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Co-hosted by The Academic Advisory Group Section on Energy & Natural Resources Law and International Bar Association

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Friday, May 25, 2001

Dinner Speaker: Karin P. Sheldon, Director of the Environmental Law Center and Professor, VLS

Karin Sheldon, Professor of Law and Director of the Environmental Law Center at Vermont Law School, gave brief remarks after dinner on Friday May 25. She noted that the principle subject of the IBA meeting—public participation in decision making processes—is fundamental to environmental law in the United States. In the 1970s Congress enacted a series of environmental laws with public participation at the heart of the statutory schemes. Citizen suit provisions were included to authorize members of the public to implement and enforce the provisions aimed at improving environmental quality. On the natural resources side, Congress directed the Forest Service and the Bureau of Land Management to carry out land planning processes that involved the public in new and significant ways.

Professor Sheldon commented that while public participation is a fundamental part of environmental law in the United States, it is not in other parts of the world. The participants in an environmental conference in Madagascar at which she spoke recently were astonished by the concepts of citizen suits and judicial review of agency action.

Professor Sheldon remarked that the themes and issues to be discussed at the IBA meeting are embedded in the environmental program at VLS. *US News and World Report* rates VLS as having the number one environmental law program in the country. VLS has the most extensive environmental law curriculum of any law school in the United States–more than 50 courses-ranging from a basic environmental law survey to specialized courses such as Environmental Justice and Global Impact of Energy Use. Professor Sheldon said that, because many environmental disputes are best resolved outside of the courtroom, VLS also provides substantial offerings in Alternative Dispute Resolution.

Professor Sheldon said that VLS is "undeniably green." The law school sees environmental policy as a set of affirmative choices to protect and restore ecosystem processes, healthy biodiversity, and to bring about sustainable human resource use.

VLS's program is multi-disciplinary. Students are trained in the social, scientific, ethical, and economic dimensions of environmental issues. They are given a solid grounding in both environmental and natural resources law, and the opportunity to concentrate their studies in a number of areas: pollution control and abatement; law and ecology; ethics and environmental justice; and international environmental law.

Professor Sheldon summarized VLS's J.D. and LL.M. degrees, and the unique one year Master of Studies in Environmental Law degree designed for professionals who need to understand and work with environmental law without becoming lawyers. She described other special features of the environmental program as well, including Summer Session with its 30 cutting edge courses taught by distinguished faculty from all over the world, and the First Nations Environmental Law program designed to train members of Native American tribes to deal with environmental problems on their reservations. She also noted that students have a host of internship and other experiential opportunities in which to apply classroom learning to real world practice of law.

Professor Sheldon briefly described VLS's environmental state of the art classroom building and its impressive energy saving features. She concluded by describing VLS's operating philosophy of *lex pro urbe et orbe,* law for the community and the world. VLS is training professionals to serve the public interest, to lead effective public participation in decision making processes that impact the environment now and into the future.

Saturday, May 26, 2001

Welcome: Celia Campbell-Mohn, Vermont Law School

As host for the conference, Celia Campbell-Mohn welcomed all of the members of the Academic Advisory Group to Vermont. She remarked that there were several reasons for Vermont being a great place to have this conference, including:

- Woodstock Inn restored by Rockefeller Family, who made their money from Standard Oil. During that time, public participation was at a minimum.
- Vermont Law School community maintains a primarily public interest law school. Many students are interested in helping their communities and promoting the environment through public participation.
- U.S. Senate – Sen. Jim Jeffords broke ranks with the Republican party and became an independent this past week. His switch will change the current dynamics of Congressional politics, as the balance of power will shift to the Democrats.

Panel I: The International Law of Public Participation – Cross-Cutting Panel

Rock Pring – "*The Emerging Role of Public Participation in International Law Affecting Mining, Energy, and Resources Development*"

Rock Pring began by describing an overview of his paper. Part I identifies the fact that a "public participation explosion" has taken place, allowing for the governed to have a voice in their own governments. He continued, in Part I, by describing the importance and the history of this "explosion."

Public Participation promises to define all of the major economic development projects of the 21st century. Mining and Minerals companies will be significantly impacted.

Government officials, project managers, industry, and financiers historically controlled projects. Now, there is more involvement from NGOs, the public, indigenous rights groups, stakeholders, etc. Projects must adapt to deal with the increase in public participation.

The factors that caused the rapid public participation "explosion," include:

- Democratisation trend of 1990s
- Adoption of new legal paradigm of sustainable development
- International Environmental movement
- Increase in involvement of development banks
- Human Rights law has entered this area
- Efforts by indigenous communities
- Technology, esp. internet which has allowed the exchange of information more possible

Public participation has become a growing body of legal requirements, causing increasing legal regulation of mining and minerals companies.

Part II of the paper examines the conceptual and historical framework leading to the evolution of the current state of public participation. In this section of his paper, he analyses the definition of public participation, as well as its positive and negative consequences.

In Part III, the paper provides an examination of the full spectrum of National/International Environmental laws with public participation requirements.

Part IV provides a look at the field of quasi-legal regimes that may be accelerating public participation greater than national/international laws. He examines the hardening of soft law, development bank policies, corporate greening policies, etc.

In Part V, the paper addresses particular groups of people that are singled out for specific treatment in public participation.

