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Like Minds? Two Perspectives on International Environmental Joint Efforts

Ruth Greenspan Bell and Sándor Fülöp

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Abstract

International environmental cooperation efforts throw environmental professionals together to work, without considering the very different life experiences, legal traditions and cultural framework that each bring to the work. As the work they do together is inherently sensitive – often, the purpose is to write new laws or develop new policies for national application -- this failure explicitly to consider the perspectives of the professionals is puzzling. Two environmental lawyers—one American, one Hungarian—who worked together over the course of 18 months in an effort designed to breathe life into provisions of the Aarhus Convention by improving public access to environmental information held by government bodies, examine the nature and content of their communication, and how that affected their end product. This case study discloses that the authors had very different ideas about what needed to be accomplished in the project, indeed of the very purpose of tools for increasing environmental public participation. It suggests ways in which communication can be facilitated in future such efforts.

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Like Minds? Two Perspectives on International Environmental Joint Efforts

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Introduction

The developed world has spent some \$10 billion in assistance over the past 25 years to improve environmental policies and management in developing countries and countries in transition. The apparent assumption has been that it is sufficient to bring environmental professionals together and let them work on issues of mutual concern. Thus, western economists work with local economists to develop market-incentive instruments; engineers install technology; lawyers in concert with their counterparts draft laws or develop enforcement policies; and so forth. Ostensibly, these professionals share joint environmental goals and possess a sufficiently common vocabulary and set of assumptions.

But do they? What can be said about their actual communication? Were they all participating in the same project for the same reasons? Did they understand its goals in the same ways? How did they communicate, or were they essentially ships passing in the night?

There is almost no literature on this issue, and with the exception of donor-commissioned evaluations of specific projects which tend to focus on whether the goals of the project were achieved, there were few after-the-fact evaluations. No effort has been made to look closely at the actual communication and working relationships between environmental professionals, and ascertain how those might have affected the project's outcome.

We suspect that one reason for this absence is that such relationships are inherently sensitive: people have a hard time saying what is really on their minds to those they don't know very well during complex international joint efforts, particularly when funding is involved. Comparative culture (Americans think of themselves as more direct, a quality that is often perceived in other cultures as lacking in tact), nationalism (whether participants feel an imbalance when a smaller country works with a larger, richer power such as the United States) and other factors intervene. It is easy to imagine a situation in which what an American thought was a frank discussion was perceived by central Europeans as intrusive or overbearing. Or one in which Americans thought silence on the part of central Europeans constituted assent, rather than dismay or even disapproval.

We seek to remedy that deficit here. We are two environmental lawyers - one American, one Hungarian -who worked together over the course of 18 months in an effort designed to breathe life into provisions of the Aarhus Convention. We have each tried to set out, as honestly as we can, what we were thinking while we worked together and to identify the differences between our approaches. Of necessity, our analysis begins as a case study. As we discovered in the course of writing this Article, we had very different ideas about what needed to be accomplished in the project, indeed of the very purpose of tools for increasing environmental public participation.

The Aarhus Convention, formally known as the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,¹ contains a commitment to institute something much like the U.S. Freedom of Information Act (FOIA).² Ratifying governments must share environmental documents with anyone who asks, whether a citizen or a foreigner, without asking why they seek the particular information. The Aarhus Convention has other parts that we will not discuss in detail here. These seek to strengthen environmental public participation and access to justice, the tools to make governments adhere to their Aarhus-related commitments.³

The Aarhus Convention is of particular interest to nongovernmental organizations (NGOs) and citizens who follow environmental matters. The information they can get can be used to monitor governments environmental management programs and in lobbying and

¹ UNECE Convention on Access to Information, Public Participation and Decisionmaking and Access to Justice in Environmental Matters, *adopted at Aarhus*, Denmark, June 25, 1998 (entered into force Oct. 30, 2001), ECE/CEP/43 [hereinafter Aarhus Convention]. See Frances Irwin & Carl Bruch, *Information, Public Participation, and Justice*, in *Stumbling Toward Sustainability* 511 (Envtl. L. Inst. 2002).

² 5 U.S.C. '552.

³ Public participation means that the public must be informed, early in the decisionmaking process, of the matter on which the decision is to be taken, the nature of the decision, the responsible authority and the given procedure. In addition, there must be a means for the public to express opinions and for the comments of the public to be taken into due consideration. But it also involves the right of the public generally to have access to information on such things as air and water quality, independent of specific decisions. Access to justice—the third Aarhus pillar—is defined as the right for all persons who feel their rights to access to information have been ignored, wrongfully refused, or inadequately answered to have a review procedure under national legislation, as well as to be able to have access to legal remedies to defend environmental interests.

information campaigns to influence public policy.⁴ Our project focused specifically on public participation in the context of the Danube River-related water management and water protection decisionmaking processes.

We worked productively together and the project itself achieved its goals. But, at various times it became apparent that we brought very different perspectives to the project. Our clearest differences were about how to handle claimed business secrets. We learned that we both brought certain experiential and cultural baggage to our joint effort. This led us each in turn to act on some fairly deep felt concerns that were not well understood at the time by the other.

