

The Danube River Protection Convention (DRPC), under article 18 para 6, affords ICPDR the opportunity to 'cooperate' with 'international and national organizations and bodies which are engaged in the protection and water management of the Danube (...) or in general questions of water protection and water management'. There are no details in the Convention on what such cooperation should or could look like.

⁹ The preparation of this document was led by Charlie Avis, WWF, with the support of the Public Participation Preparatory Group, as directed by the ICPDR RBM EG and based on the results of the Public Participation Workshop held in Bratislava, Slovakia (April 2003).

The Rules of Procedure of the ICPDR provide that three categories of entities: (1) signatory States, (2) participants with consultative status', and (3) observers, are entitled to take part in ICPDR meetings, unless ICPDR decides otherwise.¹⁰

Participation in meetings of ICPDR and subsidiary bodies is governed by two ICPDR decisions:

- 'Legal Status of Participation and Observership under the DRPC' (IC/010) (hereinafter, 'Legal Status document'),¹¹ and
- 'Detailed Guiding Criteria for Granting Observer Status' (IC/020) (hereinafter, 'Detailed Guiding Criteria').¹²

The 'Legal Status' document defines the terms 'participants with consultative status' and 'observers'. Participants with consultative status are non-member States or a non-member regional economic integration organization, unanimously invited by the Contracting Parties to participate in activities in the framework of the Convention. Observers are international or national organizations or other bodies which are engaged in the protection and water management of the Danube or in general questions of water protection and water management, invited by ICPDR to participate in all or selected activities in the framework of the Convention. Currently, ICPDR has 10 observers: the Black Sea Protection Commission, Danube Commission for Inland Navigation, Danube Environmental Forum, Regional Environmental Center for Central and Eastern Europe, World Wide Fund for Nature, International Association for Danube Research, Ramsar Convention on Wetlands, International Working Association of Water Works in the Danube River Basin, Global Water Partnership, UNESCO International Hydrological Programme.

Participants with consultative status as well as the signatory states have more extensive rights of participation than observers. Bosnia and Herzegovina is a participant with consultative status at the moment. Because non-Member States and regional economic integration organizations fall outside the scope of this report, (the scope of our task is to examine models that can help ICPDR develop improvements to public input and participation, including observer issues), this report does not examine in detail issues relating to participants with consultative status or signatory states.

The Detailed Guiding Criteria provide general conditions for an entity to be admitted as an observer. One of these is that the applicant organization acknowledges the goals and basic principles of the DRPC and has specialized technical or scientific competences relating to the goals of the DRPC. Also, the applicant organization or body has to have a structured permanent administration and have 'the mandate to speak as an accredited representative'.

The Detailed Guiding Criteria also define in more detail what kinds of organizations and bodies ICPDR envisions as observers. First of all, partners within the Danube River

¹⁰ Rules of Procedure, art. 6 (IC/002, 28 November 2002).

¹¹ Decision of October 1998.

¹² Decision of June 1999.

Basin strongly interested or engaged in Danube protection and water management are mentioned as potential observers. Of these, entities actually engaged in Danube protection and water management, sharing the goals of the DRPC, and involved in its implementation are considered the prime candidates because of the role they can play in the basin-wide coordination prescribed by the EU Water Framework Directive. Partners outside the Danube River Basin that are strongly interested in and ready to stimulate and support development of the principles of the DRPC are also identified as potential observers, with a special preference for those familiar with the tasks of large River Commissions.

With regard to basin-oriented cooperation and coordination, the Commission suggests that governmental and non-governmental organizations can coordinate their actions as observers. Small River Commissions can be involved through governmental delegations and specific groups can be represented by one umbrella organization. The overall aim of ICPDR, it states, is to get a well balanced participation (both with regard to the interests of, and DRPC provisions covered by, those accepted as observers). In an annex to the Detailed Guiding Criteria, ICPDR gives an open ended list of candidates that could be granted observer status.¹³

Identified by ICPDR as ‘the usual way’ for becoming an ICPDR observer, is for an organization or body to apply to ICPDR for observer status. In exceptional cases, driven by a specific interest, ICPDR can invite an organization to apply. In its letter of application, the applicant must:

- give a description of itself including its relevant competences and experience;
- explain what the benefit of its input will be for the ICPDR and what it expects in return from ICPDR;
- give a written confirmation that it will abide by ICPDR’s Rules of Procedure.

With a letter the Executive Secretary of ICPDR formally makes known admission of an applicant as observer. This letter specifies whether observer status is granted for a limited or an unlimited period of time and it specifies for which meetings and/or activities observer status is granted. The meetings mentioned in the letter are ICPDR plenary meetings and/or relevant Expert Body meetings.

Once an organization or body has observer status, it is invited to the meetings to which it is entitled to participate. The invitation also includes information on whether there are agenda items that exclude its participation (for example internal administrative issues). In accordance with decisions of ICPDR, an observer has access to documents of ICPDR and its bodies.

¹³ Organizations mentioned in this annex are the Black Sea Protection Commission, the Danube Commission (for inland navigation), the Danube Environmental Forum, the Regional Environmental Center for Central and Eastern Europe, the World Wide Fund for Nature, the International Working Association of Water Works in the Danube Basin and the International Working Association for Danubian Water Research.

Observers participating in meetings (the meetings which were specified in the initial invitation as observer) can express their opinions and views and have them reflected in the relevant documents of those meetings. Also, they can take part in the programs and contribute to projects to which they were invited to participate (participation to these programs is laid down in the initial invitation) or to make other voluntary contributions.

Observers (as well as signatory states and participants with consultative status) have no right to participate in the process of adopting decisions during meetings.

The Detailed Guiding Criteria also create the possibility that an organization or body applying for observer status does *not* get observer status, but is instead invited by ICPDR to participate in ICPDR activities through another, preferable ‘efficient possibility for cooperation and coordination’.

III EXAMPLES OF PUBLIC PARTICIPATION AT OTHER INSTITUTIONS

The following Section examines public participation rules and policies of other institutions. While reading this section, it is important to keep in mind the key issues of public participation, examined in detail in Section IV, which include:

- Which categories of entities can participate (individuals, NGOs, States, IGOs etc.)?
- What different forms of participation are there?
- Is participation limited in time?
- Which are the rights of participants, including: in which meetings and/or activities may participants participate, which documents do participants receive from the institutions, can participants make oral and written statements, do participants have a right to vote?
- Which are the obligations of participants?
- How is the input by participants used by the institutions?
- Is assistance provided for participation or capacity building of participants?

A. River Basin Commissions

1. International Commission for the Protection of the Rhine¹⁴

The International Commission for the Protection of the Rhine (ICPR) is the Commission established pursuant to the Convention on the Protection of the Rhine.¹⁵ Parties to the Convention are Germany, France, Luxembourg, the Netherlands, and Switzerland. The European Community is also a Party.

The legal basis for the participation of entities other than Parties in decision making in the context of the work of the Commission and its sub-groups, can be found in

¹⁴ http://www.iksr.org/GB/index_gb.html

¹⁵ This Convention was signed on 12 April 1999 and entered into force on 1 January 2003. The Convention replaces the Bern Convention from 1963.

Convention on the Protection of the Rhine and in the Rules of procedure and financial regulations. The relevant articles of the two legal instruments are quoted in Annex II.

Article 14 of the Convention is the basis for cooperation between the Commission and its observers. Three categories of entities can be recognized as observers: (1) non-member States with an interest in the work of the Commission, (2) intergovernmental organizations whose work is related to the Convention and (3) NGOs with a relevant field of interest and activities.

The Commission exchanges information with the NGO observers on the issues in the NGOs' relevant fields of interest and consults them with regard to decisions that may impact them before such decisions are taken; once these decisions are taken, the NGOs in question are informed of this. The text of the convention shows that this particular exchange of information, consultation and information only applies to NGO observers.

All categories of observers may submit information or reports to the Commission and they may be invited to participate in the meetings of the Commission. They do not have the right to vote in such meetings. Specialists representing observer NGOs or other experts may be consulted and invited to meetings too.

The "Rules of Procedure and Financial Regulations of the ICPR",¹⁶ particularly article 8, give further clarification on a number of issues relating to participation of NGO observers in the Commission's work. There are no further specifications in the available documents of what the observership of the other categories of observers (non-member States with an interest in the work of the Commission and IGOs whose work is related to the Convention) should look like.

Article 8 first gives the criteria an NGO has to fulfill to be granted observer status. The NGO in its application should accept the basic principles of the Convention, show that it has relevant knowledge with regard to the targets of the Convention and explain how its contributions will be useful to the Commission's work, that it is well structured (and how it is structured) and has the powers to speak on behalf of its members. Once the application is received, the Commission sends it out to the Contracting Parties, asking for a statement. The Commission then summarizes those statements and a decision is made in the next Commission meeting (all voting in the Commission is unanimous).

Secondly, Article 8 specifies rights of NGO observers. An NGO with observer status can submit documents and proposals to the Commission. It is at the discretion of the Commission whether these documents are distributed and at the discretion of the participants of a meeting whether they are discussed.

There is a co-ordination group under the Commission deciding on the exchange of information with the observer NGOs, on how written and oral statements are collected from observers, and on whether they are invited to plenary meetings of the Commission. When inviting observer NGOs, the co-ordination group tries to achieve a balanced participation of different interest groups.

¹⁶ http://www.iksr.org/GB/index_gb.html

If an NGO observer does not participate in the work of the Commission for a period of two years, the President of the Commission may withdraw the observer status.

The Commission provides a list of NGOs that have been granted observer status. The website of the Commission¹⁷ shows that, at the moment of writing, 12 NGOs, 3 non-Member States and 8 IGOs have been granted observer status.¹⁸

*2. International Commission for the protection of the Meuse river*¹⁹

The International Commission for the Protection of the Meuse River ('Maas' in German and Dutch) is established pursuant to the Convention on the Protection of the Meuse.²⁰ Parties to the Convention are Germany, France, Luxembourg, the Netherlands, and Belgium. This treaty has recently been replaced by a new Treaty with the same title.²¹ The recent treaty has the abovementioned countries as signatories but not all of them have ratified and the treaty has not yet entered into force. Since it has the most elaborate provisions on public participation, we shall only discuss this most recent treaty.

The legal basis for participation by observers in the context of the work of the Commission can be found in the Convention on the Protection of the Meuse River and in Annex I to the Rules of Organizational and Financial Procedure. The relevant articles of the two legal instruments are quoted in Annex III.²²

Article 6 of the Convention provides that, at their request, the Commission can grant observer status to four categories of entities: (1) the European Community (EU), (2) IGOs whose work is related to the treaty, (3) NGOs in as far as their interests or tasks have links with the convention and (4) non-member states having an interest in the work of the Commission.

Observers of all four categories can participate in meetings of the Commission and can give the Commission any kind of information, report or opinion, related to the purpose of

¹⁷ http://www.iksr.org/GB/index_gb.html

¹⁸ NGOs: Umweltstiftung WWF Deutschland Germany; Schweizerisch-deutsche Arbeitsgemeinschaft; Hochwassernotgemeinschaft RheinGemeinde- und Städtebung; Rheinkolleg; Arbeitsgemeinschaft der Internationale Wasserwerke im Rheineinzugsgebiet; Greenpeace International; Bund für Umwelt und Naturschutz; Stichting Reinwater; European Union of National Associations of Water Suppliers and Waste Water Services; NABU-Naturschutzstation, NABU-Koordinationsstelle Rhein; Alsace nature; CEFIC Verband der Chemischen Industrie e.V.