Part VI examines the future for public participation, including the predictive trends. He believes that there will be a continuing explosion.

Questions followed the presentation:

Does it really matter whether it's hard or soft law?: A discussion followed which did not resolved the question posed.

Comments by John Bonine:

- Pg. 37: Consider including as an appendix the full text of the Convention
- Mr. Bonine was bothered by the inclusion of violence as a form of public participation in the paper.
- Mr. Bonine also argued that the line should be drawn more clearly between the government bureaucracy participation and legislative participation – Trends of divergence
- Legislative – communication between electors and elected
- Bureaucracy – now power has shifted more to this form of public participation. It is interaction with "new" governors.

Barry Barton – "*Underlying Concepts and Theoretical Issues in Public Participation in Resources Development*"

Mr. Barton began by examining the his topic, which he defined as the: Legal requirements for public participation that must be complied with in order to obtain permits from an agency for an energy, mining or other natural resources development, particularly in respect of land use regulation and environmental regulation.

This topic includes: (1) Strategic planning that affects subsequent individual project's use of publicly-owned lands and resources and (2) general environmental law and specific energy and resources laws.

He described the characteristics of public participation, including the role of the agency decision-making process, which allows persons other than the agency and the proponent to participate. Additionally, public participation must, legally, be taken into account.

In the paper, he did not include, modes of participation in legislature, modes of participation in the judiciary, or the constitution and laws for provincial, regional and local government.

Subsequently, he described the structure of the paper. The introduction of the paper described the origins of public participation. An examination of the origins was very difficult, as no one knows very much that occurred before the explosion during the 1960s.

Next, he examined public participation in state and society with a focus on the background of political theory. In the discussion, he included: rational elitism, liberal democracy, liberal democracy and law, neo-liberalism, pluralism, civic republicanism, participatory democracy, ecological modernization, and reflexive modernization.

The following section examines the justifications and criticisms of public participation. Public participation technically provides more accurate decisions. It also increases the evaluation of values and judgments. It provides people with more power and allows indigenous and minority groups a voice. Human rights and political rights are more likely taken into account as a result of public participation.

The next section looked (very quickly) at questions and issues that arise with regard to public participation. These include:

1. The conflict between participation and scientific expertise
2. Participation through legislature and executive, or through multiple opportunities for involvement: Is participation back-seat driving, or watchful criticisms of official bodies? There needs to be a check on the bureaucracy.
3. The contribution of law to public participation. Arguably, the law has contributed a lot that does not arise from classical political thought.
4. Is public participation the clash of interest groups in a neutral forum, where actors compete over agendas (an open political arena); or is it a constitutive regulatory community, where actors formulate and understanding of what their interests are (a closed legal process)?
5. Is there any ascertainable public interest, or do agency decisions represent a compromise between competing interests groups?
6. To what extent is public participation being asked to shoulder the burden for the balancing of interests and values in society that properly should be undertaken by the legislature?
7. Should public participation imitate judicial procedures?
8. Public participation may be all politics, but can its design and management make a difference to outcomes?
9. Who says what is an acceptable way of participating?
    i. Violence?
    ii. Who says what is participation and what is proper?

The session was opened to questions from the group:

One commenter suggested that the paper consider processes outside of the bureaucracy. Are there other actors in the process besides lawyers, scientists, engineers? Media?

The problem with public participation and scientific expertise could be remedied if the public were experts on the subject. This could make participation available earlier.

One commenter wondered whether the public trust was relevant. Is there an obligation to be for the public to be fully informed? Who should the government consult in making its decisions?

Another commenter requested Mr. Barton's view on difference between public participation on site-specific projects and public participation in over-arching policy decisions. He believed that site-specific participation was more contentious, whereas general policy creation allowed a more open consideration of viewpoints where the people were willing to listen to other points of view.

Catherine Redgwell – "*The International Law of Public Participation: Protected Areas, Endangered Species, and Biodiversity*"

Ms. Redgwell describes her paper as cross-cutting. It focuses on the global biodiversity conventions and how these impact on domestic processes and mining and minerals activities. The Conventions she examined included (1) RAMSAR – Convention on Wetlands of International Importance (1971); (2) Convention for the Protection of the World Cultural and Natural Heritage - World Heritage Convention; and (3) Convention of Biodiversity (CBD) (1992).

The older conventions, WHC and RAMSAR allow greater public participation than the 1992 Biodiversity Convention. RAMSAR and WHC have little meat to their treaty text. From their text, soft law processes have developed.

Regulatory tools are created through WHC and RAMSAR. They include designation of sites of international importance. They must have the state's permission to list and delist. International committees conduct main oversight function and NGOs often draw attention to potential problems at the sites. The site may be delisted if it fails to be maintained properly.

The CBD has no listing process and is much less relevant for the purpose of this group. There is no participation through soft law guidance; however, an environmental impact assessment is conducted by each state. While the CBD may have an indirect impact, it is only RAMSAR and WHC that there is a link to public participation and mining projects.

Questions from the AAG:

Whether "friends" groups can involve people from all over the world through electronic processes. Is public participation limited to oversight groups like NGOs or allowed to public at large? Participation in international law extends to NGOs in certain limited contexts, while the extent of participation by individuals is left to the state concerned to regulate.

In 2002, RAMSAR Guidance on public participation is scheduled to be published.