We seek here to examine these differences. Joint reflection will help increase understanding of our effort to implement the Aarhus Convention in Hungary. Even more fundamentally, we can gain insights about the effectiveness of future efforts between environmental professionals who are trying to learn from each other's experience. This issue has particular salience to the donor community, including the U.S. Agency for International Development, the European Union (EU), western European countries, and the development banks. What support, and in what form, can representatives from the mature environmental protection systems usefully convey as other countries work to refine their environmental laws and practices, to encourage broad participatory democracy and other reforms? This Article follows up an earlier examination by Ruth Greenspan Bell of the cultural and political differences that can create unforeseen barriers to meaningful discussion.⁵

We will focus on Hungary, which was one of two countries involved in the project (the other was Slovenia). Hungary is a stellar example of a central European country in which the government and NGOs have moved quickly up what seemed initially like a steep learning curve. Relationships between donors and Hungarians in the early 1990s were much closer to clear assistance, often in the form of a teacher/student relationship, but this has evolved as the new Hungarian democracy and its practices have evolved and matured. Hungary, like certain of the transition countries, now has considerable experience to contribute to the dialogue.

⁴ See, e.g., Susan Casey-Lefkowitz, *Global Trends in Public Participation*, ELR International News and Analysis, <http://www.eli.org/elrinternationalna/elrinternationalna.htm> (password protected); Elena Petkova & Peter Veit, *Environmental Accountability beyond the Nation-State: The Implications of the Aarhus Convention* (Apr. 2000), available at <http://www.wri.org/governance/publications.html>.

⁵ See, e.g., Ruth Greenspan Bell, *Reaching Across the Communication Gulf: Reflections on the Challenges of Environmental Assistance Programs*, jointly published by RFF (Jan. 2001, discussion paper 01-05), available at <http://www.rff.org>, and ELR International News & Analysis service, available at <http://www.eli.org>; Ruth Greenspan Bell, *Communication Breakdown*, *Envtl. Forum*, Nov./Dec. 2001, at 20.

The Hungarian participants in our project had their own clear agenda, skills, and strong commitment. However, not every central and eastern European country is in this enviable position, and sometimes even similar experience teaches different people different lessons.

Background

In June 1998, the environment ministers of Europe met in Aarhus, Denmark, to sign an agreement negotiated under the auspices of UNECE, an organization set up in 1947 as one of five regional commissions of the United Nations (UN) to encourage greater economic cooperation among its 55 member states and other interested UN members. The fact that representatives of European NGOs were invited to take part in the drafting process is noteworthy.

The Aarhus Convention is evidence of a growing European commitment to government transparency. Some European countries, notably Finland, the Netherlands, Norway, and Sweden, have long had laws guaranteeing the public's right to information on request. But the EU as a whole and many of its member countries have not been notably transparent. Even the United Kingdom, which Americans assume has traditions very similar to the United States, only recently wrote a freedom of information act and has yet to fully implement it.

The EU's early experience with public involvement in environmental decisionmaking began with a 1990 Directive on Freedom of Access to Information on the Environment,⁶ which is now being revised to be consistent with Aarhus. Several other EU environmental directives, such as Directive 85/337/EEC on Environmental Impact Assessment, and certain water protection directives, including 91/271/EEC on wastewater, contain related provisions for information access and transparency.

The goals of government accountability, transparency and responsiveness pose challenges in the countries of central and eastern Europe, where historically, the public has not had an opportunity to be fully informed about and engage in government decisionmaking. However, many of these countries have recently demonstrated a strong commitment to provide

⁶ Directive 90/313/EEC.

the legal tools for environmental public participation.⁷ Our objective was to build on existing laws and practices to make Aarhus a functioning part of Hungarian government.

Trying Out These Ideas in Hungary and Slovenia

The Regional Environmental Center for Central and Eastern Europe (REC), Resources for the Future in Washington, D.C., and New York University School of Law in New York obtained funding from the Global Environment Facility (GEF), through the United Nations Development Programme (UNDP), to sponsor practical Aarhus Convention implementation steps in Hungary and Slovenia. Our funders thought that experience gained in Hungary and Slovenia might mark out a pathway for efforts in other countries in economic and political transition that are committed to the same goals.

Hungary and Slovenia were chosen as pilot countries because they have made significant reforms in the years since the fall of the Soviet Union. They have changed political and legal cultures, which were dominated since the end of World War II by the Marxist-socialism legal system, and will enter the EU in 2004. Under the former communist regimes, impressive laws and constitutions formally provided for public participation in government decisionmaking,⁸ but in fact the Communist Party maintained absolute control over every aspect of society, including law creation.⁹ Hungary and Slovenia's current efforts to build a more open society run up against the legacy of government secrecy.

