Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law

Marianne Dellinger*

TABLE OF CONTENTS

---

* Marianne Dellinger holds a J.D. (Order of the Coif) and a M.A. She is an Assistant Professor of Law at Western State University College of Law. She graduated at the top of her class from the University of Oregon School of Law and subsequently clerked for the late Hon. Francis J. D'Eramo of the Superior Court of the United States Virgin Islands and for the Hon. Procter Hug, Jr., of the United States Court of Appeals for the Ninth Circuit. Before law school, she enjoyed a successful career in international communications. She is grateful to Alec Walker (Whittier Law School 2012) for his research assistance on this Article. Finally, this Article is dedicated to the memory of Dr. Svitlana Kravchenko, who was the longest-serving member of the Aarhus Convention Compliance Committee upon her untimely death in February 2012. Dr. Kravchenko was a true global citizen and tireless advocate for an improved environment for the sake of both people and animals. Her passion for mentoring her law students and new lawyers will be missed by all who knew her.

I. INTRODUCTION

Large population segments around the globe are displeased with how their governments govern. This is no less so on the environmental stage. Calls for sustainable development and a greener economy are intense. At the same time, the speed with which governments address the need for such change often seems glacial at best. Many government solutions seem ineffectual. This Article examines how a bottom-up approach in the form of public participation in environmental decision-making and enforcement at the national and international levels has the potential for bringing about positive procedural and substantive change sooner than would be the case through traditional legal venues. The focal point of the article is the United Nations Economic Committee for Europe's ("UNECE") Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention" or the "Convention"), which just celebrated its first decade of being in effect. This Article is the first major work to comprehensively examine the first ten years of Aarhus Convention case law, with a view to identifying whether environmental democracy[1] is a mere "toothless" procedural device or whether it also presents an opportunity for increased interaction among civil society and governments. The Article demonstrates that the latter is the case and that such interaction may prove more effective in creating substantively improved environmental laws and policies than traditional government driven solutions.

First, this Article describes the major advantages and disadvantages of public participation in government decision making in general. The article goes on to describe how these, and related considerations, led to the rapid negotiation and ratification of the Aarhus Convention. This Convention has been hailed as groundbreaking and unique, especially when compared to other multilateral environmental agreements ("MEAs"). The Article will thus briefly analyze the Convention framework in order to demonstrate its uniqueness in international and national legal contexts. In this connection, the Convention provisions upon which this article relies will be identified.

Because of the many recognized advantages of public participation, legal requirements calling for such participation are not only creatures of

1. The term "'environmental democracy' reflects the objectives of opening up decision-making processes affecting the environment by widening the range of voices heard and improving the quantity and quality of policy choices available to society." JOSEPH FOTI ET AL., VOICE AND CHOICE: OPENING THE DOOR TO ENVIRONMENTAL DEMOCRACY 3 (Greg Mock et al. eds., 2008), *available at* http://pdf.wri.org/voice_and_choice.pdf.

environmental law. For example, laws in both the United States and the European Union ("EU") feature generalized as well as specific environmental public participation provisions. Further, court decisions in the United States and beyond have emphasized the importance of public participation to environmental justice[2] and democracy. This Article will briefly highlight such law in order to demonstrate the growing importance of public participation in the worldwide forums.

The major goal of this Article is, however, to illuminate the first ten years of case law under the Convention's provisions regarding public participation in decision making. This examination is undertaken to determine whether the Convention's procedural provisions have proved to have any real bite and whether the Convention has, in addition to procedural changes, also led to any positive substantive change in national or international environmental law. Not surprisingly, in an area where an intergovernmental organization hears cases of previously exclusive national sovereignty, some friction has arisen just as a lack of effort by a few nations to observe and follow the Convention principles has become apparent. However, several significant successes have also been achieved. Some of these have arisen in newly democratized nation states that may have been seen as unlikely candidates for the promotion of public participation in government decision making. These success stories will be told with a view to demonstrate that what may be seen as a dichotomy between procedure and substance is more correctly seen as an interface between the two. This interface provides the public with significant potential to effectuate positive bottom-up change instead of having to wait for traditional top-down solutions.