Hot areas of development are located where government is very weak (government institution not developed). To what extent should companies hold what they believe to be adequate public participation opportunities, esp. for indigenous and native groups, in these areas?

Gillian Triggs – "*International Perspective on Public Participation: Indigenous Peoples' Rights*"

Ms. Triggs focused her presentation on Kakadu National Park located in Northern Australia. She specifically concentrated on the rights of indigenous people to participate in resource development on their lands with a specific focus on the international law perspective. Currently, indigenous people are limited in their participation, despite laws allowing them to participate.

Kakadu National Park is a World Heritage Site. Jabiluka mine is located within the park. The park was subject to mining leases prior to its listing as WHC site. Numerous indigenous groups live within the park. The Jabiluka mine site is currently on a standby, environmental, care and planning phase while stakeholder discussions occur regarding the delivery of better commercial, social and environmental outcomes for the region. The indigenous people oppose any further mining development.

The issues for the Park include:

1. Rights of indigenous peoples to participate meaningfully in resource development of their ancestral lands.
2. Validity of "consent" of indigenous group to mining
3. Political impact of activities by environmental and anti-uranium mining NGOs
4. Role of the Media
5. Mandate of the World Heritage Commission to list the Kakadu National Park as endangered in absence of Australia's consent
6. Inability of ERA, Ltd. to implement the mining lease despite significant financial investment and compliance with all regulatory procedures and processes.

Her paper focuses on the procedural capacity of giving effect to public rights. She examines the evolving law and the uranium mine developments. Originally, the indigenous groups submitted to project. However, they now oppose. NGOs were brought in and currently the mine is on hold. The Senate has found that the original consent of the indigenous was not valid. The matter should go back for reconsideration of cultural impact. UNESCO took up the matter and recommended listing the National Park as an endangered site, since the culture is at risk. The government of Australia was not happy; UNESCO should have requested the state's permission (sovereignty issues).

Ms. Triggs highlighted a range of issues present at Kakadu National Project:

1. Uranium mining
2. Role of the Media
3. Role international organizations
4. Questions of sovereignty
5. Cultural and spiritual aspects play role in listing as a site
6. License gained where all scientific evidence showed no environmental impacts
    i. Racial Discrimination Convention
    ii. Convention on Rights of Indigenous People – DRAFT, but law is still evolving

Kazuhiro Nakatani – "*Energy Security, Public Participation, and International Law*"

Mr. Nakatani's presentation had four distinct sections: (1) Public participation, Aarhus Convention and energy security; (2) Public participation, global market and energy security, (3) Energy security as an analogy to food security: The right to energy in international law; and (4) Choice of energy and public participation.

Public participation, Aarhus Convention and energy security

The Aarhus Convention is the first treaty in which public participation in matters of energy and environment are placed as a subject of international law. The Convention is very important as it increases government accountability, transparency, and responsiveness.

The three pillars of the convention include: access to information, public participation, and access to justice provisions. The provisions of Aarhus are not customary international law; they only create new obligations for the contracting States.

Public participation, global market and energy security

Oil and gas are the major energy resources that are vulnerable to great fluctuations in price and production. The International Energy Agency implements the risk control system, called Emergency Sharing System (ESS) that will enable demand restraint and allocation of available oil among Member States when production decreases. The successful damage control by the IEA in the Gulf Crisis and the global trend of economic deregulation have added a new market-oriented approach to the activation of ESS. However, we have to bear in mind that the ESS might not work against future energy crises. One of the reasons is that deregulation might accelerate overreaction and psychological panic once an energy crisis shortage happens. We have to consider the gas emergency sharing system as well.

Energy security as an analogy to food security: The right to energy in international law

Mr. Nakatani links the need for energy to the need for food. He creates the analogy by exchanging the word food for energy in the Rome Declaration on World Food Security. Both are clearly very important for creating stable and efficient societies.

Choice of energy and public participation

Mr. Nakatani believes that developed states owe a moral obligation to underdeveloped states to use non-oil options in times of crisis, as underdeveloped countries do not have the ability to use the nuclear option.

Questions and discussion brought out the fact that worldwide energy plans, as discussed by Mr. Nakatani require a great deal of cooperation among and between countries.

Peter Cameron – "*Contractual Management of Public Participation Issues: The Private Law Perspective*"

Mr. Cameron focuses on the actions being taken by private companies or companies in the private sector. He looks at their ability to form contracts for sustainable development. The theory of sustainable development is attracting a great deal of attention and companies are developing ways to make it more concrete and substantive. The legal meaning of sustainable development is unclear, but acceptability in policy terms is very high and growing (in water as well as energy/minerals areas).

Developments in the mining industry are very interesting, not just with regard to public participation, but also in those areas where dispute settlement is being developed. Public participation and the principal of sustainable development are inter-linked.

His paper focuses on Latin America, where there are dramatic changes in the mining sector that have been used as models by the World Bank for other countries.

He examined voluntary initiatives, which include:

1. Guidelines
2. Codes of conduct
3. Best environmental management practices
4. Reference to international standards

His paper aims to provide an outline of public participation and the main reasons why it is possible to view it as an essential element of sustainable development. He seeks to argue the importance of voluntary initiatives.