The two countries also participate in the effort to cleanup the Danube River sponsored by the GEF, UNDP, and the EU through the legal vehicles of the Convention on Cooperation for the Protection and Sustainable Use of the River Danube and a Strategic Action Plan for the Danube Basin (SAP). Each of these compacts includes a commitment to public outreach. Our project

⁷ See, e.g., the results of the Hungarian country report of The Access Initiative, available at <http://www.accessinitiative.org>.

⁸ See, e.g., H. Brown et al., *Effective Environmental Regulation, Learning from Poland's Experience* (2000) (describing a 1980 Polish Environmental Protection and Development Act that explicitly granted NGOs the right to file public interest lawsuits and to access information about firms). *Id.* at 29, 37-39. The Hungarian Act I. of 1977 on public complaints is also a good example. It gave wide range of rights to the members of the public to intervene in administrative cases with complaints, suggestions etc. Moreover, the statute contained strong witness protection type rules, in order to prevent harassment of those who use the rights given by the act. Naturally, prior to 1989, the issues people could raise and the cases in which they could intervene in were limited. But since then the legislation had a renaissance and environmental activists have been able to use it successfully in some instances.

⁹ Maimon Schwarzschild, *Variations on an Enigma: Law In Practice and Law on the Books in the USSR*, 99 Harv. L. Rev. 685, 691 (1986).

worked with governmental officials and NGO experts from both countries, connecting public outreach to the Danube clean up. Thus, officials representing environment and water management ministries were involved.¹⁰ The project emphasized practical approaches such as building government infrastructure, systems of records, ways to track and respond to requests from citizens, and methods to assure that government workers respond to requests in a timely fashion and provide the requested documents.

Barriers to Information Access in Hungary

We conducted research early in the project to learn what aspects of current laws, policies and practices needed reform in order to make information access a reality. Fülöp's research showed that Hungary has basic environmental information provision laws in place.¹¹ But when he tested those laws by asking for specific documents, and by interviewing Hungarians who had sought to use those laws, he found that information was not being provided in the way that the law apparently envisioned.

Information is relatively more forthcoming for those who know who to ask and how to ask for it, for example certain NGOs that interact routinely with the environment ministry. But problems are more likely to come up when unknown persons make requests, and when sensitive documents are requested, particularly when there is a lack of clarity in the law, and authorities must therefore make discretionary decisions. Our investigation demonstrated that ad hoc decisions generally work against, rather than in favor of, disclosure.

Perhaps because government officials felt their responsibilities had not been clearly set out, they used various devices to avoid requests. For example, it was common for authorities to decide, inappropriately, whether requesters have an adequate right to or legal interest in obtaining the information in question. Fülöp also speculated that administrative bodies were confusing public participation and access to information rights with legal concepts of standing, although neither the Aarhus Convention or current Hungarian law require such a test. He also

¹⁰ This partnership is examined as a case study of international environmental assistance and cooperation by Ruth Greenspan Bell, Jane Bloom Stewart and Magda Toth Nagy, described in Ruth Greenspan Bell et al., *Fostering a Culture of Environmental Compliance through Greater Public Involvement*, *Env't Mag.*, Oct. 2002, at 34.

¹¹ Fülöp's Hungarian needs assessment, Identified Legal, Institutional and Practical Barriers to Public Access to Environmental Information to Support Public Involvement in Hungary for Danube Pollution Reduction Goals, can be found on the REC's web site at <http://www.rec.org/REC/Programs/PublicParticipation/DanubeInformation/PDF/HungaryNeedsAssessment.PDF>.

reported some cases in which authorities denied requests on the basis that documents would disclose business secrets.

Particular Issues Related to Business Secrets, Basic Laws and Various Interpretations

The Hungarian legal framework surrounding personal data, public data, business secret and other secret categories, and whether or not information can be protected from public scrutiny, is unusually tangled. In part, this is a historical accident. The current Hungarian laws still contain a large number of more or less contradictory provisions retained from the previous regime. Indeed, an electronic search for the word secret in the published Hungarian laws discloses 728 items. Despite some formal clarification of terminology, the legal muddle seems to have been one of the reasons for denial of document requests by responsible individuals in the environmental inspectorates and the water management directorates.

Two separate Hungarian laws must be considered. One is Hungary's Freedom of Information Act.¹² Fülöp's legal review concluded that this law provides an unqualified right to data that can be characterized as having a public interest nature, including environmental data. As the legislation has no qualifying language, all environmentally-related information held by government offices is arguably public interest data.¹³ The second relevant law is in the Civil Code. It provides legal relief to citizens and companies if business secrets are violated. The actual definition of business secrets is contained in a 1995 Commentary to the Civil Code.¹⁴ Business secrets are data related to a lawful operation of a factory or shop and its operation, which if acquired by an unauthorized person would endanger usual safe operation or the owner's financial interests. Another definition is found in the Business Competition Act.¹⁵ As defined

¹² Act LXIII on the protection of personal data and on the publicity of public interest data (1992).