Countries: Belgium, Liechtenstein and Austria

IGOs: Commission Internationale de l'Escaut, Internationale Kommissionen zum Schutz der Mosel und der Saar, Commission Internationale pour la Protection de la Meuse, Internationale Kommission zum Schutz der Elbe, Oslo and Paris Commissions, Zentralkommission für die Rheinschifffahrt, Internationale Gewässerschutzkommission für den Bodensee.

¹⁹ <http://www.cipm-icbm.be/default.asp>

²⁰ This Convention was signed on 26 April 1994. <http://www.cipm-icbm.be/files/accord/fr2.pdf>

²¹ This new Convention was signed on 3 December 2002. <http://www.cipm-icbm.be/files/accord/fr1.pdf>

²² The text of the Convention and other instruments is available in Dutch, German and French. The French version is given in Annex III.

the treaty. They do not have a right to vote in the meetings. The Commission exchanges information with them and hears them in respect of advice, recommendations and decisions which the Commission thinks is of interest to them and informs them after such a decision has been taken.

Annex I to the Rules of Organizational and Financial Procedure gives details with regard to cooperation with observers. It is important to note that under the Annex not all observers are always treated the same. Certain provisions of Annex I provide for differentiated treatment of the different types of observers.

Annex I provides how each of the four categories of potential observers can request to be granted observer status.

For the EU and non-member State applicants it seems sufficient to send in an application for observer status. The available documents show no further requirements for those two categories.

In their application for observership, IGOs and NGOs have to give the Commission a description of their organization, their activities, their relevant expertise and their reasons for requesting observer status. They also have to give proof of their legal status. The available documents show no further requirements for IGO applicants.

For NGOs there are further requirements. An NGO has to show that it has a well organized structure, with the NGO representatives being fully mandated to speak on behalf of the organization's members. It should have an interest in, work on, and have special scientific or technical expertise on issues that are related to the Convention and the work of the Commission. It also has to adhere to the goals and principles of the Convention and the Rules.

Annex I also gives the criteria used by the Commission for the recognition of NGO observers:

- there should be a well balanced representation of different interest groups;
- a balanced division should be made between international and regional NGOs;
- the total number of NGOs should be a "reasonable number" in order to ensure efficient cooperation;

Generally the observer status is granted to NGOs for a period of four years (renewable), but the Commission can withdraw this status at any time by a reasoned decision. Because of the fact that the Commission only allows for a limited number of recognized observers, the Rules provide the possibility that two or more NGOs team up as *one* recognized observer.

Once granted observer status, observers can attend all plenary meetings with regard to all issues except the ones having to do with the internal organization of the Commission, and receive the relevant documents with regard to those issues. They can also send experts to meetings and, at the initiative of the President of the Commission and with the approval of the delegations, have experts attend working group meetings. Those experts will

receive the documents related to those meetings. All of the documents received by the observers and/or their experts may only be used in the context of the work of the Commission and the working groups. They cannot distribute these documents to others outside of the organization.

Annex I also leaves open the possibility for ‘other kinds of cooperation’ between the Commission and observers.

A statement on the website of the Commission²³ says seven NGOs have been granted observer status.²⁴ The information available does not clarify whether there are observers from the other three categories.

*3. International Sava River Basin Commission*²⁵

The International Sava River Basin Commission is established pursuant to the Framework Agreement on the Sava River Basin.²⁶ Signatories to the Convention are Bosnia and Herzegovina, the Republic of Croatia, the Republic of Slovenia and Serbia and Montenegro. The Agreement will enter into force in December 2004. The legal basis for the participation in the context of the work of the Commission, can be found in the Sava Agreement, the Statute of the Commission, its draft Rules of Procedure and in the draft Stakeholder Involvement Strategy. The relevant articles of these legal instruments and the draft Strategy are quoted in Annex IV.

The Sava Agreement does not have clear provisions on public participation. Article 5 refers to cooperation with international organizations (including ICPDR), while article 6 on cooperation with national organizations provides for nomination of ‘national organizations (authorities or bodies)’ that are competent to implement the Agreement in the territories of the Member States. The latter article does not seem to exclude the possibility that such authorities or bodies are semi-governmental bodies or NGOs and, if NGOs were to be considered included in this definition, would give them a role in the realization of the Agreement. The Agreement does not have any other provisions on public participation.

The Statute of the Sava River Basin Commission, regulating all issues having to do with the work of the Commission, is an integral part of the Agreement. Article 3(5) of the Statute provides that the Commission may invite observers to its sessions. One of the tasks identified for the Commission in article 4 (1sub k) is to cooperate and harmonize activities with the abovementioned international and national organizations (authorities and bodies).

²³ <http://www.cipm-icbm.be/news.asp?id=52>

²⁴ WWF Belgium; Bond Beter Leefmilieu; RIWA Maas/Meuse; Union Wallonne des Entreprises; Stichting Reinwater; Inter-Environnement Wallonie; l’Union Régionale des Fédérations pour la Pêche et la Protection du Milieu Aquatique.

²⁵ <http://www.unece.org/env/water/text/Sava-agreement.pdf>

²⁶ The Agreement was signed on 3 December 2002 and will enter into force in December 2004. <http://www.unece.org/env/water/text/Sava-agreement.pdf>

The draft Rules of Procedure²⁷ add some additional information to the above documents. Article 5.6 indicates that meetings of the Sava Commission are not public, unless the Commission decides otherwise. Article 14 of these draft Rules repeats the Statute and also provides that the Commission may grant observer status. They identify which entities can be granted such status (states, international, regional and national governmental and non-governmental organizations) and they provide that observer status can be *ad hoc* or permanent.

With regard to cooperation, also mentioned in articles 5 and 6 of the Agreement, the Rules provide that the Commission shall cooperate with international, regional and national organizations. For the international organizations referred to in article 5 of the Agreement the Commission is to develop specific cooperation and coordination mechanisms.

In addition to the abovementioned documents, which have all been developed by the Sava Commission, a project executed by the Regional Environmental Center for Central and Eastern Europe and funded by USAID has led to the development of a more detailed policy document on stakeholder involvement in the activities of the Sava Commission. Although not an official Commission document, the Strategy is valuable because it provides opportunities for opening up the Commissions's processes to a wide range of non-Member State entities. The Draft Stakeholder Involvement Strategy identifies three levels of public participation (referred to as 'involvement of the public/stakeholders'): local, national and sub-regional.

For the sub-regional level (the level most relevant for this report since it is the level on which the Sava Commission operates), the draft Strategy proposes two models: the Aarhus/UNECE model and the ICPDR model. The first is characterized as 'relatively open': NGOs and international organizations can apply for observer status and are usually accepted. Through *inter alia* financial assistance, these organizations are encouraged to form coalitions (such as ECO Forum). In specific meetings there is also representation of the business community. The draft Strategy states that if this model were to be followed, the Sava Commission's Rules of Procedure should be amended to ensure that NGOs or other stakeholders can get observer status and they should clarify:

- who can get the observer status;
- criteria and procedure for granting observer status (for example relevant activity of the organization applying);
- whether there is a registration procedure request;
- to whom this request should be submitted and who decides on the request;
- rights of observers;
- differences between permanent and *ad hoc* observer status and who is eligible to obtain one or the other.

The other model suggested in the draft Strategy is the ICPDR model. In a nutshell this model includes inviting major NGO networks or international/regional NGOs and stakeholder groups to meetings and expert group meetings. Application to become an observer is also provided for under this model. Because the Sava Agreement involves a

²⁷ Draft of 5, 6 July 2004.

smaller number of countries than does the DRPC, less emphasis can be put on international and regional organizations and more on national organizations as observers.

Both suggested models provide for participation of observers in meetings of the parties and other meetings, including expert group meetings. The principle is that these meetings are public. However, at this moment, the existing Sava legal instruments do not provide for this.

With regard to defining *who* are going to be the public / stakeholder entities participating (*inter alia* as observers), the draft refers to the requirement under the Aarhus Convention: the public concerned. Questions to be asked would be which are the key stakeholders that can be affected by the decision-making and activities covered by the (implementation of the) Sava Agreement, or which ones have an interest in participating in the decision-making related to them, which stakeholders need to be informed and/or involved in what activities or types of activities, in what way, and in what stages of activity or decision making?

A tentative effort in the draft Strategy to be more specific leads to the following list:

“different authorities and those stakeholder groups in addition to NGOs who may have different economic and other interests connected to the Sava initiative such as business and industry associations, chamber of commerce or economy, e.g: those connected to navigation, ports, ship owners, as well as to agriculture, tourist industry, biodiversity issues, management and supply, quality of water, but also other stakeholders, NGOs, professional experts, academy, municipalities, etc should be looked upon when defining key stakeholders. The different international or regional organizations which have valuable expertise or extensive activities in the Sava region should also be involved.”

Also, in the context of an earlier project in a Sava context (“Sava River Basin – Support to Public Participation”) a process of dialogue was started. Four national workshops and a regional workshop were held where participants including officials, NGOs and other key stakeholders discussed how stakeholders should be identified for participation. A list of stakeholders was drawn up for each country and this list could be used as a starting point for the public participation as proposed in the draft Strategy.

The draft Strategy states that not only should stakeholders be invited to participate, but those who consider themselves interested and who have not been invited should also be able to participate. Active dissemination of information and of the possibilities for participation can enhance such ‘uninvited’ participation.

The draft concludes with giving six steps for stakeholder identification:

- 1) Define the key stages of process/ key issues or opportunities for involvement (See Section on proposed decision making/activities/issues below);
- 2) List stakeholders and their perspectives to the selected decision making/ issues/activities and regarding different stages if possible;
- 3) Organize them in different categories/types;
- 4) Allocate to the identified stakeholders a concrete name, address, contact information;
- 5) Check results: have all stages of the process been covered? Are those who benefit

- or will be negatively affected both included?;
- 6) Once the stakeholders are identified, the list can be ordered by identifying the degree of involvement of each actor in each stage and completed with a contact list;

B. Other water-related international institutions

1. Great Lakes Commission²⁸

The Great Lakes Commission was established in 1955 by the US Great Lake States (Illinois, Indiana, Michigan, New York, Ohio, Pennsylvania and Wisconsin) in the Great Lakes Basin Compact.²⁹ Through the 1999 Declaration of Partnership³⁰ associated membership of the Canadian provinces of Ontario and Québec was established. The two Canadian provinces previously held observer positions.

The legal basis for public participation in the Great Lakes Commission can be found in the Great Lakes Basin Compact and the bylaws of the Commission.³¹ The relevant provisions of these instruments are quoted in Annex V.

As shown below, the Great Lakes regime provides for three different types of participation of entities other than member states in the work of the Commission: (1) ‘cooperation’, (2) observership, and (3) participation by ‘the public’ (which in the definition used by the Commission, also includes NGOs).

Article VI of the Great Lakes Basin Compact provides the legal basis for the participation of entities other than member states to the Commission meetings. Any public or private agency or body having an interest in the Basin or part thereof can be allowed to ‘cooperate’ with the Commission.³²

The bylaws of the Commission contain a provision about observer status:

The Commission shall be permitted to designate observers representing the United States and Canadian federal governments, provincial governments, regional organizations, or any others it may so designate to advance the goals and objectives of the Great Lakes Basin Compact. Observers may be permitted to participate in discussions, deliberations and other activities as approved by the Commission, but shall have no vote.³³

It should be noted that the interpretation given by the Commission to this provision is that all observers have to be public organizations (US and Canadian federal agencies, tribal

²⁸ <http://www.glc.org>

²⁹ <http://www.glc.org/about/glbc.html>

³⁰ <http://www.glc.org/about/pdf/declarations.pdf>

³¹ <http://www.glc.org/about/pdf/bylaws.pdf>

³² US Congress enacted a Law in 1968 granting consent to the Great Lakes Basin Compact. However, according to section 2 of that Act, the consent does not extend to article VI, in as far as this article aims at authorizing recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies.