Questions/Suggestions for Mr. Cameron, included:

1. Do the Codes of conduct and voluntary initiatives really work?
2. Suggestions for paper:
    i. Compare mining and oil and gas industry
    ii. Include Case studies – Nigeria?

iii. Agreements with Indigenous Groups – Peruvian Project
iv. Narrow v. Broadening
v. Look at non-legal drivers that are bringing companies toward these contractual agreements

3. Does industry have an interest in public participation? Should a debate take place in the papers to show the importance of participatory democracy?

Panel II: The Americas

Celia Campbell-Mohn – USA: "*The Human Dimension in the 21st Century Energy and Natural Resources Development: The New Law of 'Public Rights in Private Development in the United States*"

Ms. Campbell-Mohn began by examining the "three pillars" of public participation and how they are satisfied by current U.S. law. The Emergency Planning and Community Right-to-Know Act (EPCRA) provides access to information regarding toxic chemicals maintained in a particular locality. Material Safety Data Sheets are maintained and information is compiled by the EPA and placed in the Toxics Release Inventory. This allows NGOs to have access to such information and creates extensive public pressure.

With regard to access to courts, citizens suits provisions provide the ability for a citizen to sue a company for failure to comply with their permit under an environmental statute.

Access to decision-making is provided through notice and comment rule-making procedures on rules, leases, plans, etc. An executive order also requires public participation. The EPA 2000 Public Involvement Policy provides guidance to EPA on how to include public in its regulatory process. It applies to all EPA programs.

Her paper is organized into various statutes. Generally applicable statutes or policies include: Environmental Justice, Friendly-neighbour contracts (where communities contract with incoming industry), National Environmental Policy Act (NEPA) (Requires Environmental Impact Statements), and the Endangered Species Act (ESA).

On public land, the following statutes are applicable: Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA), Outer Continental Shelf Leasing Act (OCSLA), Surface Mining Control and Reclamation Act (SMCRA), Mineral Leasing Act (MLA), Federal Land Policy Management Act (FLIPMA), Federal Coal Leasing Amendments (FCLLA), and National Historic Preservation Act (NHPA).

On private land, the Coastal Zone Management Act (CZMA) applies. The paper also addresses different statues that apply on tribal land and in Alaska.

The public can gain access to information through Freedom of Information Act (FOIA) and Emergency Planning and Community Right-to-Know Act (EPCRA). The paper also examines the pollution abatement statutes including: Clean Water Act (CWA), Clean Air Act (CAA), Comprehensive Environmental Response Liability Act (CERCLA), and the

Resource Conservation and Recovery Act (RCRA). It concludes with a note on the Alien Tort Claims Act (ATCA), which provides the ability for NGOs to sue companies in a United States court for environmental damages caused abroad.

Al Lucas – Canada: "Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?"

Public Participation is found on the board and provincial level for the most part in Canada. In his paper, he attempted to look at the bridge between participation and empowerment.

Case Studies: Public Participation: Bridges to Empowerment?
Mr. Lucas looked at three case studies. He first examined constitutionalised aboriginal rights. He found that there is a fiduciary obligation in government to look after the interests of aboriginal peoples. There is a constitutional obligation to consult with the aboriginal, which may even rise to requirement of consent in some cases.

The second case study examined was the Alberta Energy and Utilities Board, an ADR Initiative. It consists of consensual dispute resolution. The company must identify the "stakeholders" and bring them together in a preliminary meeting. The people become empowered through this process.

The last case study is the Energy Project Approval Processes – Participant Funding. Some major energy and resource decision-making agencies have developed a fund to provide money to assist citizens in participation. Funds must be spent in agreed upon way. It helps to level the playing field for participants especially in quasi-judicial settings.

He concluded that the bridge is not complete. However, the process is moving toward citizen empowerment. By and large, Canada is not there yet.

In Canada, there are no citizen suit provisions. Instead, there are statutory rights for compensation.

Jose Juan Gonzalez – Mexico and Central America: "Key Regional Perspectives on Public Participation"

In his paper, Mr. Gonzalez primarily focuses on the public participation in mining and energy development decision-making in Mexico. The constitutional legal framework for regulating the mining and energy sectors primarily revolves around Articles 27 and 28 of the Constitution. Article 27 refers to property and the exploitation regime for these natural resources. Article 28 refers to the strategic areas of the Federal government and prevents the creation of monopolies.

The paper examines the public groups that are entitled to participate. Indigenous, tribal, and native populations are recognized in the Mexican constitution. This assumes that the law must protect and promote the development of their languages, cultures, etc. In Mexico and Central-America (with the exception of Panama), the nation is the owner of the mineral resources regardless of the landowner. However, there is some private investment.

In Mexico, the Constitution recognizes a right to general information and the right of petition. There is some right to participate in the making of decisions. The only procedure in which the government is obliged to listen to the public is in the evaluation of environmental impacts. Access to justice is recognized in several Central American countries. Generally, public participation is very limited.

Lila Barrera-Hernandez – South America "*Indigenous Peoples and Oil and Gas Development: The case of Argentina, Colombia, and Peru*"

The benchmark for public participation in Latin America is the International Labour Organization Convention No. 169 (ILO). In ILO Art. 1, governments are given the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these people and to guarantee respect for their integrity. All three of the countries examined in the paper have ratified the convention – Argentina, Colombia, and Peru.