¹³ *Id.* art. 2. Point 3 expressly defines public interest data: Public interest data is all the data, which are handled by state or municipality administration or by other bodies fulfilling administrative tasks, which are not personal data. The definition of personal data is found in the same text, at Point 1: Personal data is any data that can bring into connection with individual natural person, plus the information which could be concluded from that data. Article 19, & 3 stipulates: The authorities described in Para. (1) shall ensure the availability of public interest data handled by them to any person, unless it is state or service secret, the access is restricted by international agreement or it belongs to the categories of [a-f]. The mentioned categories are: a. defence, b. national security, c. crime prevention and prosecution, d. central financial and foreign currency policy interests, e. foreign relations, relations with international organisations, and f. interest in connection with court procedure.

¹⁴ In the civil law, there is no stare decisis, but there is authoritative commentary, which is often considered persuasive (although not binding).

¹⁵ Act LVII. of 1996, art. 4, & 3.

there, a business secret is every fact, information, solution or data about economic activities kept secret in the equitable interest of the owner, who has taken all necessary measures to ensure secrecy. It is forbidden to acquire or use such secrets in a dishonest way or [to] unlawfully communicate [them] to other persons or to publicize them.¹⁶

In addition, the concept of business secret is legally combined into the category of personal data protection, a broad area that includes securities secrets, bank secrets, insurance secrets, customs secrets and various professional secrets. The law on protection of personal data and disclosure of public interest data does not mention business secrets (and is not in direct conflict with the relevant civil law regulation), so material in possession of public authorities that might be counted as trade secrets is automatically accessible unless it falls under other categories or exemptions.

The issue, then, is whether these laws are in conflict and if so, how the conflict is to be resolved. Fülöp's legal opinion is that the law is clear, and that these provisions do not pose a conflict. In his view, free access to environmental data takes precedence over the protection of business secrets, and only those categories specifically exempted, which do not include business secrets, can be withheld from public scrutiny.

Possible contradictions between the administrative and civil law regulations on business secret have been discussed, at least in part, by the Hungarian Data Protection Ombudsman in a string of opinions.¹⁷ While the Ombudsman has not proposed a definitive solution, he has suggested that the two sets of interests (transparency and accountability of administrative decisionmaking processes and civil law interests in connection with property rights and freedom of business activities) should be balanced one against each other. In his opinions, the Ombudsman has read the balance in favor of disclosure, although it is not yet clear whether he has considered a case involving genuinely sensitive business data in the context of an environmental matter. He has noted, for example, that those private enterprises and companies who get in contact with the state or with a municipality in connection with their business, are obliged to accept that their business secrets come into publicity in such amount and manner as is required by the interests of the public control of management of the public assets and use of public money.¹⁸

¹⁶ *Id.*

¹⁷ The office of the Ombudsman reports to the Hungarian Parliament. Its opinions are authoritative but not binding.

¹⁸ See <http://www.obh.hu/adatved/indexek/besz/cases.htm>.

The balancing test is also demonstrated in a case involving the public's right to know about privatization transactions. Here, the Ombudsman stated that "[the] transparency and accountability of [the] privatisation process, as a public interest prevails [over] the private interest of protection of business secret."¹⁹ He has also said that the public has the right to know about private infringements of environmental requirements and related enforcement actions.²⁰

Hungarian Structure of Laws

Part of the difficulty a common-law lawyer has in understanding this matter has to do with Hungary's continental legal system, which separates administrative and civil law rules. Administrative law is a tool for governments to carry out their day-to-day organizational tasks. Administrative law is proactive and acts directly on the activities of the natural and legal persons. Typically, if administrative legislators decide to protect a secret, they would directly prohibit its dissemination.

Civil law, on the other hand, operates retroactively to remedy serious breaches of social or private interests. Generally, in the civil law, what isn't prohibited or constrained is allowed. Civil law steps in only when a secret is used to cause unjust and meaningful harm.

Currently, the mere acquisition of business secrets will not engage the civil law. To show liability, it must be established both that the offender possesses the information, and has misused it, for example, by making a publication without authority or other abuse of the acquired business secret. Article 81 of the Civil Code states: "Those who infringe the secret of private letters; those, who get into possession of private, industrial or business secret *and publicize them unlawfully or otherwise abuse them*, commit an infringement of personal rights."²¹ (emphasis added) Potential relief, when legal liability is found, is in the form of damages to the injured party or fines.

¹⁹ Opinion No. 528/A/1996.

²⁰ Opinion No. 425/A/1996. A similar, but more general, statement is found in another opinion: Our view is that because of the social interest of environmental protection the free access to data about environmental pollution and environmental status shall enjoy primacy above the protection of business secret and restoration of good will of the companies.

²¹ Act IV of 1959 on the Civil Code of the Hungarian Republic, Art. 81.

What are the Implications of the Legal Structure for Managing Business Secrets?

An administrative body that encounters a problem normally managed under the civil law, for example, a document with business secrets that is part of an administrative matter about access to environmental information, apparently has two available courses of action. The body can lawfully disseminate public interest data that contains business secrets. If individuals who receive that data abuse it and thereby cause business harm, the matter would be resolved in a private action in a civil court. The administrative body would not be a party to that action.