³³ Article II, section 4.

authorities, regional and international commissions, academic associations). NGOs, for example, cannot become observers.³⁴ The website shows that seventeen organizations have been accepted as observers.³⁵

Michael Donahue, the Commission's president and Chief Executive Officer, informed us that the Commission has no other binding written rules on how the public or observers can participate in the work of the Commission. Public participation procedures were developed over time and are entirely based on practice. Only with regard to the obligations of observers, the Commission has written down a series of 'expectations' that it expects to be met by observers. These expectations deal with:

- being fully versed in the goals and objectives of the Great Lakes Basin Compact and in the structure of the Commission;
- serving as a point of contact for the Commission;
- participating regularly in meetings;
- membership of and participation in task forces and groups;
- obligation to circulate the Commission's draft policy positions and materials within their agency/organization;
- report to Commission on policy issues and developments within their agency/organization;
- when requested, represent the Commission in meetings, hearings and other events;
- organize round tables, workshops etc.
- designate an alternate also authorized to represent the agency/organization;
- be accessible to Commission staff;
- work with their agency/organization to secure financial support for activities of mutual interest;
- maintain an active role in Commission operations.

Donahue explained some of the other practice with the Commission. With regard to public participation in the work of the Commission, Donahue gave the following information. The Commission has two plenary meetings a year. Invitations go out to the entire 'Great Lakes community' (estimated to be thousands of individuals and organizations). Those who wish to participate in the meetings can do so. There are no requirements for such participation. They receive a briefing book for these meetings. The briefing book contains draft resolutions, a draft agenda etc. Everyone has the right to provide written comments and suggestions on resolutions, agenda items and other materials in the briefing book before the actual meeting. During the meeting there is an open comment period in which the public can speak. Members of the public can make proposals for *inter alia* official recommendations of the Commission if the proposal is supported by at least one of the member states.

³⁴ Personal communication CEO Commission.

³⁵ U.S. Army Corps of Engineers, U.S. Department of Commerce, U.S. Department of Agriculture, Council of Great Lakes Governors, U.S. Department of the Interior, U.S. Department of Transportation, U.S. Department Homeland Security, U.S. Environmental Protection Agency, Great Lakes Fishery Commission, International Joint Commission, Canadian Government (federal), Chippewa / Ottawa Resource Authority, Great Lakes Sea Grant Network, Coastal States Organization, Office of Ocean and Coastal Resource Management - NOAA , U.S. Dept. of Energy , National Association of Conservation Districts.

Besides the two plenary Commission meetings, there are technical meetings where the public can participate. Most projects initiated under the auspices of the Commission (approximately 57 at the moment of our telephone conversation) have an advisory committee consisting of *inter alia* interested members of the public.

In response to our questions whether there are certain prerequisites for members of the public who wish to participate in the work of the Commission or limitations on the number of people attending, the amount of speaking time, or the length of written comments, Donahue stressed that there were no such limitations and that practice so far showed that such limitations were not necessary.

Because of the fact that the Commission and the number of people participating under the Commission has grown substantially over the past years, the Commission has decided to commit to writing down the practices that the Commission has developed over time. An 'Operations Manual' is being prepared which will most likely have a section on what the protocol is for meetings. A first draft of the manual is expected to be ready by February 2005.

Thus, the Commission seems to use a very liberal, 'no restrictions' model for public participation, but this is based on practice and therefore could potentially be changed *ad hoc*.

2. OSPAR Commission³⁶

The OSPAR Commission is established pursuant to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).³⁷ Currently, the Parties to the Convention are Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. The European Community is also a party.

The legal basis for the participation of the entities other than member states in the OSPAR Commission and its subsidiary bodies can be found in the OSPAR Convention and the Rules of Procedure of the OSPAR Commission.³⁸ The relevant provisions of these instruments are quoted in Annex VI.

With regard to the participation of observers in the Commissions work, article 11 of the Convention provides for three types of observers: (1) non-member states, (2) IGOs whose activities are related to the Convention, and (3) NGOs whose activities are related to the Convention. The Commission may decide by unanimous vote to admit these entities as observers. Observer status confers the right to participate in meetings of the Commission, but not to vote. Also, observers can present information and reports relevant to the objectives of the Convention. Article 11(3) refers to the Rules of Procedure of the Commission for more detailed provisions on observers.

³⁶ <http://www.ospar.org/eng/html/welcome.html>

³⁷ <http://www.ospar.org/eng/html/welcome.html>

³⁸ <http://www.ospar.org/eng/html/welcome.html>

Article 20 of the Rules of Procedure distinguishes six different types of subsidiary bodies under the Commission, which all have meetings:

- the main committees;
- working groups;
- the meeting of heads of delegation to the commission and the committee of chairmen and vice-chairmen;
- the group of jurists and linguists;
- intersessional correspondence groups;
- *ad hoc* meetings included in the schedule of meetings.

By unanimous vote of the Commission other subsidiary bodies can be created.

Article 23 of the Rules provides that non-member states and IGOs admitted as observers may be represented in meetings of the main committees and of working groups and may participate in meetings of the intersessional correspondence groups on the same basis as for meetings of the Commission. They may participate in the meetings of the other bodies at the invitation of the chairman.³⁹

The Rules of Procedure have devoted Annex 2 to the participation of NGO observers. This Annex also provides further detail on other aspects of the observer status of NGOs.

Only those NGOs that (1) have an organized administration, (2), have an international character, and (3) are authorized to speak for their members, will be granted observer status. When applying for observer status an NGO has to send in a statement on how it meets these three criteria, and on its relevant expertise and experience as well as an explanation of how this expertise would assist the work of the Commission. Also a confirmation must be given that the NGO will abide by the rules of the Commission. When the Commission receives such an application of an NGO, it is distributed among the member states for comments. A summary of the comments is again distributed and the member States grant observer status by unanimous vote.

NGO observer status can be general, but it can also be for specific topics discussed in a meeting. Annex 2 provides specific numbers of seats for general NGO observers and specialized NGO observers, depending on the meeting they are attending. It is the Chairman of the (subsidiary) body in question who decides on which NGOs are allowed participate. However, the host of the meeting may decide that more seats are provided for NGOs. As a general rule, meetings on management issues or on documents to which NGOs have not been granted access, are not open to NGO observers.

If an NGO is accepted as an observer to a meeting, it can submit relevant documents. Distribution of those documents is at the discretion of the Chairman. It can also

³⁹ Pursuant to Rule 58, certain documents (documents of a management nature and documents of the meetings of Heads of Delegation to the Commission and of the Committee of Chairmen and Vice-Chairmen) are only made available to Parties, State observers and IGO observers. These documents are not made available to NGO observers.

participate in discussions, again at the discretion of the Chairman. An NGO observer is allowed to make proposals, if such a proposal is supported by at least one member state.

As a last set of conditions, Annex 2 requires that NGO observers act according to the Rules and Procedures, recognize basic purposes and principles of the OSPAR Convention and do not hinder the work of the Commission and its subsidiary bodies, limit the information they provide to what is needed for the work of the Commission and do not use the meetings for demonstrations. Also, the private character of the meetings should be respected. If an NGO observer does not follow the Rules and Procedures, the Commission or a subsidiary body can take "appropriate action".

If an NGO does not participate in the work of the Commission for 2 years, the chairman of the Commission can consider that the observer status has lapsed or can decide that the observer status will be limited to receiving documents.

C. Other international institutions and regimes

*1. Border Environment Cooperation Commission*⁴⁰

The Border Environment Cooperation Commission (BECC) is an international organization created by the Governments of the United States and Mexico under one of the side agreements to the North American Free Trade Agreement (NAFTA).⁴¹ The purpose of the BECC is to help conserve, protect and enhance the environment in the U.S.-Mexico border region, through the development and certification of environmental infrastructure projects that incorporate innovative sustainability and public participation concepts. Once certified by the BECC, a project may qualify for funding from the North American Development Bank (NADB) or from other sources requiring such certification. BECC's mandate includes projects related to pollution of *inter alia* the rivers in the border region.

Recent reforms agreed to by the US and Mexico have led to a change in the organizational structure of BECC and the NADB. There will be a single Board of Directors for both, which has its consequences for the legal and policy instruments for the organizations. Since no new instruments are available yet, we shall focus on the existing ones regarding the BECC.⁴²

The legal basis for participation by entities other than member States in BECC can be found in the Agreement establishing BECC⁴³ and in the Rules of Procedure of the Board of Directors. With regard to public notice and comment, detailed requirements have been laid down by the Board of Directors in the "Procedures regarding Public Notice". The

⁴⁰ <http://www.cocef.org/ingles.php>

⁴¹ Agreement of 16 and 18 November 1993 between the Government of the United States of America and the Government of the United Mexican States concerning the establishment of a Border Environment Cooperation Commission and a North American Development Bank.

⁴² Personal communication Javier Torres, Public participation officer BECC/COCEF.

⁴³ <http://www.cocef.org/popups/bech.htm>

same goes for the "Project Certification Criteria", and the "Procedures regarding complaints from groups affected by projects".⁴⁴ The relevant provisions of the Agreement and these procedures are quoted in Annex VII.

As we shall see below, the BECC regime provides for two types of participation of other entities than member states in the work of the Commission: (1) participation by members of the public as members of BECC institutions, and (2) participation by the public in general (which also includes NGOs).

Under article II, section 2 of the Agreement, the BECC, when receiving a request for assistance, consults, as appropriate, with an Advisory Council established under the Agreement and with private investors and national and international institutions.

Also, the Agreement (article II, section 4) provides for access to information and for the possibility to give written notice to and provide an opportunity to comment for 'the public' with regard to the general guidelines⁴⁵ for environmental infrastructure projects that the Commission establishes and with regard to applications for certification of projects. It also provides that groups affected by projects that the Commission has assisted or certified can complain to the Board of Directors that these projects violate the terms of the chapter on the BECC or violate rules and procedures established by the Board of Directors pursuant to this chapter.

The Board of Directors is the organ of the Commission taking most of the decisions. It can delegate some of its decision making power to a General Manager. The Board consists of 10 members. Two of these are members of the US and Mexican public who are residents of the border region. These two members of the public are full fledged members, they have the same (voting) rights and duties as the other members (mostly government or local government representatives) of the Board.

Under the BECC an Advisory Council is also established. This Council must include among its members at least one, and no more than six, residents of each of the border States representing either states or localities or local community groups. They are appointed by the US. There must likewise be at least one, and no more than six, residents of the Mexican border states appointed by Mexico. Also, there are three members of the public, including one representative of a US NGO on the Council, all appointed by the US at the US' discretion and three members of the public, including an NGO representative appointed by Mexico at its discretion. This Council provides advice to *inter alia* the Board of Directors on any issue regarding the BECC.

⁴⁴ <http://www.cocef.org/brules.htm>

⁴⁵ It is important to realize that the different guidelines (of which we shall discuss the public participation provisions below), not only give *rules* on public participation but they have also been *created* with the involvement of the public.

The Rules of Procedure of the Board of Directors⁴⁶ give more details on participation in meetings of the Board of Directors.

First of all, the Board can invite any person it wants to its regular and special sessions (this participation can be subject to confidentiality agreements).

At each regular session, at least one public meeting is held. Any person may attend such a meeting. Those wishing to attend the meeting need to register, indicating when relevant which organization they are part of. Attendance at these meetings is subject to availability of space, and security and safety requirements. Also, due regard is given to an equitable balance between participants from the two countries.