The means of implementing ILO include access to the land. The right to land enjoys constitutional protection in all three countries in varying degrees. Titling procedures are in place, but process is very slow and often costly, even though it is available. Indigenous lands can be divided into 3 categories: Titled (individual or communal title), Occupied, or Used. There are no rights to underground minerals.

With regard to public participation, Colombia and Peru are much more active in providing participation to the public, as opposed to Argentina. Areas where the public is allowed to participate include: development plans, project planning, impact studies, decision-making, follow-up, and benefits.

Access to justice is allowed through citizens' suits. The fast access to the judicial process is to sue public or private parties through summary actions based on constitutional rights.

She made several general conclusions:

1. Abundant legislation – scarcely regulated
2. Conflict of laws and regulations is a constant
3. Change is often driven by conflict
4. Indigenous rights to land and resources are real
5. Land titling and oil & gas development do not proceed at the same pace
6. Law in the area of public participation is very unclear
7. Participation centres around project approval and EIA
8. Participation techniques tend to be adversarial and do not accommodate cultural differences
9. Practice may exceed legal requirements - silence of the law is most noticeable regarding financial and economic issues

Panel III: Emerging Economies: Africa and Asia

Yinka Omorogbe – Sub-Saharan Africa (ABSENT)

John Bonine – Central and Eastern Europe: "*Navigating the Seas of 'New Democracy' in Central and Eastern Europe*"

A great deal of change is currently taking place in Central and Eastern Europe (CEE). The authoritarian governments of yesteryear are receding into the background. The sources of this change include the requirements to becoming part of the European Union (EU). All of the CEE countries are either members of the EU or on track to become members of the EU. The ratification of the Aarhus Convention has created a seismic change in what is happening throughout Europe. The development of free trade and foreign investment has also changed the CEE.

Today, much decision-making no longer occurs primarily in parliaments and legislatures. Many parts of Western Europe still limit public participation outside of the electoral and parliamentary process. Numerous forces have been generating the beginning of a new kind of democracy in CEE. This is leading in the way of greater public participation. These forces include an increase in activism, especially from environmentalists. Grassroots groups are also receiving funding from various foundations. Legal advice for activists is available from various groups.

In CEE, there are some constitutional rights to public participation. These include: (1) Rights of access to information; (2) public participation; (3) access to the courts; and (4) the right to a safe environment. Explicitly, the right to information is present in 13 countries. The right to participate is not present in many constitutions. However, it is available through Aarhus. The right of access to the Constitutional courts is available in six countries. Implicit, in the constitution of Hungary is the right to petition the government. The right to a safe environment, which is interpreted as procedural access, not a substantive result, is present in Slovenia and Hungary (Every citizen has a right to go to court to protect their environment– no restrictions on standing to sue).

Another important force present in the CEE are public interest law firms. There are a number of them that seek to represent the people against their government and industry. Furthermore, public interest law organizations are being pressed for involvement in public participation. A participation overload problem is present in many countries.

Svitlana Kravchenko – Newly Independent States (former USSR) "*New Laws on participation, Newly Independent States*"

The Aarhus Convention plays a great role in the Newly Independent States with regard to public participation. The negotiation of Aarhus included participation from NGO's. Many countries have to make changes to their legislation to comply with Aarhus. Denmark changed 250 laws to comply, whereas Ukraine didn't change any and ratified immediately.

The role of Aarhus in the future is evolving. Task forces and Intergovernmental working groups continue to develop protocols, procedural issues, etc.

The three pillars of public participation found in Aarhus were examined.

Access to Information
Access to information from government and business is achieved through passive laws. There are general information laws, specific environmental information laws, and some sectoral laws. The government is not allowed to provide access to trade secrets and confidential business information, unless it passes the public interest test.

Public Participation
The Minister conducts Environmental Impact Assessments and a conclusion on whether the project is to go forward is made by the Minister of Environmental protection. Public participation is less developed in the areas of land use planning and legislation. Currently, the Terminal case is in Arbitration Court. In this case, an organization sued Minister for giving permission to build fertilizer plant. They claim he should take into account public participation.

Access to Justice
The public has the right to participate in the judicial system through Administrative appeals. NGOs have the right to file lawsuits in the courts: civil, criminal, arbitration, and constitutional. The public has standing to sue against polluters and the government.

Conclusions
Ms. Kravchenko concluded that many gaps in legislation are present; however, Aarhus is filling some of those gaps. Government enforcement of public participation requirements remains weak, but NGOs are working to enforce them. The Doors to Democracy are opening in the Newly Independent States, despite the difficulty in working with the government.

Some organizations conduct seminars to educate judges and prepare judges for future litigation. She is currently awaiting information on Chernobyl.

Zhigu Gao – China "*Public Participation in Asia: The OK Tedi Case and its Implication for Mining and Petroleum Industries*"

Mr. Gao took the liberty in expanding the topic to include all of Asia. He focused on three cases: OK Tedi, Ogoni & Texaco. These provide good examples of public participation and have environmental aspects.

The OK Tedi Case:
A mine was established in a remote area of 43,000 people. Several millions of dollars were spent on construction. However, heavy rainfall led to a landslide in 1981. The government

ordered closure of the mine. An environmental study revealed a great deal of ecological destruction.

The Plaintiffs sued the mining company in 1994 for the 60 million ton discharge that destroyed vegetation, animal life, and caused great ecological damage. They sought $2.84 billion (US) in damages. The defendants claimed that there was no breach of responsibility and that their actions were lawful by government sanction.