On the other hand, the administrative body could try to find a way around the civil law issues. But to prohibit or control the dissemination of sensitive data it must use civil law in a proactive way; without a specific administrative rule it may be thwarted. It certainly would be possible for the Parliament to legislate that business secrets should be given direct administrative law protection (rather than merely retroactively punishing abuses), if the abuses outweighed other public values such as chemical safety, public health and environmental protection. It could therefore issue an administrative regulation detailing which data in which circumstances could be exempted from the general law requiring public interest data to be available.²²

This situation sent one set of signals to Bell, and another to Fülöp.

How Did our Approaches Differ?

We agreed that the public should have an absolute right to certain information such as emission data and information about enforcement actions.²³ We also agreed that the current Hungarian situation introduced a great deal of confusion. When administrative bodies are forced to use general, retroactive civil law rules (e.g., “do not harm the business secret”) with their rough, proactive tools (prohibition, restrictions, and denials) the result can harm both the interests of transparency and some equitable private interests. Fülöp was particularly concerned that the officials at Hungarian administrative bodies were not adequately trained to perform sophisticated legal tasks. But we had very fundamental disagreements about what kinds of information should be protected, and who was entitled to the protections of the law.

²² An amendment of the Atv for this and other purposes is actually under preparation. See Zsuzsanna Kerekes, *There is No Taxpaying Without Representation: About the Conflict of Freedom of Access to Information and Business Secrets* (Data Protection Ombudsman Office, Budapest, forthcoming 2002).

²³ See, e.g., examples contained in the Aarhus Convention, *supra* note 2, art. 4, & 4.

Bell's Perspective

The research convinced Bell that Hungarian law must be clarified and in some respects modified. In her opinion, information access is a balancing act between the needs of the public and legitimate private interests. Bell was comfortable with the distinctions made by U.S. law, namely that the public has an unconditional right to emissions data, but some information, as defined in the FOIA, is clearly protected from disclosure.

Bell reasoned that government employees who have responsibility for responding to information requests gain confidence from clearly defined duties. Otherwise, they will likely err on the side of caution and withhold if the status of the documents gives them a feeling of unease. She contended that Hungary needed to establish the clearest possible decision rules in order to facilitate the release of information appropriate for dissemination. Her analysis was highly influenced by the 17 years she had spent at the U.S. Environmental Protection Agency (EPA).

At EPA, Bell's responsibilities included representing the U.S. government's interests under the Toxic Substances Control Act (TSCA).²⁴ TSCA mandated that EPA review new chemicals that industry proposed to put on the market. Some of the chemical formulas were highly sensitive. Disclosure of them to the public and competitors would have wreaked substantial economic damage to the submitting company. It was imperative that EPA's rules and procedures were clear about what was legally protected. Moreover, EPA had to have reliable procedures for handling and storage to assure that legitimate business secrets could not be inadvertently released. For example, in the case of the Polaroid Corporation, public knowledge of their chemical formula could have essentially shut the company down. Polaroid's very existence depended on its ability to produce the fastest developing photographs. EPA was under constant pressure, including lawsuits, to assure that the chemical formulas would receive the utmost protection from intentional or unintentional disclosure.

Bell drew a second lesson from this experience. She thought that industry would more comfortably provide necessary information to the government, enhancing the effectiveness of the regulatory process, if it felt it could trust the government to protect legitimate business-confidential documents.

²⁴ 15 U.S.C. ' '2601-2692, ELR Stat. TSCA ' '2-412.

Fülöp's Perspective

Fülöp's response to his research was quite different. He had been the environmental prosecutor for the General Attorney of Hungary, and, for the last eight years, a public interest environmental attorney. His current job is to fight on behalf of NGOs, municipalities and local groups to obtain environmental information, rights to participation and access to justice. His central European/continental legal background also influenced his judgments.

Fülöp differed on matters of emphasis --where exactly should the line be drawn, what weights should be assigned between the protection of business secrets compared with the need to provide the public with clear and accurate information about environmental risks, and how to handle the collision of these two interests.

Bell's position in favor of legislative reform seemed, to him, to be counterintuitive. He thought current Hungarian law adequate, and specifically opposed giving administrative bodies legal authority to meddle in complicated civil law issues. At best, Fülöp favored a clarifying lower-level regulation or an official guideline. He reasoned that if government used administrative regulations to protect certain industry-generated data, it might open the door to other abuses. He feared that legal change might provide excuses for administrative officers to favor short-term development and production interests over vague and long-term environmental interests. In the Soviet period, government routinely favored production goals over environmental requirements. New legislation introducing specific business secret protection measures could replicate this sorry state of affairs.

Even more fundamentally, in Fülöp's view, any guidance or detailed regulation should be clear about the priority of the public's interest for environmental protection. Any other result would undercut the public's right to know about environmental conditions and dangers, and their right to control the state administration, which would seek to protect economic interests with wider business secret protection. Any regulation or guidance should stand on the no harm basis, i.e., business secrets and other business interests should be protected only if there is no environmental or public interest warranting disclosure.