Persons, representatives of states, localities and NGOs of both countries, and IGOs, who have a specific interest in requests for assistance or certification by BECC, or other issues on the agenda, can request to make an oral statement (the request must generally be made 15 days before the meeting, must identify the person who will make the statement as well as the organization, if any, the person represents, must identify the subject of the statement). A written presentation of the statement has to be provided on beforehand and is translated in the other of the two official languages. Any additional materials need to be provided in the two languages.

The same persons can also ask permission to submit a written statement for formal consideration during a public meeting. The statement has to be provided in both languages or on time so it can be translated in the other language. Only statements in the two languages will be considered at a public meeting.

With regard to both oral and written statements, residents of the localities where projects are located have priority. The Board decides on which oral and written statements will be allowed, making sure there is an equitable balance among nationals of each of the countries.

The minutes of the public meetings are made available to the public. Minutes of closed meetings are made available to the public on a decision by the Board.

Outside the context of meetings, any person may make a written submission to the Board at any time and about any subject relevant to the work of the Commission (again, only if submitted in both languages).

The Procedures regarding Public Notice, adopted by the Board of Directors, specify different kinds of situations where notice should be given:

- public notice of public meetings of the Board of Directors;
- public notice regarding applications for project certification;
- public notice regarding technical assistance requests and technical assistance grants, and
- public notice of project pending for certification by the Commission.

In each case it is specified what information should be provided and by which means notice should be given. With regard to meetings of the Board of Directors, the procedures also provide directions for individuals who wish to attend such meetings on how to

⁴⁶ Due to the changes in the organization, described above, these Rules of Procedure are no longer in effect. They are discussed here since they do provide a useful example.

register. With regard to the certification of projects, the procedures provide for public comments. They specify when public comments should be given and which subsidiary body will consider them. They do not specify what the subsidiary body should do with these comments.

The Project certification criteria also have provisions on public participation. An applicant requesting the certification of his project will have to submit a Comprehensive Community Participation Plan. This means that the applicant must establish a local Steering Committee, consisting of representatives of different organizations in the community affected. This Committee assists in the implementation of the Participation Plan through organizing all kinds of public participation and information activities. In addition, the applicant must organize meetings with local organizations to inform them and get their support and provide public access to project information. At least two public meetings must be convened and these meetings must be organized following BECC criteria. The applicant is required to provide to BECC a report on the successful implementation of the Comprehensive Community Participation Plan. As one of the elements in achieving high sustainability of the project, the criteria mention that a post-certification participation plan is developed, ensuring this participation throughout the life of the project.

In the Procedures regarding complaints from groups affected by projects details are given on how two or more people (individual complaints are not allowed) can complain about how one or more projects that had received technical or other assistance by the Commission and/or that had been certified by the Commission, and that have caused or will cause negative environmental and/or health effects. The procedures provide minimum information that should be included in the complaint (if information is missing, the Board of Directors can either dismiss the complaint – it can however be handed in a second time with the missing information - or have additional information gathered). If a complaint contains all this information, it is considered by the Board of Directors. The Board, the Advisory Council and the general public are informed of the complaint. The Advisory Council prepares recommendations to the Board with regard to the complaint. Third parties may also submit their views on the complaint. The Board of Directors has to make a clear statement on the complaint, giving reasons supporting its conclusion. If it is planning on taking any steps as a result of the complaint, it must include a timetable for those steps. There is a time limit for complaints: they must be handed in no later than two years after full completion of a project. The procedure does not seem to provide for an appeal of a Board decision on a complaint.

2. North American Commission for Environmental Cooperation⁴⁷

The North American Commission for Environmental Cooperation (CEC) is an international organization created by Canada, Mexico and the United States under the North American Agreement on Environmental Cooperation (NAAEC). The CEC was established to address regional environmental concerns, help prevent potential trade and environmental conflicts, and to promote the effective enforcement of environmental law.

⁴⁷ <http://www.cec.org/home/index.cfm?varlan=english>

The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The Commission consists of a Council, a Secretariat and a Joint Public Advisory Committee (JPAC). The Council is composed of the environment ministers (or the equivalent) of each country. The Committee is composed of 15 members, from both government and the public (NGOs, businesses, academia etc.). The secretariat has professional staff from the three countries.

The legal and policy basis for the participation of the public in the CEC can be found in the NAAEC,⁴⁸ the Rules of Procedure of the Council,⁴⁹ the Rules of Procedure of the JPAC⁵⁰ and in the Framework for Public Participation in CEC Activities.⁵¹ The relevant provisions of these instruments are quoted in Annex VIII.

Under the NAAEC, the three organs of the Commission have some general obligations with regard to participation of the public.

Under article 9 and 10, the Council holds meetings that are open to the public and, in principle, decisions and recommendations made in those meetings are made public. Also the Council can ask for the advice of NGOs or persons, including independent experts.

When the CEC secretariat provides a report on a certain environmental issue (pursuant to article 13), interested NGOs and persons, and the JPAC (which partly consists of members of the public) can submit information. The secretariat can also convene symposiums, conferences etc. in order to gather relevant information from the public for such a report.

The JPAC's basic function is advisory (see article 16). It can advise on any matter relevant in the context of the NAAEC and provide scientific, technical and other information. It can also provide such information with regard to a so-called factual record. That is a record in a possible enforcement action against one of the three States, if this States is found to be violating provisions of the NAAEC. What makes the NAAEC special is that a submission by an NGO or a person can be at the basis of such enforcement action (see article 14). NGOs and individuals can play a very powerful 'watchdog' role in this respect.

The Council Rules of Procedure provide further detail on the involvement of the public in the work of the Council. At regular or special sessions of the Council, meetings are in principle public. When closed meetings are held, those persons and NGO representatives that were invited by the Council to advise on a certain issue, have to agree in writing that all information that comes to them and that is considered confidential, is protected and not made public by them (Rule 4).

⁴⁸ http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english

⁴⁹ http://www.cec.org/files/PDF/COUNCIL/CCL-dec-2002_en.pdf

⁵⁰ http://www.cec.org/files/PDF/JPAC/JPA-dec-2002_en.pdf

⁵¹ http://www.cec.org/files/pdf/PUBLICATIONS/GUIDE19_en.PDF

Rule 6 outlines the different levels of participation by the public in Council meetings. The Council may invite representatives of NGOs and individuals to provide advice. *Ad hoc* or standing committees, working groups or expert groups established by the Council can do the same. When it comes to making oral statements at public Council meetings, only NGOs established in the territory of a State Party and individuals residing in the territory of a Party are allowed to do so, provided they are accredited as participants. The only requirement for accreditation seems to be that an applicant for accreditation has to have an interest in the work of the Commission. The Council decides on the accreditation of participants.

Non-accredited persons may attend public meetings of the Council as observers (N.B. it is confusing that the CEC regime uses the word ‘observer’, since the status of these non-accredited members of the public does not at all resemble the observers as identified under the regimes such as ICPDR, Rhine, Meuse etc.). The non-accredited members of the public have to register with the Executive Director. Whether they can attend meetings depends on things like availability of space and security considerations. Also due regard is given to the importance of having an equitable proportion of attendees from among the nationals of each Party (which is especially relevant when there is limited space). Non-accredited persons may not make oral or written statements at such public meetings.

Pursuant to Rule 9, interested persons can suggest agenda items for Council sessions. Both the agenda items agreed upon for public meetings and the summary records of such meetings are made public by the Council (Rules 9 and 11).

The JPAC Rules of Procedure, more especially Rule 5, repeat JPAC’s role within the Commission. JPAC, which includes member of the public and NGOs, can advise the Council on any matter within the scope of the Agreement and may provide relevant technical, scientific or other information to the Secretariat, including for purposes of developing a ‘factual record’.

In its Framework for Public Participation in CEC Activities, the Commission sets out what it considers public participation and how it envisages achieving focused public participation. This policy document aims at giving a more practice oriented approach on the public participation issues touched upon in the abovementioned legal instruments.

The first of the guiding principles the CEC uses in the context of public participation is to ensure equity in the distribution of public participants. An effort is made to include as many different sectors in society as possible in the decision making processes of the CEC, bridging possible economic, cultural and other differences and inequities that exist between different groups and between these groups in the three countries.

The second principle is efficiency and timeliness of public participation: making participation an integral part of decision making, involving the public at an early stage, adapting the format of participation to different situations and different needs, informing

the public of what decisions the public participation process can affect and how this process will affect them.

The third principle mentioned is transparency and accessibility. This includes providing the public with all relevant CEC documents for their involvement in CEC activities (but only 'as appropriate'), making the documents needed for public consultation available and accessible (through the internet and through hard copies) timely (so there is enough time to provide comments) and in the relevant translations. In activities involving public participation, details of the registration process for the public should be included.

In the context of transparency and accessibility, the CEC also emphasizes that at all times the extent of the public participation and/or possible restrictions to this participation should be made clear. Three levels of participation are distinguished:

- a. open public meetings: meetings open to participation by all without restriction, subject to space availability and the security of participants;
- b. meetings with the public as observers: meetings fully or partially open to the public as observers, subject to space availability and the security of participants;
- c. meetings with public participation by invitation: meetings or portions thereof, open only to specific groups or persons (the appropriate CEC component decides on this).

Records of public meetings should be circulated to participants through registration addresses or other appropriate means.

In the context of accountability to the public, the Framework provides a number of requirements:

- there should be clear objectives for public participation;
- the public should be informed of next steps and decisions that will be taken
- the public should be informed of how and when their comments are being considered in the CEC's activities
- the effectiveness of public participation should be considered and, if necessary, improvements made.

As to what mechanisms to use for public participation, the CEC recognizes that different mechanisms, or combinations thereof, could be considered. Examples mentioned are *inter alia*:

- Consulting with JPAC and disseminating CEC information through JPAC;
- Seeking the advice of the National and Governmental Advisory Committees;
- Actively obtaining information from the public via questionnaires, interviews, forums, meetings, seminars, etc.
- Consulting with the public on specific issues through workshops, round tables, electronic discussion groups etc.

Also the Framework provides 'directives' with regard to public participation mechanisms. These are more detailed logistically oriented guidelines on how to implement public participation mechanisms. The directives provide practical approaches

on how to conduct open public meetings (including when to send documents, how to register to participate etc.), how to call for public comments and on a CEC contact list for distribution of information.

Unlike the institutions discussed above in this report, the CEC and its Framework explicitly provide for financial support for the public in order to enable it to participate in meetings of the CEC bodies, committees and work groups. Since not all participants can receive financial support, certain criteria have been established. Financial support is limited to one participant per organization per meeting, taking into account equitable representation of participants of the three countries. Also, selection aims at ensuring a wide range of views and interest (different sectors representing a broad range of views in each country), demonstrated expertise with the topic(s) to be dealt with at the public meeting in question and the ability to present specific, concrete and constructive proposals.

3. Aarhus Convention⁵²

The UN ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) is the most well known convention dealing with *inter alia* public participation. Forty States have signed the Aarhus Convention and thirty have ratified.⁵³ The EU signed the Convention and will ratify soon.

Relevant provisions on public participation can be found in the Convention itself,⁵⁴ the Rules of Procedure⁵⁵ and draft Guidelines on promoting the application of the principles of the Aarhus Convention in international forums⁵⁶. The relevant provisions of these instruments are quoted in annex IX.

These three sets of instruments of the Aarhus regime provide arrangements for participation in different institutional settings.