The Supreme Court in Victoria heard the case. The issues for their consideration included:

1. Whether the two companies are liable for pollution?
2. Whether the companies should pay compensation for past & present?
3. Should they have to construct a tailing dam?

Mr. Gao quickly pointed out several implications of the case, including the placement of development over the environment and the consciousness of the community of the problems caused by the mine. Mr. Gao also pointed out the emerging trend for citizens to take legal action against foreign companies in terms of environmental protections. There is also a great deal of lax legislation.

He concluded that there is an emerging trend in local communities to take their complaints about environmental degradation to court. These three cases took place in the southern hemisphere.

Lye Lin Heng – Southeast Asia "*Public Participation in the Environment: A South-East Asian Perspective*"

Ms. Lye looked at public participation in South East Asia very broadly. She began by examining public participation in the countries of ASEAN, the Association of South-East Asian Nations. Within this association, there are marked variations in the amount of participation due to differing degrees of development and the state of the economy. The founding member states include: Indonesia, Malaysia, the Philippines, Singapore, and Thailand. The new members include: Brunei, Vietnam, Laos, Myanmar, Cambodia.

Environmental Impact Statements and the dissemination of information are required in many countries, but they are not really enforced.

Next, she examined public participation in various countries located in South-East Asia. In Brunei, there are few environmental problems. Cambodia has constitutional protection for the environment, but the country lacks resources and capacity. The country has passed a framework law on environmental protection .

Myanmar is starting to look at the environment and is currently developing a national environmental policy.

According to Ms. Lye, Vietnam is making considerable progress with its environmental laws. Various environmental laws are in place, and they are in the process of passing a law

to implement CITES. The fledgling NGOs have been very helpful in beginning the environmental movement in this country.

The Philippines has the most progressive environmental laws and judiciary. There is Constitutional protection for the environment, protection for indigenous groups and NGOs. EISs are required for all projects and the NGOs are active.
Singapore has no substantial natural resources. It is a very small country with efficient systems, excellent environmental infrastructure, innovative schemes for car control, littering, etc. There is no law mandating EIAs, but the NGOs are active. A tension is present between conservation and development, especially regarding golf courses.

In Indonesia, there is environmental protection for the "greatest welfare of the people." Five years plans for environmental policy are in place. The country recognizes NGOs. A course in Environmental Law is mandated in law schools. There are laws requiring EIAs and class actions are allowed. The NGOs are well established (over 600), but there are problems in court with corruption.

Thailand has a clear provision in the Constitution for public participation, including a requirement for EIAs, a right to sue authorities, a right of access to information, and a right to participation in decision-making activities.

Malaysia has a requirement for EIAs for prescribed activities. The NGOs are well organized and there is an increasing recognition of public participation.

Ms. Lye concluded that the nature and extent of public participation varies greatly in each Sate in South-East Asia. Even where there is a provision for mandatory EIAs and for public participation, the implementation varies from project to project. It is difficult for the public to overturn projects that have already received government approval/sanction.

Cocktail Reception: Speaker Kinvin Wroth, Dean VLS

Dean Wroth is delighted that VLS is hosting this conference. He welcomed all attendees. He hopes that VLS will develop more international programs with law schools outside of Canada and European Union. He invites all participants to speak with Linda Smiddy, Director of the VLS Exchange Program.

Dinner at South Royalton House: Speaker Mr Luke Danielson, Director, MMSD (IIED, London): "*Public Participation in Global Initiatives – World Poverty – Where we come from*"

Mr. Danielson began his presentation by revealing his reason to go to law school. He pointed to his friend Skip Chase, who cared deeply about the problem of poverty. Currently, 24 percent of the world' population survives on less than $1 a day. The global environmental outlook reveals some serious environmental challenges ahead.

Mr. Danielson posed the questions: "Do we have to choose our commitments?"

- Vision One: We can't provide a dignified existence without economic development. The only way it can be achieved is to follow our current path, which would lead to serious environmental problems.
- Vision Two: We can't afford to have further economic development. It creates an uninhabitable planet.

Using the theory of sustainable development, neither of the preceding visions will be successful. This is based on the insight that poverty is a fundamental cause of environmental degradation – overuse of natural resources. Neither poverty nor environmental degradation can be remedied without functioning institutionality. Mr. Danielson believes this should be the focus for legal scholars.

The Four Pillars of Sustainable Development include:

1. Economic Development
2. Social and Cultural Development
3. Environmental Protection
4. Government which promotes 1-3

Mr. Danielson focused on Pillar Four. Globalisation poses new challenges. National governments have limited territorial jurisdiction. National governments have not yet developed the capacity to enter many aspects of the global economy.

International Organizations are showing some leadership – Global Compact. These organizations can recruit the private sector to behave itself in the global environment. However, national governments are wary of the invasion of their spheres. With regard to governance for sustainable development, sovereign national governments and their subsidiaries and international organizations have a role. However, these institutions may not be able to create sustainable development.

The alternatives include: negotiating treaties, United Nations system, World/Regional banks, and private voluntary initiatives. With regard to voluntary initiatives, people can work together. These have emerged in various nations. The elements of these initiatives include norms, administrative structure, and incentives.