To Fülöp, the public and private interests at stake were not equal. He freely admitted that his could be a dangerous position only a decade after communism, which automatically and mechanically cast every private interest under a cloud. But even acknowledging the necessity of protecting business secrets as far as possible, he gave more value to interests connected with environmental protection, public health and the democratic values of transparency and accountability of state administration, and would, between the two, give them supremacy above secrets rooted in economic interests.

Fülöp thought that this admittedly unbalanced approach could be justified by the language of the Aarhus Convention. For this, he cited its Preamble, Recital 6, which distinguishes between the right to a clean environment (which is, because of strong connection to the right to life itself, a basic right) and other rights, which are less than basic.²⁵ He found support as well in Principle 1 of the Stockholm Declaration²⁶ (the right to environment is a fundamental right), and in similar conventions, such as Article 8 of the Universal Declaration of Human Rights,²⁷ and the Preamble to U.N. General Assembly Resolution 45/94. Fülöp interpreted these provisions to mean that business secrets must not be withheld if there are heavier *public* interests on the side of the disclosure.

Fülöp was also skeptical of Bell's examples for protecting information and data. He did not think they were relevant to actual Hungarian experience. In his experience, most public participation cases sought information from government bodies, and represented efforts by the public simply to obtain information about those bodies and how they spend the taxpayers' money. Fülöp believed that information inquiries in Hungary reflect peoples interests in the effects of the operations of plants and other pollution-producing facilities, with specific focus upon those operations that relate to environmental dangers. He saw those inquiries as separable from the scientific or economic information that might be business sensitive.²⁸

²⁵ Aarhus Convention, *supra* note 2, art. 4, '4, uses the legal technique of sub-exemptions. The main rule of the Convention is availability to the public of any environmental information. It then goes on to provide exemptions, such as confidentiality of commercial and industrial information. The precise relevant language is:

4. A request for environmental information may be refused if the disclosure would adversely affect:

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.

²⁶ Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416.

²⁷ Universal Declaration of Human Rights, adopted by the U.N. General Assembly (U.N.G.A.), on Dec. 10, 1948, U.N.G.A. Res. 217A(III), U.N. Doc. A/810, at 71, art. 8.

²⁸ See, e.g., Aarhus Convention, *supra* note 2, art. 4.7; Article 22.2 of the Helsinki Convention on the Transboundary Effects of Industrial Accidents, Convention on the Transboundary Effects of Industrial Accidents, art. 22.2; Article 12.9 of the U.N. Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849; Article 14.2. of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, available at http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm; Article 39.2 of the North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 I.L.M. 1480 (1993).

Comparing our Differing Perspectives and How we Interacted

It was not until late in the project that we really began to understand the depth of the differences between us. Clearly, these differences did not merely have to do with different interpretations of the Aarhus text, such as whether the Convention did or did not leave countries significant latitude to deal with business confidentiality in domestic legislation. They seemed instead to be rooted in even more basic issues about how to define the public, and in ascertaining the purpose of rules for public participation.

Fülöp's Response

Fülöp saw two values at stake in the issue of public participation in environmental decisionmaking. One is related to democracy, including the need for transparency and accountability of offices that use taxpayers' money, and the continuing need to scrutinize those in power. The second concerns substantive environmental protection issues. Access to information allows the public to engage in the very process of environmental protection. Information reveals problems, provides knowledge to facilitate their prioritization, clarifies decisionmaking and how it takes place, and allows individuals to monitor implementation. The public component provides thousands of ears and eyes (as well as expertise) that makes the entire process of environmental protection more effective.

As a result, Fülöp viewed the public as the inhabitants of a given country who act in public participation matters only in that capacity. To him, this did not include members of the business sector. In fact, he suggested that business had no real need for the assistance that participation laws provided the public. In his view, the laws were designed to enable populations that would otherwise either be excluded from access or have poor participation prospects to be included in the public dialogue. Business, he contended, already has reserved seats at the table where environmental decisions are made and does not need rules that would arguably give them additional opportunities.

While Bell thought this position profoundly anti-democratic, Fülöp argued that democracy is not totally mechanical and not at all value-neutral. He concluded that the public participation rules in the Aarhus Convention and in the Hungarian Environmental Act are intended to support the participation of this very specific "public." All other relevant concerns (business interests, for example) should have due consideration but must be of a secondary nature.

Bell's Response

Bell identified two possible solutions to the problem as she defined it. The Hungarian participants could either find a way to interpret current law so that legitimately confidential business information would be protected, or, in the alternative, consider drafting amendments to the law. She thought the law should anticipate problems rather than wait for them to happen. She was unable to convince Fülöp of the necessity for legal revision.