The first set consists of the substantive provisions of the Convention on public participation (Convention articles 6, 7, and 8). These provisions are directed towards Aarhus Member States. They provide basic rights for public participation that should be implemented in the national law making and decision making rules of these Member States. When we look at the exact wording of these articles, we see that they are directed towards Member States and should be implemented in national legislation. However, the principles on which articles 6, 7 and 8 are founded, can be applied to a much wider range of institutions (not just national ones), including organizations such as ICPDR. This is why the examination in this report includes the article 6, 7, and 8 of the Convention. When reading the section on these articles, the reader should keep in mind that we are not

⁵² See <http://www.unece.org/env/pp/>

⁵³ See <http://www.unece.org/env/pp/ctreaty.htm>

⁵⁴ See <http://www.unece.org/env/pp/documents/cep43e.pdf>

⁵⁵ See <http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.2.e.pdf>

⁵⁶ <http://www.unece.org/env/documents/2004/pp/mp.pp/wg.1/mp.pp.wg.1.2004.13.e.pdf>

as much concerned with the exact wording of the articles but more with the underlying basic principles.

The second set, the draft Guidelines, is an example of how the basic principles underlying articles 6, 7, and 8 can be used in a purely international context. These Guidelines are a first attempt to apply the Aarhus principles to international forums outside an Aarhus context (another – different - example of how these basic principles can be applied to an international/supranational context, is the EU Commission proposal discussed below).

The third set consists of article 10 of the Convention (with more details in the Rules of Procedure). This is the provision in the Convention on participation of observers to the Meeting of the Parties (MOP) to the Convention, and to possible subsidiary bodies. This third set is an example of how the Aarhus regime applies the basic principles of public participation to itself.

a. Public participation requirements applicable to States and national legislation

The Aarhus Convention provides for public participation in decision making by State authorities in three broad categories of situations:

1. public participation in decisions on specific activities (activities listed in Annex I and activities *which may have a significant effect on the environment*) (article 6);
2. public participation in plans, programmes and policies *relating to the environment* (article 7);
3. public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments *which may have a significant effect on the environment* (article 8).⁵⁷

The provisions of article 6 are the most detailed and the most strict. Activities that fall into this category are generally subject to public participation. The ‘public concerned’⁵⁸ is informed early on in the decision-making procedure of the kind of activity, the kind of decision that will be taken, the procedure for making such a decision (including an explanation of the participation possibilities) and the authority that is going to take the decision, as well as of whether the activity is subject to an environmental impact assessment. The article further provides that the public concerned should be informed well in advance of possibilities for participation in the relevant decisions, that the public be given enough time to participate and the right information to make this participation informed. It also states which information relevant to the decision-making should at a minimum be provided to the public concerned (sometimes only at their request). The public can submit comments, information, analyses or opinions that it considers relevant to the proposed activity and the authority taking the decision shall ensure that in the

⁵⁷ For a detailed discussion of the articles 6-8 of the Convention, see “The Aarhus Convention, an implementation guide”, p. 85 – 122 (2000).

⁵⁸ “The public concerned” means the public affected or likely to be affected by, or having an interest in, the environmental decision making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

decision due account is taken of the outcome of the public participation. The decision (with the reasons for taking it) is in turn provided to the public.

The provisions for public participation in article 7, with regard to the plans and programmes roughly follow the same rules as the ones of article 6 (as to timeframes for participation, early participation and the obligation to take the results of the participation into account in the decision, article 7 explicitly refers back to article 6). Although their formulation is equally mandatory as for the first category ('a party *shall*'), it is also less precise. In as far as policies relating to the environment are concerned, the wording of the Convention is not as strict: Parties have to 'endeavor to provide opportunities for public participation' in their preparation of policies. What the participation should look like and what is to be done with its outcome is not specified.

Article 8 provides some basic requirements regarding the adoption of regulations and similar instruments: early participation, sufficiently long time frames, publication of draft rules, a possibility to directly or indirectly (through representative consultative bodies) comment, and the obligation to *as far as possible* take into account the results of the public participation.

These public participation requirements are focused on the situation of States. It is therefore difficult to apply them directly to the situation of international institutions, such as for example Water Basin Commissions. However, the principles underlying these requirements are as relevant for international institutions as they are for states.

b. Principles of public participation for international forums

Article 3(7) of the Convention obliges the Member States to promote the application of the Aarhus principles in international environmental decision-making and in international organizations. For this reason the "Expert Group on public participation in international forums" was established under the Aarhus Convention. The Expert Group has come together twice, discussing the adoption of draft Guidelines. The first meeting led to an 11 August 2004 report which outlined the approach to be taken when drafting the guidelines.⁵⁹ During the second meeting of the experts group draft Guidelines on promoting the application of the principles of the Aarhus convention in international forums were presented.⁶⁰ The draft Guidelines apply to organization such as ICPDR as well as organizations with a broader scope but with a potential effect on the environment.

The draft Guidelines have a section with general principles/objectives and considerations and sections on the three pillars of the Aarhus convention (access to information, public

⁵⁹ <http://www.unece.org/env/documents/2004/pp/mp.pp/wg.1/mp.pp.wg.1.2004.13.e.pdf> . Relevant documents used as a basis for the report of the first expert group are "Access to information, Public Participation and Access to Justice in International Forums" <http://www.unece.org/env/documents/2002/pp/mp.pp.2002.18.e.pdf> and "Survey of Selected Access to Information, Public Participation, and Access to Justice Rules and Practices in International Forums" <http://www.unece.org/env/documents/2002/pp/mp.pp.2002.18.add.1.e.pdf> . This last document provides relevant information with regard to *inter alia* public participation opportunities under other regimes.

⁶⁰ <http://www.unece.org/env/pp/ppif/PPIF.Gs.v.31Oct.ntc.doc>

participation and access to justice). In the section on general principles (section III⁶¹) the draft Guidelines provide that a diverse range of relevant actors should participate, including (but not limited to):

- representatives of those affected or likely to be affected by, or having an interest in, the outcomes of decisions, including environmental citizens organizations;
- those who can offer expertise relevant to the issues under consideration; and
- representatives of commercial interests that might cause, contribute to, or be in a position to alleviate the problems under discussion,

with special attention to those who are most directly or most likely to be affected, or interested in the outcomes of decisions. In order to assure that such participation is balanced, it may not always be useful to have a ‘one size fits all’ approach. When the public concerned consists of groups with different capacities, resources, socio-cultural status or political power, it may be more useful to have a differentiated treatment to counterbalance such inequities.

The draft Guidelines have an important provision on funding that is not often found in other legal instruments: sufficient resources should be made available to enable balanced participation.

The section on public participation (section V) gives more detailed provisions. The provisions seem somewhat contradictory. They, for example, explicitly state that restrictions on who participates may not be excessive or established only for reasons of minimizing the burden for governments or to promote efficiency, unless there is no other reasonable alternative available.⁶² However, at the same time the draft Guidelines recognize that there may be special circumstances under which participation is restricted, in order to ensure quality efficiency and expediency of the decision making process. In that case, the restriction could be made through an accreditation process or a selection procedure, as long as the procedure is based on clear and objective criteria, fair, accountable and accessible and the public is informed. Selection criteria suggested include field of expertise, representation in geographic, sectoral, professional and other relevant contexts, and knowledge of the working language of the organizations. When applying such procedures, both continuity of representation and chances for newcomers and underrepresented stakeholders to become part of the process, should be taken into account.⁶³

At the same time, the draft Guidelines encourage NGOs and other actors to organize themselves in order to ensure efficiency and expediency of the decision-making process. Elements to be taken into account in this self-organization are transparency, legitimacy, breadth of representation, openness to participation, coordination and procedures for comprehensive consultation with constituencies.

⁶¹ The available draft has a typing error and numbers this section as II.

⁶² Guideline no. 42.

⁶³ Guideline no. 44.

Also, as a principle, meetings of international forums, subsidiary bodies etc are open to participation, unless there are good reasons to decide otherwise, which reasons should be made publicly available.

The draft Guidelines give a non-exhaustive list of different kinds of decision making that could benefit from public participation: national preparation for international decisions, the formulation of rules, plans, programs, policies and projects, the negotiation and implementation of conventions, and the preparation of international events.

The draft Guidelines also provide what mechanisms for public participation could look like. Several elements are discussed:

- Not one mechanism is promoted but several (taking into account the type of international forum concerned, nature and phase of decision-making etc.): consultative status, NGO advisory committees, NGO forums and dialogues, participation of NGOs in governmental delegations, internet broadcasting of events and general calls for comments.
- Those participating should be entitled to access to relevant documentation, to propose items for the agenda, to speak at meetings and circulate written statements.
- Reasonable time-frames for participation should be used so that the public is informed in time and can prepare and participate effectively (timing for participation should be compatible with timing used with regard to public access to documents).
- The opportunity to participate should be provided at such a stage that options are still open and participation can be effective.
- The public concerned should be informed in due time of its participation possibilities and of the availability of information (through websites or directly to the members of the public concerned if they have asked for this)
- The procedure to be followed (including timeframes) should be clear and objective.
- After participation, a reasoned decision is taken and made publicly available, which takes into account the comments given.

As a final issue, financial assistance and capacity building are discussed. It is suggested that preparatory meetings and forming coalitions on specific issues may enhance participation. Governments and donors are urged to provide support, including financial support.

c. Participation principles applicable to the Aarhus Convention Meeting of the Parties and subsidiary bodies

When it comes to how the Aarhus institutions *themselves* have given shape to the participation of the public, the Convention provides some groundwork and is being built upon by the Rules of Procedure. Article 10 of the Convention provides that:

- the UN,
- UN specialized agencies,

- the International Atomic Energy Agency,
 - non-Member States and non-member regional economic integration organizations (that qualify to become Members), and
 - intergovernmental organizations qualified in the fields to which the Convention relates,
- all are entitled to participate as observers in Meetings of the Parties.

Non-governmental organizations, qualified in the fields to which this Convention relates, must inform the Executive Secretary of the Economic Commission for Europe that they wish to be represented at a meeting of the Parties. They are entitled to participate as observers unless at least one third of the Parties present in the meeting raise objections.

The Rules of Procedure have expanded this observer status for the abovementioned list of organizations to all meetings in the context of the Convention (not only those of the meeting of the Parties but also meetings of subsidiary bodies) and Rule 23 ensures that the Rules of Procedure also apply to the meetings of the subsidiary bodies. None of the observers is allowed to vote in the meetings.

The Rules also provide that observers are notified of a meeting taking place. This notification is also put on the UN ECE website. The same goes for the provisional agenda of a meeting and the official documents relevant to such meetings. The idea is that the Convention's own article 4 on access to information is followed. A member of the public (members of the public are not observers) can request to be notified too and can also ask that the relevant documents are sent to him/her.

Meetings of the Parties are open to members of the public unless it is decided otherwise, especially when decisions are made on confidential information. Such closed meetings are exceptional. If the members of the public wishing to attend the meeting are too numerous they can follow the meeting through audiovisual equipment. During the meetings of the Parties or meetings of subsidiary bodies, the observers mentioned above can request to address the meeting and are included on the list of speakers. If two or more NGOs have common goals and interests in the context of the Convention, the chairperson to a meeting may ask them to form one delegation or to present their views through only one representative.

For the period in between meetings and the duration of one meeting a Bureau is established. It has seven members. A representative of the environmental NGOs, chosen by them, is invited as observer to the bureau meetings.