Mr. Danielson issued a note of caution with regard to these initiatives because it may be difficult to get everyone to comply due to the size of the industry or business. Not everyone will have the ability to participate.

Who should convene the process? Mr. Danielson indicates that someone with "convening" power should take the first step. Most of the universally recognized "neutrals" are busy. There needs to be a balanced group of conveners.

The system, once established, should be legitimised through its specific structure, case specific decisions, and broad policy decisions. The system could be governed by one stakeholder in a management position or through group management like a board of

directors. This must allow for reaffirmation or renewal. The government of States should be involved. Failure to do so might weaken the result.

Sunday, May 27, 2001

Panel IV: Western Europe

Peter Davies – European Union: "*The European Community, Public Participation and the Aarhus Convention*"

The Aarhus Convention seeks to ensure public participation. This convention will impact upon EC law (EC directives and possible the EC Treaty itself). The Aarhus Convention was adopted on June 25, 1998. Three Pillars form the foundation of the treaty. They include:

1. Access to Justice

Before Aarhus was adopted, the 1990 Directive allowed freedom of access to environmental information. However, this directive was faulty and failed in its true mission. Aarhus seeks to improve access to environmental information in light of the failings in the directive.

The definition of environmental information is a broad definition, but it is narrowly interpreted. For example, a request for economic information about a nuclear processing plant to determine its viability was denied because it is not environmental specific. Aarhus allows the inclusion of any information on energy. There is a direct link between the Aarhus definition and future EC law. The definition of Public Authorities has also caused some problems in the past, when trying to determine who were public authorities related to the environment. Aarhus has broader definition that will encompass much more.

The grounds for refusal include confidentiality, trade secrets, etc. The exceptions are considered too broad. Aarhus mandates a much more strict definition. Aarhus improves the ability to access information. Aarhus contains a public interest test – the denial must be weighed against public interest.

The time for availability is two months under the directive. Aarhus tightens things even more; Aarhus mandates the information be turned over in one month. This approach is linked to availability of information in electronic form, which ensures a much more active dissemination of information.

Under the 1990 EC Directive, there is a need for a review procedure. Judicial review is very costly for a NGO and it creates a barrier to access to information. Aarhus indicates that there should be review by court or other independent review body. People must have access to a cheap, efficient, judicial procedure.

The cost of information under the 1990 Directive must be "reasonable," which provides a great deal of discretion. Aarhus also uses the term "reasonable," but the government is duty bound to provide a schedule for cost.

2. Public Participation in Decision-Making

The Aarhus Convention obliges State parties to ensure certain minimum requirements are observed when informing the public. It must take place early in the procedure. This will necessitate change to EC directives.

3. Access to Justice

With regard to actions brought by natural or legal persons against activities of the EC institution, Art. 230 of the EC Treaty controls. Non-privileged applicants must have direct and individual concern to the person wishing to initiate the action. With regard to actions initiated at Community level by the Commission against member states for failure to fulfil community obligations, Art. 226 of the EC Treaty controls. Discussion as to whether Aarhus will impact on Art. 230 and Art. 226.

4. Questions:

To what extent with the Aarhus Convention impact on EC law?
Why has a momentum built for the signing and ratification? There is a problem enforcing environmental law; the Commission believes that enforcement needs to take place on the grassroots level.

Anita Ronne – Denmark, Greenland, and the Faroe Islands

Public Participation is very broad. In Denmark, public participation has developed over the past 20 years. There is advanced work on the environment and development. A long tradition for democratic rights exists. There is broad public participation in decision-making. Denmark was the first country to ratify and implement the Aarhus Convention in Western Europe.

In her paper, she begins with the Danish constitutional framework. The constitution was last revised in 1953. The citizens have influence indirectly by voting in an election every four years. Proportional representation is present. Judicially, the constitution guarantees review of administrative decisions.

The Danish Constitution applies to "all part of the Kingdom of Denmark" and the "realm." This includes continental Denmark, the Faroe Islands, and Greenland. Both Greenland and the Faroe Islands have an autonomous status where legislative power is delegated to local parliaments.

Both the Faroe Islands and Greenland have their own home rule arrangements. The Faroe Islands have the Home Rule Act (1948), which allows for extensive self-government. Greenland has the Rule Act (1978).

The Home Rule Act distinguishes between two different kinds of affairs, which the Faroese political system can influence. The first includes "special affairs" like health, social security,

tax, education, and national environmental affairs. The second includes "common affairs" such as church, police, import and export control, and natural resources in the subsoil. In 1992, the Danish government agreed to allow the Faroese authorities to transfer the natural resources to the category of "special affairs" so that the Faroe Islands have full authority over natural resources.

In Greenland, there is Danish recognition of the fundamental right over mineral resources of the Greenlandic people. Joint decision power and veto rights are allowed in resource matters. A joint minerals resource council is in existence. There is a division of income from natural resource activities between Denmark and Greenland. A comparison of the Faroe Islands and Greenland reveals a great difference between their relation to Denmark.

Public Access to Information:

The public's access to information includes the state of affairs and plans, sector plans, Parliamentary debates, etc. There is an Act on the Access to Public Administration Files and an Act of Public Administration, which allows access to information in one's own cases. The government must report on status and plans every year, which includes plans with regard to the energy supply, oil and gas, heat system, and spatial planning.