How We Resolved (or Didn't Resolve) our Differences

We were never actually able to come to a definitive and mutually satisfying resolution of this issue. To some extent, the problem was resolved by agreeing to disagree, or to ignore the issue. This outcome was facilitated by the fact that the project was only funded for 18 months of work. Simply put, we ran out of time. In the end, Bell rationalized this incomplete resolution in the following way: the fledgling regulatory systems in Central Europe generally don't yet collect highly sensitive information from industrial dischargers. The most urgent issue for NGOs in the region is how to assure that governments will follow the law and share basic discharge information. As a result, clear rules for handling confidential business information can wait until basic issues are resolved.

Bell also reflected that her position might have been rooted in American insistence at holding industry at arm's length from government. The U.S. acts through formal regulation or permits subject to public process, and almost never through private negotiations. In contrast, perhaps Fülöp's position reflected the fact that the European environmental regulatory systems are more comfortable with a closer relationship with industry. A well-known example of this is the Dutch Covenants, negotiated between industry and environmental authorities.

Fülöp disagreed with Bell's first point. He argued that even under socialism, the government collected a great deal of information. He believed that Hungarian enterprises must submit at least as much information to the government as occurs under the western democracies. Fülöp thought the evidence demonstrated that Hungarian business interests seldom abuse the information system. He had not yet heard any complaints from any Hungarian enterprises regarding alleged abuses of business secrets that they had provided to environmental authorities. In any case, Fülöp thought actual harm could be avoided if environmental authorities were to properly track the information they issue, and give adequate warnings to requesters about the careful handling of sensitive elements of the environmental information.

Other Examples

Another example of possible mis-communication concerned whether the project should have devoted more time to electronic communication. The U.S. team was initially split on this issue. Could Hungary and Slovenia leapfrog U.S. experience and move directly to electronic information access? Bell thought it would be misleading to suggest that electronic dissemination could take place before each country built the same foundation necessary to support normal FOIA regimes. In her view, each country must first put into place management systems for records, ministry- and government-wide rules, and undertake a great deal of training for government employees who would manage the systems. She was also impressed by the costs of establishing and maintaining extensive electronic sites.

However, the project evaluation indicated that Hungarian NGO representatives would have favored a very specific utilization of electronic communication and Internet by administrative authorities.²⁹ They thought that once electronic tools were established, it would be impossible for governments to back away from electronic information access.

Although most of the project took place before September 11, 2001, the events following the attack on the World Trade Center and the Pentagon left Bell dubious that the mere existence of a program could lock in any government's commitment. Freedom of information in the United States is under challenge as a result of the war on terrorism; for example, certain of the bills leading up to the legislation that created the Department of Homeland Security would have exempted the Department from whistle-blower protection and the Freedom of Information Act, and the final Act did in fact exempt certain voluntarily submitted information from release under FOIA. If this is the reaction in a country with well-established freedom of information rules, what does this say about countries in which public officials are not accustomed to sharing information with the public or see little value in informing or incorporating the opinions of lay members of the public? How realistic is the NGO position that it would be impossible for governments to back away from a commitment, once made?

But most importantly, the project organizers did not comprehend these particular opinions in their complexity and totality until the project evaluation, long after the issues might have been aired and discussed, despite many in-region meetings and other interactions. Had

²⁹ Final Evaluation Report for "Building Environmental Citizenship to Support Transboundary Pollution Reduction in the Danube: A Pilot Project in Hungary and Slovenia" prepared for UNDP by Pavol Zilincik, March 31, 2002 (on file with Ruth Greenspan Bell)

these views been expressed early on, the project might have taken a different direction. And, what part of these views really reflected Hungarian NGOs beliefs that the U.S. project managers were underestimating their capabilities?³⁰

Indeed, the issue of capability was continuously sensitive. The project we worked on together was characterized variously as a joint effort and as environmental assistance. To some, the terms implied an unequal or not fully collegial relationship. For many years, advisors from the U.S. and western Europe have promoted various models and solutions from their own countries, sometimes without being fully candid about shortcomings in their design or implementation.³¹ Some advice carries the negative implication of more powerful countries dictating to smaller countries.

This atmosphere requires that western advisors walk a fine line. On the one hand, the project must be closely tailored to meet the particular circumstances and needs of the country participants. On the other, there is a great deal that countries like Hungary and Slovenia can learn from western experiences such as the U.S. FOIA's implementation successes and failures.

The independent evaluator of the project (Pavel Zilincik, a Slovak NGO leader), succinctly captured the contrasting feelings of some participants on this issue:

Active participation of foreign experts enriches the project by contributing invaluable practical experience with well-developed access to information systems. At the same time it should be taken into consideration that

- There are limits on the transfer of this experience in terms of their applicability [and]
- People in the region are much more advanced than they were ten years ago, they know more and in many areas they have developed their expertise on which we can rely (e.g., in preparing manuals and guides tailor made for local conditions).³²

³⁰ See, e.g., the discussion of the Russian-U.S. effort in Bell, *supra* note 6.

³¹ See, e.g., Ruth Greenspan Bell & Clifford Russell, *Environmental Policy for Developing Countries*, Issues in Sci. & Tech. (Spring 2002), reprinted in *Failsafe*, available at <http://www.felsef.org/summer02.htm#4b> (June 17, 2002).