Ten years of the existence of the Aarhus Convention have now passed. This Article concludes with a view to the future of the Convention and its possible geographical and thematic development as well as to the potential expansion of its principles into other national and international legal instruments.

II. WHY PUBLIC PARTICIPATION?

Why is public participation necessary or even desirable when, after all, it is the job of our governments and elected representatives to assess

2. "Environmental justice ("EJ") is a term that captures a civil rights movement, a normative goal of distributional fairness and community empowerment, as well as a broad set of laws, regulations, and initiatives that seek to address disproportionate and adverse environmental conditions in minority and low-income communities." Steve Bonorris & Nicholas Targ, *Environmental Justice in the Laboratories of Democracy*, 25 A.B.A. SEC. NAT. RES. & ENV., 44 (Fall 2010).

and balance competing interests and resources, taking everyone's best interests into account? Do the advantages of public participation outweigh the disadvantages? How might the democratic systems be improved by public participation? And what *is* public participation at its core?

As a threshold matter, public participation in government decision making is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.[3] The core values and beliefs supporting public participation are:[4]

> (1) Public participation includes the promise that the public's contribution will influence the decision.
>
> (2) Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
>
> (3) Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
>
> (4) Public participation seeks input from participants in designing how they participate.
>
> (5) Public participation provides participants with the information they need to participate in a meaningful way.
>
> (6) Public participation communicates to participants how their input affected the decision.

This Section sets forth some of the most significant advantages and disadvantages of public participation, drawing on lessons learned from environmental law and general democratic processes.

A. Advantages

Perhaps most important when weighing the pros and cons of public participation, is the fact that democratic processes are not perfect. They are "only . . . as representative of popular will as politicians are consistent with their election platforms."[5] But sometimes politicians and lawmakers do not remain loyal to their platforms. "We hope that our elected representatives have adequate time, information, integrity,

---

3. Int'l Ass'n for Pub. Participation, *IAP2 Core Values*, http://www.iap2.org/displaycommon.cfm?an=4 (last visited Mar. 26, 2012).

4. *Id.*

5. Bende Toth, *Public Participation and Democracy in Practice—Aarhus Convention Principles as Democratic Institution Building in the Developing World*, 30 J. LAND RESOURCES & ENVTL. L. 295, 296 (2010).

resources, and wherewithal to assess and balance competing interests. . . ."[6] Sometimes, this is not the case. Public participation can help by adding another expert voice to the democratic discourse as well as to lawmaking and law enforcement processes. Although the "public" who is granted access to participate typically consists of nongovernmental organizations ("NGOs") that may be considered "partisan," such voices nonetheless strengthen the dialogue and are crucial to democracy itself.[7]

Other legally and practically significant advantages include the ability for governments to build partnerships with affected stakeholders and to make use of their specialized and often financially valuable knowledge in the design and implementation of legal provisions addressing the needs of affected stakeholders.[8] Such "hidden" knowledge includes legal, environmental, financial, governmental, and other information that is invariably used in governmental planning processes. Public participation thus has the potential for helping governments supplement or save resources. Importantly, an empowered public can help facilitate the creation of substantively better decisions through the submission of valuable input on draft legislation.[9] In return, public participation helps educate and inform the public.[10]

Public participation also helps governments resolve potentially conflicting needs and concerns early in the planning process when legislative, procedural and/or practical changes may be easier to make than later. In other words, public participation may serve as a time-saver before a "crisis point" is reached.[11]

A greater amount of compliance with new legal provisions is ensured through early and improved consensus building. Drawing a parallel to business life, employees have proven to be more cooperative in regards to decisions they personally resist if these decisions were made using principles of transparency and relative democracy. If conflict does arise, public participation helps make conflict management more efficient.[12] Civil society may also play an important role in triggering compliance investigations. This is of particular importance at the international level where nation-states are often unwilling to bring compliance matters before international tribunals out of comity concerns.