An environmental impact assessment must be conducted for projects on land, for offshore-oil and gas activities, and offshore electricity activities.

In her paper, she also discusses public participation in energy companies. Time did not allow her to discuss: Oil and Gas Exploitation or Gas supply. Consumers primarily own the heat and electricity supplies. Consumer influence in company and other companies is great. There is an obligation to include consumers in the board of these companies.

Questions: On Greenland, indigenous people are the majority!

Martha Roggenkamp – The Netherlands: "*Public Participation in Sustainable Development of Energy Supply in the Netherlands*"

Very little information is available on public participation in the energy sector. The energy sector was dominated by inclusion of EC directives, but there is no mention of public participation.

The Netherlands Constitution was passed in 1814, but since then, there has been a great deal of new development. The first chapter of the constitution enacts the fundamental rights such as non-discrimination, equality, etc. It is also the concern of the authorities to keep the country habitable and to improve the environment. Public participation is included in the legislative process through the system of parliamentary representation. Another instrument for direct public participation is the right to referendum.

There are several organizations and bodies participating in the energy sector.

Until the 1970s, public participation took place through the traditional system of representation, which includes political parties and religious/church organizations. Now, there are bodies representing the interests of the energy sector. Each sector has their own organization. There are also bodies representing consumer interests, which set tariffs, and bodies representing other environmental interests. Most provinces have their own associations. These include such organizations as the Association for the protection of the landscape and Vereniging Waddenzee, an Assoc. of Wetland areas, which has an enormous impact on expropriation of wetlands. These groups must establish that they are "Interested Parties" in order to participate. This is often reflected in their organizing statutes and/or actual activities.

The legal framework of public participation in the energy sector generally includes the Administrative Law Act. It provides the definition of "interested party" and "order." An order is a written decision constituting a juristic act under public law. The Act contains procedures for granting an order, as well as the procedures for objections and appeals. Access to information is provided unless it is highly sensitive. The Environmental Law Act includes a provision for EIAs. The Physical Planning Law Act also impacts environmental decisions.

More specific to the energy sector are the Upstream Mining laws, the Electricity Law, and the Gas law. The Onshore and Offshore Mining law provide for exploration and production of oil gas and salt. A license is an order under the Administrative Law Act. No elements of public participation are present in Mining law/bill except a determination that the activity is in the public interest. The Electricity Law and Gas law follow same procedure. Hence, there is no public participation included in the energy laws; however, these laws must be considered in effect with the Administrative Law Act.

Ms. Roggenkamp gave a few examples of practical effects and experiences. With regard to a fossil fuel project planning to drill in a wetland area, there were protests by Vereniging Waddenzee, but the people in the area of the development wanted it due to need for jobs.

The establishment of installations after license is awarded takes awhile after issuance of license before can start. Other licenses and public participation are required.

The Administrative Law Act currently meets most of the Aarhus requirements. This is almost a non-issue in the Netherlands.

Ola Mestad – Scandinavia: *"Public Participation" in Sustainable Development: The New Law of Public Rights in Private Mining, Energy, and Resource Development – The Case of Norway"*

Mr. Mestad claims that he had trouble preparing this paper with regard to considerations of how narrow it should be. There is much more information on general environmental law, but he attempted to look at the issue of public participation in the energy sector much more narrowly.

Norway is the second largest exporter of oil and fish. Norway clearly has a natural resources based economy. The country is not a member of EU, but it does follow what the EU the guidance of the EU.

Mr. Mestad began by examining the constitutional background of Norway. Through the 1980-90s, three changes took place. A statement of principle was added to preserve and develop the language, culture and way of life of Sami. It is an attempt to balance development and Sami people's natural way of life. Also, a constitutional provision on environmental issues was adopted in 1992, which provides that there is a right to an environment conducive to health and to natural surroundings." Citizens are required to be informed of the state of natural environment and of the effects of any encroachments on nature. Lastly, a constitutional provision on human rights was added, stating that the state must ensure and respect human rights. This provision does not add much to public participation requirements.

Government planning is the first phase in which public participation may take place. If plans are developed and discussed in Parliament or in public hearings, everybody will have access to information and an opportunity for public debate or lobbying towards members of Parliament. For example, public hearing for hydropower plants provides an opportunity for public debate.

The public is also afforded participation through the development approval process. The right to public participation is allowed though two general acts: the Public Administration Act or the Freedom of Information Act. Public participation comes into play through the right to notification, a right to access the file, and a right to submit arguments and documents. However, there is no right to notification about the fact that somebody has applied for a development permit. Impact assessments are required which cover economic and cultural. Furthermore, administrative decisions are made public. These rules have improved the relationship between the developer, the authorities, and the public. The assessments also have improved the knowledge and the consciousness of developers with regard to environmental impacts.

The leading case with regard to the environment and access to justice is the Alta Case, which concerned the establishment of a hydropower plant in the Sami homeland. Upper-class NGOs challenged approval for project in Court. The Supreme Court held that the party must have a legal interest to have standing. The court found standing. The court concluded that since environmental impact assessment had been made public, there was no problem wrong with the approval process. The dam was built. Ten years later it was said that the dam should not have been built.

Questions:
How is the Aarhus Convention being implemented? A great deal of work done has been done. Private enterprises are to be included in Norway, allowing access to private information.

AAG Business Meeting Followed