³² Final Evaluation Report for "Building Environmental Citizenship to Support Transboundary Pollution Reduction in the Danube: A Pilot Project in Hungary and Slovenia" prepared for UNDP by Pavol Zilincik, March 31, 2002, in Section entitled "Findings and Lessons Learned," (on file with Ruth Greenspan Bell)

A final example is the basic project structure. It started with a close inquiry into the specific basis for the implementation problems in Hungary and Slovenia, including the impacts of relevant legal institutions and actual law enforcement. For Bell, the strength and capacity of available institutions, not specific technical fixes, was the core issue. Some project participants thought this emphasis absorbed too much time and resources, and apparently would have preferred to move more quickly to finding solutions.

Are There Lessons for Joint International Environmental Efforts?

International environmental interactions are a potential mine-field of contradictory preconceptions and sensitivities. If you consider how difficult it is for two U.S. lawyers to negotiate a contract or consent degree, and then add confounding factors such as different languages, legal systems, and significantly different life experiences, the picture starts to become clearer. Few people find it easy to detach themselves from the assumptions they hold as part of their culture and language; these are attitudes and characteristics that go deep into the marrow of our bones, and we carry them without thinking. What is amazing is that this thought seems rarely to have occurred to those who orchestrate international environmental joint efforts. The basic issue of communication has been ignored by planners, including the development banks and assistance funders.

It is certainly possible to remedy this situation, and to facilitate joint efforts, but it takes time and effort. Often, for example, Americans going abroad are given some background material about the country they will be visiting, but otherwise receive little or no orientation. If they are diligent, the travelers will read more about the country and its history and even find guides on proper and improper actions. But more is necessary. Their assumptions about how courts work, or regarding the basic framework and assumptions of environmental protection, may be wildly different from the counterparts they encounter.

Our own experience suggests that when there is a level of good will and personal background, these differences should not be a barrier--if enough motivation exists on both sides to keep working. But projects can hit potholes or elicit unanticipated sensitivities. It may be possible to anticipate some of these, but other subtle problems may be perceived, at best, as background noise. Because of this, we think project planners ignore them at their peril. It is certainly possible that these have been responsible, at least in part, for the many funded environmental projects that have never evolved into genuine policy changes.

Conclusion

We clearly shared a desire to find ways to increase the public's ability to obtain information from government bodies. We were united in a joint commitment to transparency and effective environmental protection. Perhaps communication was facilitated, and there was a level of good will, built on 10 years of friendship and communication.

Toward that end, with others in the project, we were able together to produce a level of consensus and develop useful aids for the Hungarian public and for government officials. One, a detailed Hungarian-language guidance manual for public officials with practical and background information, is designed for use at all levels of Hungarian government. A second document is a "plain Hungarian" citizens' guide with practical instructions on how to make requests, sample letters, advice on how to protest incomplete responses, and information on how to find material on the Internet. Everyone involved in the project (including the evaluator) acknowledge that these materials will facilitate requests and responses.

Beyond the formal outputs of the project, the numerous meetings and conferences built communication and bonds between the various project participants, including high- and medium-ranked environmental and water management officials, NGOs and others. The meetings and project activities helped "kick-start" the Aarhus implementation effort in Hungary. Officials became familiar with international processes and national problems. Government officials sat together with the NGO leaders, shared experiences and reached consensus, and gained commitment.

But we never really resolved fundamental differences, some of which only became apparent after the formal end of the project. Had there not been strong goals in common, these differences might have damaged prospects for working together. It is only possible to guess what earlier recognition and resolution of these differences might have meant for the project. Would this have made a difference to our working patterns or to our outputs? Would it have been easier to sort out the confidential business information issues, or would the result have been the same?

The pilot project is over, but our goal is to work together as a team on Aarhus Convention implementation in the neighboring Danube countries, including some (including Ukraine, Romania, Croatia, Yugoslavia, Bulgaria, Moldova, and Bosnia-Herzegovina) that are experiencing a more difficult transition than Hungary and Slovenia. If UNDP decides to provide

funding, the project team will include the NGO and government officials who worked on the first project, who will bring their insights and efforts. At that point, the entire team must confront the “languaculture”³³ with equal fervor as legal and institutional issues, in order to work together in the most effective way. This time the cross-cultural issues will include not only communication between Americans, western Europeans and central Europeans, but also the Hungarians and Slovenians will encounter their own languaculture challenges, as they seek to impart their experience to their eastern European neighbors.

U.S. and western European experience can make an important contribution to countries just beginning to implement freedom of information acts or other tools for environmental protection. But each country must draw its own policy conclusions and each is shaped by a very different set of experiences, legal traditions and cultural framework. Partners in such projects can agree on basic goals, but they should not take anything for granted in their communication, and should take care to assure that they are not communicating at cross-purposes.

³³ Michael Agar, *Language Shock: Understanding the Culture of Conversation* (1996).