4. European Commission Proposal for a Regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies

As stated above, the EU has signed the Aarhus Convention and is planning to ratify it. In order to ensure full implementation of the Convention, EU legislation is adapted and created. This legislation aims to ensure that the Convention is implemented in the EU

Member States' legislation, but also to ensure that the community institutions follow the Aarhus rules. The Proposal of the European Commission for a Regulation directed at the community institutions, is the first step in ensuring community institution compliance with the Aarhus Convention. The relevant paragraphs and provisions of the Proposal are quoted in annex X.

The implementation on the community level of the Aarhus public participation requirements is limited to a part of article 7. Articles 6 and 8 and one part of 7 are not implemented in the Proposal. This means that the Proposal does not contain provisions with regard to public participation in decisions on whether to permit proposed activities listed in annex I or proposed activities not listed in annex I which may have a significant effect on the environment (both article 6). Also public participation in the preparation of policies relating to the environment (article 7, last part) as well as public participation during the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment (article 8), are not implemented. The European Commission explains in the Proposal why article 6 is not implemented (but the explanation is questionable⁶⁴). It does not fully explain why article 8 and a part of article 7 are not implemented.

With regard to public participation in the preparation of plans and programmes relating to the environment⁶⁵ (first part article 7), the Proposal provides for:

- reasonable timeframes (including sufficient time to inform the public of the plans and programmes to be prepared, of the modalities of participation, an sufficient time to participate effectively);
- participation at an early stage (when options are still open);
- taking due account in the decision of the outcome of the public participation;
- identification (by the relevant authority) of the public which may participate.

⁶⁴ In the context of the implementation of article 6, the discussion is limited to

- 'decisions taken at Community level relating to the financing of the listed activities and of others that may have a significant effect on the environment' (article 6 would not apply because on the national level of EU states, such decisions were not considered subject to public participation and because of a risk of duplication of procedures);
- decisions taken on a community level, such as the establishment of lists of active substances or classification of substances' (article 6 would not apply because these decisions do not have a significant effect on the environment);
- decisions regarding placing on the market of GMOs (article 6 would not apply because it is more proper to await the outcome of negotiations on this subject within an Aarhus context).

⁶⁵ Article 2(1f) of the Proposal defines 'plans and programmes relating to the environment' as "plans and programmes,

i) which are subject to preparation and/or adoption by a Community institution or body,
ii) which are required by legislative, regulatory or administrative provisions,
iii) and which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, as laid down in Decision N° 1600/2002/EC of the European Parliament and of the Council, or in any subsequent general environmental action programme.
General environmental action programmes shall also be considered as 'plans and programmes relating to the environment'.

This definition shall not include financial or budget plans and programmes, or internal work-programmes of a Community institution or body."

Since this EU implementation of a small part of the Aarhus Convention adds little to the Convention itself, it will not be discussed in great detail in the following section.

IV ANALYSIS OF KEY FEATURES OF PUBLIC PARTICIPATION, INCLUDING OBSERVERSHIP, AT THE INSTITUTIONS SURVEYED

The descriptions of the different international institutions and their legal and policy instruments for participation as described in sections II and III show a wide variety of ways to approach the issue of participation. Also, some of the instruments discussed are in force, while others are in draft form and/or still in a negotiations phase, and some provide a more general policy framework while others give detailed rights and obligations. Reviewing each set of rules and instruments of each institution in its entirety is important because this is the only way to see clear linkages between different elements within these sets of rules and instruments in a specific institutional context. For example, an institution may provide very restrictive requirements for observership, but wide possibilities for other ways of participation in its decision making processes. If we would only look at observership, this may unduly lead to the conclusion that this institution is not very open to the public. However, while keeping this in mind, it may nevertheless be useful to deconstruct the different regimes into separate aspects of participation and compare the regimes for these aspects.

In the following some major subjects are highlighted and the approaches to those subjects under the different regimes are discussed.

A. Categories of participants and their participation

Besides the ‘usual’ Member States, most of the regimes researched in this report identify different categories of other participants for their meetings and processes. A few regimes, such as OSPAR and Meuse, only identify observers. In the observer category they include non-Member States, NGOs and IGOs (the Meuse regime also includes the EU).

The regimes that provide for different categories of participants include the ICPDR regime. It identifies:

- ‘participants with consultative status’ (States or regional economic integration organizations),
- observers (national or international organizations or bodies engaged or interested in protection and management of the Danube River or general issues of water protection and management), and
- organizations or bodies, other than the two previous categories, with which it cooperates and coordinates.

The first category of entities has farther reaching rights of participation than the second. The extent of the rights of the third category is not specified.

The Great Lakes and Rhine regimes identify organizations with which they ‘cooperate’ and organizations that can participate as observers. Under the Great Lakes regime, the involvement of the first category is farther reaching than the involvement of the second

category (whether this is the case for the Rhine regime does not become very clear from the available documents). The Great Lakes regime only recognizes as observers ‘public organizations’. This excludes NGOs from observership. At the same time, the Great Lakes Commission provides broad opportunities for participation of NGOs and the public at large to participate in Commission meetings as ‘regular’ participants, while the OSPAR and Rhine regimes do not allow the public to participate in meetings and have quite a number of rules restricting the participation by NGOs.

The draft Guidelines for international forums prepared under the Aarhus regime are exceptional in that they propose a wide range of possible participants and do not limit their participation to, or further define it as, observership:

- representatives of those affected or likely to be affected by, or having an interest in a decision of an international institution;
- entities that can offer certain specific expertise;
- representatives of commercial interests that can be the cause of an environmental problem.
-

The draft Sava Stakeholder Involvement Strategy suggests a similar approach and a tentative list of which these may be, is suggested: government agencies at different levels, local government, non-governmental institutions, political organizations, research institutes, industries, agriculture, tourism, or different other businesses, households, etc.

Finally, there are some regimes that provide much more open-ended possibilities for participation. The substantive (and to a slightly lesser extent the procedural) provisions of the Aarhus Convention, as well as the BECC and CEC regimes allow for the possibility of ‘the public’ (not necessarily organized in organizations or bodies or designated as observers) to participate. This definition is meant to include a broad group of entities, representing as much as possible the different economic, social and cultural groups in each of the countries involved. Under the BECC and CEC regimes this participation takes place by the public participating in meetings but also by members of the public being *members* of BECC and CEC (subsidiary) institutions.

When taking the regimes investigated together, some general remarks can be made on entities participating. Generally speaking, non-Member States, IGOs, NGOs and individual members of the public can play a role as participants. Most regimes investigated have used the instrument of observership to allow for participation in the work of their institutions. Some regimes (including ICPDR, Sava, Great Lakes) also allow for less firmly regulated ‘cooperation’ or ‘coordination’ with one or more categories of these entities.

With the exception of the Aarhus regime and the European Commission’s proposal and to a certain extent the draft Sava Stakeholder Strategy, the European regimes investigated provide no role as participants for the public or the public concerned. They limit the participation to non-Member States, IGOs and NGOs. The State and the IGO observers generally have farther reaching rights than the NGO observers (see for example under OSPAR). The North American regimes investigated have a role of importance for the

public alongside roles for IGOs and NGOs. They allow members of the public to participate in meetings. BECC and CEC deserve special attention in this respect because they have also incorporated the public in their institutional structure. Both regimes have an advisory organ (The Advisory Council under BECC and the JPAC under CEC) which count a significant number of members of the public among its members. Two members of the public also have a role equal to the roles of government officials in the main organ of BECC, the Board of Directors.

B. Procedure and requirements for granting participant status

In order to prevent unregulated and unlimited participation, most of the regimes investigated have created procedures and requirements for which persons or organizations can participate. In the following we shall start with those regimes that have observership of organizations and states as a (main) modus of participation (ICPDR, Rhine, Meuse, Sava, OSPAR, Great Lakes, Aarhus) followed by the regimes where participation is broader (BECC, CEC, Great Lakes, Aarhus, EU, Sava draft Stakeholder Strategy).

1. Participation as observers

Most of the regimes in the first category have similar requirements that need to be fulfilled if an organization wishes to become an observer (those that in addition have participation options such as ‘participants with consultative status’ and ‘cooperation’ or ‘coordination’, generally have little regulatory details for these forms of participation).

Most of these regimes have a list of generic and/or organizational requirements. The applicant organization has to have specific technical, scientific or other knowledge or expertise as well as interests that are relevant for the institution and that correspond with the goals and objectives of the respective Conventions (Aarhus suggests a similar requirement in its draft Guidelines). ICPDR has specified these requirements in more detail, distinguishing the kind of knowledge and interests an observer organization working *in* the Danube River Basin should have and what those *outside* should have, and stating a preference for basin-oriented cooperation and coordination. It has also provided an open-ended list of possible candidates for observership. It is also required by most regimes that the organization must be well organized and structured and that its internal structure is such that it can legitimately have representatives speak in Commission meetings on behalf of the organization and its members. OSPAR is the only regime of the ones researched that has the requirement that an observer has to be an organization with an *international* character. Also, under most regimes, the applicant organization has to declare that it will abide by the rules of the regime (Convention, Rules of Procedure etc.) to which it is applying.

Most of the regimes with observer status that were investigated require that the organization in question *apply* for the observership. Only ICPDR has the additional possibility that an organization can be *invited* by ICPDR to become an observer. The application for observer status has to contain written acknowledgment of all of the

elements/requirements mentioned above. Also, the larger part of the regimes require that the applicant explain how its input as an observer will be useful to the work of the institution.

Generally it is the Commission (or MOP) that makes the final decision whether to grant observer status. Some regimes give specifications on voting on observer status (the OSPAR Commission, for example, decides on whether to grant observership by unanimous votes of the Parties), while others apparently use their 'regular' voting procedures.

However, even if an organization fulfills all of these requirements, under most regimes this does not mean that observer status is automatically or always granted. Only the Aarhus regime seems to be constructed in such a way; if the regime's sole requirement for IGO and NGO observers to the MOP (being qualified or having an interest in the fields to which the Convention applies) is fulfilled, observer status follows automatically (except that if 1/3 of the Parties objects, an NGO can be refused observership).

Several of the regimes investigated stress the fact that they want participation in their meetings to be well balanced and use this as a reason for refusing observership to otherwise qualified organizations. ICPDR wants a balance with regard to the interests covered and the provisions of the Convention covered, For NGO observers, the Meuse regime requires balanced representation of interest groups as well as regional and international organizations. It explicitly adds that another reason it uses for limiting the number of NGO observers, is to keep their total number 'reasonable' so that collaboration is effective. This is an argument that is rejected in the Aarhus draft Guidelines for international forums. These guidelines prescribe that restrictions 'should [not] be [neither excessive nor] established solely for the sake of minimizing governmental burdens or promoting efficiency unless there is no reasonable alternative to such restrictions'. At the same time, the Aarhus draft Guidelines suggest that besides field of expertise and representation in geographical, sectoral, professional and other relevant contexts, knowledge of the working language of an institution may also be used as a selection criterion.

The principle of effective collaboration of the institution with its observers, is used in a number of the regimes investigated, such as ICPDR, Meuse and the Aarhus draft Guidelines for international forums, to promote the idea of 'self organization': NGOs with similar interests are encouraged to form 'umbrella organizations' with one delegation participating as an observer to meetings and speaking through the same representative(s). The Meuse regime even seems to imply that those NGOs that decide to make joint requests for observership stand a greater chance of being accepted. Aarhus is the only one of the regimes that for one situation has made self organization a formal requirement and for another a distinct possibility. First, a single representative of 'non-governmental organizations established for the purpose of, and actively engaged in, promoting environmental protection and sustainable development' elected *by the Parties* (NB not by the NGOs themselves), is invited to participate as an observer to meetings of the Aarhus bureau. Secondly, the Rules of Procedure of the MOP allow the Chairperson

to request representatives of two or more ‘similar’ NGOs to constitute themselves into a single delegation for the purposes of the meeting, or to present their views through a single representative. An example in the Danube context of such self organization is the Danube Environmental Forum (DEF). ECO Forum is an example under the Aarhus regime.

2. Other public participation

Some of the regimes in the second category, those provide for more extensive participation including by ‘the public’, also have requirements for such participation, although these are generally less detailed and less strict.

The CEC and BECC regimes requires that members of the public wishing to make oral statements on agenda items in public CEC or BECC Board of Directors meetings, should register. The CEC regime also requires that they must have an interest in the work of the Commission. The CEC Council decides on registration.

Under the CEC regime, other members of the public that are not registered may still attend meetings and do not have to show an interest, only they are not allowed to speak. The only CEC and BECC limits to the participation of the public are availability of space and security considerations. If space is limited, their attendance can be limited taking into account attendance by an equitable proportion from among the nationals of each Party.

As to participation of the public under Aarhus, the substantive provisions of the Convention applicable to Aarhus member states are slightly different for different decision making processes. For those decisions involving activities mentioned in Annex I or activities that may have a significant effect on the environment, ‘the public’ can participate in the decision making process and participate in meetings in that context. When it comes to participation concerning plans and programmes relating to the environment, the authority drawing up those plans and programmes gets to decide who participates (taking into account the objectives of the Convention). Since the provisions on plans and programmes are the only ones implemented in the EU Commission proposal, this also means that in that context, the EU institutions get to decide who participates.

Aarhus requirements for other kinds of decision making (policies relating to the environment, executive regulations and/or generally applicable legally binding normative instruments) are not very specific but generally allow for ‘the public’ to play a role. The Aarhus draft Guidelines for international forums recommend participation by ‘a diverse range of relevant actors’ and indicate some elements that could be used to streamline participation of these actors:

- restriction of participation should only happen under special circumstances, depending on the nature and phase of the decision making process
- restriction should be applied to ensure the quality, efficiency and expediency of the decision making process
- accreditation or selection procedure should be based on clear and objective criteria
- the public should be informed of these procedures

- the procedures should be transparent, fair, accountable and accessible
- selection criteria may include, among others, field of expertise, representation in geographic, sectoral, professional and other relevant contexts, knowledge of working language
- procedures should take account of the value of continuity of participation without restricting the entitlement to participation of newcomers and underrepresented stakeholders
- public interest organizations should be given no less standing and participation rights than those enjoyed by business organizations [this last item is fully in brackets in the draft]

The Sava draft Stakeholder Involvement Strategy, provides an example of another approach to selecting who can participate. In this strategy, the Commission proposes a list of issues and activities that should or could include stakeholder involvement opportunities, implying that entities involved in these issues should be the ones participating.

When members of the public participate in the activities of a regime, through *membership of the institutions* of that regime, other requirements apply. BECC and CEC provide examples. For the two Mexican and US members of the public that are part of the BECC Board of Directors, there is the requirement that they are residents of the border region. The requirements for the members of the Advisory Council are:

- that they are residents of the border States of the US and Mexico and that they represent these states, localities or local community groups (for each country 1 to 6 of such members are selected)
- that they are members of the US and Mexican public and for each country, at least one of them is a representative of an NGO (for each country three of such members are selected)

The rules applying to the appointment of these members are determined by the US and Mexico.

With regard to the members of the public in the CEC Joint Public Advisory Committee (JPAC), the legal instruments under the CEC regime do not provide any requirements (there isn't even the requirement that any of the members *should* be members of the public, although practice shows that each country has appointed such members).

3. Time limit on participation status

Different regimes have different provisions regarding the duration of participation rights. The regimes investigated which allow for participation of the public, have no time limits on this participation.

Observership in some regimes is subject to limitations. Observership to the Meuse Commission, for example, is limited to 4 years. It can be withdrawn at any time during those 4 years by the Meuse Commission but if that does not happen and 4 years have passed, it can be renewed. Other regimes (Rhine, OSPAR, Great Lakes) simply don't

specify and it may be assumed that in those regimes organizations can be observers for an unlimited amount of time. ICPDR and the Sava Commission can grant observership for both a limited and an unlimited time (under the Sava regime ‘*ad hoc*’ and ‘permanent’).

Only the Rhine, and OSPAR regimes explicitly provide for the situation that an observer does not ‘use’ his observer status. If an observer (in case of OSPAR this is only for NGO observers) does not participate as observer in meetings for 2 consecutive years, the Rhine Commission’s president may decide to withdraw the observer status. The chairman of the OSPAR commission has similar powers but he may also choose a less stringent ‘punishment’ and decide to restrict the observership of that organization to only receiving documents.

C. Rights of participants

1. Possibility to attend meetings

All of the regimes researched allow for some kind of participation of observers and/or the public in meetings.

Generally a distinction is made between meetings that are private/closed and meetings that are open/public. Under the CEC regime, for example, a number of public Council meetings are held but other meetings of the Council are only public if the Council so decides. Sava Commission meetings are not public unless the Commission decides otherwise. Whether a meeting is closed or open may be regulated in advance but it may also be decided for individual meetings. Also certain parts of otherwise open meetings, generally the parts where confidential issues or internal matters of the organization are discussed, can be closed to outsiders. Under the ICPDR, Meuse and OSPAR regimes, for example, those parts where matters of personnel, budget and internal organization are discussed, are not open to observers. If a meeting is closed, some regimes do provide that members of the public or organizations may be invited to participate. Such participation is subject to strict confidentiality requirements for the person or organization (see for example under the CEC regime). However, some regimes, like the Meuse, have confidentiality requirements for the documents distributed to observers for *all* meetings.

Meetings of the Parties under the Aarhus regime are open, both to observers and to the public (only in exceptional circumstances the MOP may decide otherwise). The same goes for the meetings envisaged under the substantive provisions of the Convention (with the obligations for the individual Aarhus member states). It must be noted however, that the meetings under the substantive provisions of the Aarhus convention have a somewhat different character than the meetings convened under the different other regimes investigated.

In some regimes, the fact that certain meetings are in principle open to outsiders, does not mean that every organization or member of the public can attend those meetings. ICPDR, for example, has the possibility to grant observer status for all meetings of the Commission and its subsidiary bodies, but it can also grant observer status for certain

specific meetings. In its application to ICPDR, an applicant observer can indicate which meetings have its particular interests or where its expertise is most helpful. Implied in the approach of ICPDR is that once an organization has been granted observer status for all or selected meetings, it can attend all such meetings. The Rhine and Meuse regimes have a different approach: even though an organization (or State) has observer status, it still has to be invited for plenary Commission meetings and meetings of subsidiary bodies. The regimes have a similar requirement for NGO observers and meetings of subsidiary bodies. Under the Great Lakes regime, participation of observers to meetings is subject to approval of the Commission. Participation of the public is not, we have been told. The OSPAR regime has made a slightly different distinction: IGO and State observers can participate in all meetings on the same basis as they participate in the Commission. NGO observers are subject to special regulation under the OSPAR regime: for attendance to meetings of the Commission, NGO observers are divided into ‘general NGO observers’ and ‘specialized NGO observers’ and a limited number of seats per meeting is available for each group. Meetings of OSPAR subsidiary bodies also only have a limited number of seats for NGO observers. The Commission has in addition reserved its right to, ‘if need be (...) restrict participation in a specified meeting of observers in any category’.

2. Receiving announcements, agenda, draft documents and documents for meetings

Under most of the regimes investigated, meetings (date, place agenda) are announced to a wide public through the websites of the organizations. Observers who are allowed to and have indicated an interest in participating in a meeting are generally informed (and invited) specifically and receive the documents that pertain to the meeting, or part thereof, they will be attending (see for example ICPDR, OSPAR, Meuse and the Aarhus provisions for the MOP as well as the draft Guidelines for international forums). Under the Aarhus provisions for the MOP, members of the public receive the agenda and other relevant documentation for meetings of the MOP on request and the Aarhus draft Guidelines recommend something similar. The provisions of the Aarhus convention applicable to the individual member states also have the obligation that the public (concerned) is informed by the relevant national or local authority of the time and venue of a hearing, as well as the obligation to give access on request to the relevant documents or draft documents (in as far as these are not confidential). The BECC regime requires providing notice in advance through a wide range of different media of meetings (including the proposed agenda, place and time) of the Board of Directors. If the Board is planning on discussing projects that are considered for certification, there is an obligation to also provide in advance to the public, for each of these projects:

- a summary of the project, describing how it complies with certification criteria;
- a list of the most important project documents on file with the Commission;
- a list of all written comments received.

The available legal and policy instruments for most of the regimes investigated do not make explicit whether it is possible for observers and members of the public to propose agenda items or suggest changes to the agenda. The CEC regime has a provision allowing ‘interested persons residing or established in a territory of a Party’ to propose agenda items for regular Council sessions. The CEO of the Great Lakes Commission informed us

that under this regime the public, including NGOs, may propose agenda items and suggest changes to the agenda. The Aarhus draft Guidelines also recommend that public participation include proposing items for the agenda.

3. Participation through oral statements at meetings and submission of documents, including comments

Observers generally have the opportunity to speak during the meetings they (are allowed to) attend (see for example ICPDR). However, under some regimes this opportunity is conditional. The OSPAR regime allows NGO observers to take part in discussions, but only at the discretion of the chairman, while a proposal made by an NGO observer is only discussed if it is supported by at least one member state. The Great Lakes regime has similar practice with regard to proposals of the public. Under the Rhine regime a coordination group decides on how to gather oral and written statements of NGO observers. The Aarhus provisions applicable to the individual Aarhus member states also explicitly provide for a hearing where members of the public can voice their ideas and concerns with regard to certain decisions (although this obligation is not specific for all possible types of decision making). The CEC regime has a similar provision allowing accredited members of the public, including NGOs, to make oral statements on agenda items during a public Council meeting. The Aarhus provisions on participation in MOP and subsidiary body meetings however, also prescribe that no one is allowed to speak at the MOP without having previously obtained the permission of the Chairperson, with IGO and NGO observers allowed to speak about every agenda item (after having obtained permission).

Observers generally have the right to present documents, information and reports to the Commissions (or MOP) or to their subsidiary bodies. Under some regimes members of the public also have this right. Most regimes require that these documents, information and reports have relevance to the objectives of their Convention or to the activities of the Commission (MOP) or subsidiary bodies (see for example OSPAR, Rhine).

Even though observers, and under some regimes members of the public, can send in documents, information and reports, under some regimes they are not distributed or discussed automatically at a meeting. Under the OSPAR and Rhine regimes, for example, distribution of documents provided by NGO observers is at the discretion of the Executive Secretary / Secretary General to the Commission and the parties at the meeting decide whether they wish to discuss these documents etc. The CEC regime indicates that all comments not only have a role during an open public meeting, but that they will also be made available to the public (through *inter alia* the organization's website).

Separate attention should be given in this section to those kinds of oral statements and documents submitted, that are characterized as 'comments'. In some national legal systems the concept of 'comments' is highly defined, but this amount of definition and refinement is not always easily transposable to the international level. What if, for example, during a meeting an NGO gives a detailed written or oral criticism on a proposal for a decision? Is that to be qualified as an oral or written statement or as

comments? In this report we shall not try to define what, if any, could be the differences between comments, and written oral submissions, but just mention those regimes that speak of comments.

Under the BECC regime, members of the public have the opportunity to comment on general guidelines established by the Commission, for environmental infrastructure projects it provides assistance to. They also have the opportunity to comment on such a project that is considered for certification by the Board of Directors. When it turns out that a certified project has caused or will cause negative environmental or health effects, groups of two or more people affected may complain with the Commission about this and it may lead to the Board of Directors taking steps to prevent, stop or mitigate the negative effects. The CEC regime is another example. It allows the public to provide comments to (draft) documents and comments for meetings (even if the person/organization is unable to attend the meeting), without the specification of relevance.

Both the Aarhus Convention and its draft Guidelines for international forums have general provisions that provide for giving comments on (draft) decisions to be taken. The information available for the Great Lakes regime indicates the same.

4. Consultations

In this category, two provisions under the Rhine regime, and almost identical ones under the Meuse regime, should be mentioned. Under both regimes, the Commission consults with NGOs on decisions which may have an impact on them. Once such decisions are taken, the Commission informs the NGOs thereof.

Similarly, under the Rhine regime, the Commission may decide to consult specialists representing the recognized nongovernmental organizations or other experts and invite them to its meetings.

Under the BECC regime, BECC consult with the Advisory Council and, as appropriate, with private investors and national and international institutions, particularly the North American Development Bank (NADB), before it provides assistance to those who want to develop projects in the border region that could be funded by the NADB. The CEC regime provides for consultations with JPAC as well as with the public.

The Aarhus draft Guidelines for international forums also acknowledge that giving consultative status to NGOs is one of the ways to ensure effective public participation.

5. Right to vote

The larger part of the regimes investigated explicitly states that observers, or members of the public, are not allowed to vote. Those that do not have such an explicit provision do not seem to allow them to vote either.

D. Use of participation inputs

Quite a number of the regimes investigated do not provide clearly what is to be done or should be done with the views, information, analyses and other inputs provided through participation. A few give clearer indications. The ICPDR regime, for example, provides that position and views of observers, as expressed during meetings are to be reflected in the relevant documents resulting from the meeting. The Aarhus Convention and the draft Guidelines both provide that the results of public participation should be taken into account in the decisions to which the participation pertained. The EU Commission's proposal provides that the decision making on the plan or programme related to the environment, due account is taken of the outcome of public participation.

Under the BECC regime, the complaints procedure provides complainants with an outline of how their complaint is being taken into account and a reasoned decision on what, if anything, is being done in response to their complaint.

E. Obligations of participants

Many of the obligations for observers are part of the requirements the different regimes have for them to become observers (such as that they have to abide by the rules of the Convention, and/or Rules of Procedure of Commissions or the MOP). Some additional requirements may be worth noting. Under the Rhine regime, for example, NGO observers are to respect of the President's instructions aimed at a proper conduct of meetings and to respect of particular agreements passed with the Rhine Commission. ICPDR has almost identical requirements. The OSPAR regime has the largest list of additional requirements /obligations for NGOs. They have to:

- recognize the basic purposes and principles of the Convention and not to hinder the work of the Commission or of its subsidiary bodies;
- deliver only such information as is pertinent to the work of the Commission or of its subsidiary bodies;
- refrain from using the meetings of the Commission or of its subsidiary bodies for the purpose of demonstrations;
- respect the private character of the meetings and of the documents circulated for them; and
- respect any specific requirements agreed to by the Contracting Parties relating to the participation of NGOs at the meetings of the Commission or of its subsidiary bodies.

The regimes that allow for the participation of the public do not have as many of these requirements. For CEC we can mention the requirement that persons or NGOs wishing to give oral statements at public meetings need to register as participants and if they are invited to closed meetings, they have to keep confidential information received in that context confidential. The Great Lakes regime does have a list of requirements for its (public entity) observers, but these are not binding. It has no obligations for members of the public participating.

F. Providing assistance

Only two of the regimes investigated have explicit provisions on the available legal and policy instruments for providing assistance to NGOs and/or the public to make full use of available participation possibilities.

The Aarhus draft Guidelines suggest two types of assistance:

- capacity building, emphasizing the importance of capacity building in developing countries, countries with economies in transition and for stakeholders who are new to international forums;
- investment of resources to enable balanced participation of all members of the public concerned, including international secretariats and public interest organizations (especially those based in countries with economies in transition and developing countries).

CEC is the other regime with explicit provisions on financial support. The regime provides that financial support, when offered, is limited to one participant per organization for the same meeting. When selecting the participants in question, this choice should be driven by the aim of achieving broad equitable participation, selecting participants from different sectors and groups in each country. Other selection criteria would be demonstrated expertise with the topics dealt with at a particular meeting and the ability of the participant to present specific, concrete and constructive proposals.

G. Other possibilities for involvement

In section A. mention was made briefly of the fact that some of the regimes investigated not only provided for the involvement of observers and/or the public in their work, but also mention forms of involvement such as ‘cooperation’ and ‘coordination’ (see for example the ICPDR and Sava regimes). As noted there, little specification of what such cooperation or coordination consists of, is given.

Two other examples of such different kinds of involvement, one from the ICPDR regime and the other from the Aarhus regime, can be given. First, ICPDR allows observers to ‘take part’ in programs and contribute to projects initiated under the convention and allows them to make ‘other voluntary contributions’. There is no specification of what these activities entail.

Second, the Aarhus draft Guidelines suggest a number of options, with different levels of involvement for involvement of NGOs in the work of international forums:

- consultative status for NGOs
- NGO advisory committees
- NGO forums and dialogues
- Participation of NGOs in delegations of Member States
- Internet broadcasting of events, and
- General calls for comments.

No further specification is given.

V BENEFITS AND DRAWBACKS OF PUBLIC PARTICIPATION OPPORTUNITIES AT THE INSTITUTIONS SURVEYED

[comm. NYU: We are not completely happy with this section since it has too little added value. When reviewing the benefits and disadvantages of the different approaches under the items investigated under IV, the same benefits and disadvantages came up time and again. Stating these same benefits and advantages with each ‘sub-item’ under IV is very repetitive. That’s why section V was created. I’d rather leave out section V entirely and, after comments and discussion with ICPDR, add a section V with preliminary recommendations.]

[ICPDR/DRP, please provide input on this]

When reviewing the different features of participation and the choices made with regard to these features under the different institutions as discussed in section IV, two related themes can be identified that apply to almost all of the choices identified in section IV. Both themes have clear benefits and drawbacks.

The first theme is the level of control an institution can / wants to have with regard to participation. The second theme is the balance an organization can / wishes to strike between the widest possible participation and efficiency. In the following we shall describe these two themes, illustrate them with a few examples and outline benefits and drawbacks.

A. Control

Generally speaking, the more detailed the requirements given in the different legal and policy instruments of an institution, the more control an institution can have on who participates in its activities and meetings and on the level and extent of such participation. The institutions that allow for ‘the public’ to ‘participate’ without specifying who they consider to be the public or what exactly its participation will entail, have significantly less control over their participation structures, than those who specify in detail that only certain entities can participate and that these entities have to fulfill all kinds of requirements (for example, that they must have expertise and interest in issues relevant to the institution, that they must have an organized administration etc.).

Another way for an institution to exercise control is to invite entities to participate in its activities and not leave the choice whether to participate entirely in the hands of these entities. Providing financial support to some entities to facilitate their participation, while refusing it to others, is another way of controlling who participates.

Control is an excellent way to achieve the ‘balanced and equitable participation’ that many of the regimes investigated are aiming for but it is a double edged sword that can just as well prevent such balanced and equitable participation.

The benefit of exercising control over the participation process is that an institution can make participation look exactly the way it wants to. Those entities that are considered less desirable as participants can be kept out of the door, while the desirable ones are participating, and those issues that according to the organization can benefit from participation by ‘outsiders’ are open to participation while those where the organization does not see the benefit of participation are excluded. Also, differences in economic or political power between entities wishing to participate can be leveled out through exercising control.⁶⁶

Besides being a benefit, a high level of control can also have negative impacts. Because of the fact that an organization, through its participation instruments, can control what that participation looks like, it can surround itself with so called ‘yes men’ and filter out any unwanted external comments. Criticism on the organization’s activities, meetings and decisions can simply be filtered out, leaving the organization with a possibly distorted impression that it has consulted the outside world and has the support of this outside world for its actions and plans. Also, those entities that are less organized and less familiar with the idea of public participation, but who may nevertheless be directly affected by the institution’s actions, may end up not participating because the well controlled process of the institution is simply too difficult and cumbersome for them.

B. Efficiency vs. wide participation

A theme closely related to that of control is the theme of efficiency versus wide participation. The regimes investigated show different ways of dealing with this issue, all trying to strike a balance between the two. On the one side of this scale we find a regime such as the Great Lakes, where a ‘no restrictions’ approach is chosen for participation of ‘the public’ alongside participation by observers and ‘cooperation’. On the other side we find regimes such as OSPAR that only allows for participation by observers and subjects this participation to a substantial number of rules and restrictions.

The benefits and drawbacks of either approach are obvious: the larger the number of entities participating in the activities, processes and meetings of international institutions, the wider and more varied the external input is on these activities, processes and meetings. At the same time, such wide participation may make the process of effectively using such participation long, cumbersome and costly. The Aarhus draft Guidelines are one of the instruments investigated that clearly outline these conflicting themes,

⁶⁶ See for example Guideline 19 of the Aarhus guidelines for international forums: “Where the public concerned have differentiated capacity, resources, socio-cultural status or political power (among other factors), there may be a need for differentiated treatment to assure a balanced and equitable process. Processes should be designed to minimize inequality by creating, where possible, a more level playing field for the resolution of issues and controversies. Recognizing that commercial interests, including those regulated by international forums, frequently have greater financial capacity [and political influence] than other actors, efforts should be made to ensure that representatives of such interests do not have an inappropriate role in or undue influence upon decision-making in international forums.”

recognizing both the value of allowing for wide participation and the value of keeping a participation process effective and manageable.⁶⁷

In between the two extremes described before, there are a large number of regimes that have chosen ways to provide for differentiated participation. They provide for a different level of participation for different entities: some participate closely in decision making while other entities are only invited to give their opinion in general hearings or consultations. They can also provide for a differentiation between entities that have a general interest and/or experience in the work of the institution and entities that have a specialized interest and/or experience. They provide for participation in all meetings or participation in certain specific meetings, submission of documents at all times or at designated times, oral statements at all times or at designated times and about all subjects or only about specific subjects. For each of these ‘sub-issues’, again, efficiency has to be weighed against wide participation and, although on the smaller scale of ‘sub-issues’, benefits and drawbacks are mostly the same as on the more general level.

⁶⁷ See for example Guidelines 42, 43, and 44 of the Aarhus guidelines for international forums:

“42. Public participation should be as broad as possible. [However, when restrictions are needed according to paragraph 20, they should [not] be [neither excessive nor] established solely for the sake of minimizing governmental burdens or promoting efficiency unless there is no reasonable alternative to such restrictions.]

43. Participation of the public [concerned] in the meetings of international forums, including their subsidiary bodies and other formal and informal groups, established for purposes such as those described in paragraph 3, should be allowed unless there is [a reasonable basis][an overriding reason] to exclude such participation and a reasoned decision to this effect is taken and made publicly available.

44. Under special circumstances, depending on the nature and phase of the decision making process, as well as on the format of participation sought, participation may be restricted in order to ensure the quality, efficiency and expediency of the decision-making process. In this case, accreditation or, if applicable, selection procedures based on clear and objective criteria, [should][could] be set up and the public be informed accordingly. The procedures should be transparent, fair, accountable and accessible. Selection criteria may include, among others, field of expertise, representation in geographic, sectoral, professional and other relevant contexts, and knowledge of working language. Procedures and criteria should take account of the value of continuity of participation without restricting the entitlement of newcomers and underrepresented stakeholders to participate.