---

6. *Id*.

7. *Id*. at 321.

8. Biodiversity Conservation Ctr., *Main Benefits of Public Participation*, http://www.biodiversity.ru/coastlearn/pp-eng/benefits.html (last visited Mar. 26, 2012) [hereinafter Biodiversity].

9. Toth, *supra* note 6, at 298.

10. *Id.* at 297.

11. Biodiversity, *supra* note 9; Toth, *supra* note 6, at 297–98.

12. Biodiversity, *supra* note 9.

In the environmental arena, public participation helps ensure that the environment remains on the political and legislative agenda.[13] Public participation in environmental democracy has become especially important in recent times when the intergovernmental drive toward the creation and improvement of international environmental standards has diminished rather than increased.[14] Further, decision makers are often removed from the firsthand effects of their decisions and thus may be unaware of, or unaccountable for, the direct effects of their decisions. [15] Conversely, the general public is often better situated to evaluate on-the-ground effects of laws, policies, and actions affecting the environment.[16] Public participation is thus considered "essential" not only to sustainable development and the greening of the economy, but also to wider social dimensions such as poverty eradication, employment, social inclusion, and gender equality.[17] A widely accepted view is that "if any change is ever to occur, it will depend on the general will of states *and* the good practice of NGOs" rather than solely on legal theory and governmental action.[18]

In short, public participation is widely considered not only a "high mark"[19] for environmental democracy, but also one of the fundamental elements of good governance in general.[20]

---

13. *Id.*

14. NGOs IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? 152 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008) [hereinafter Dupuy & Vierucci].

15. Toth, *supra* note 6, at 297.

16. *Id.* at 298.

17. U.N. Econ. Comm'n for Eur., Report of the Second Meeting of the Parties: Decision II/4 on Promoting the Application of the Principles of the Aarhus Convention in International Forums, ¶ 5, U.N. Doc. ECE/MP.PP/2005/2/Add.5 (June 20, 2005), *available at* http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf [hereinafter Almaty Guidelines]; U.N. Econ. Comm'n for Eur., *Chisinau Declaration*, ¶ 1, U.N. Doc. ECE/MP.PP/2011/CRP.4/Rev.1 (July 1, 2011), *available at* http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp_pp_2011_CRP_4_rev_1_Declaration_e.pdf.

18. Dupuy & Vierucci, *supra* note 15, at 152 (emphasis added); *Chisinau Declaration*, *supra* note 18, ¶ 4.

19. THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW 41 (Marc Pallemaerts ed., 2011) [hereinafter AARHUS CONVENTION AT TEN].

20. Almaty Guidelines, *supra* note 18, at 5; *Chisinau Declaration*, *supra* note 18, ¶ 1.

B. Disadvantages

Sovereignty and power distribution issues are often at the forefront of the disadvantages frequently mentioned in the public participation discourse. For example, concerns over public participation include hesitation by governments unwilling to cede their traditional lawmaking powers and venture into what they may see as new and untested territory. From a sovereignty point of view, governments are used to getting their guidance from domestic legislation, not international conventions such as the Aarhus Convention. [21] Further, Western ideals of democratic developments such as public participation may not prove effective in cultures with a tradition of weak participation in public affairs such as the former East Bloc of Europe.[22] "Traditional public participation . . . is often structured as an internal/external, us-versus-them, zero-sum conflict relationship."[23] Unless all actors are willing to see public participation as an advantage, the situation could become one of competition rather than fruitful collaboration.

Public participation also presents an issue of exactly who can best represent the "public." In light of the significant increase of various NGOs and interest groups each with their own respective agenda, it is debatable whether any groups can be said to effectively represent the general public. Some experts are hesitant towards a "wholesale acceptance of the notion that NGOs are truly reflective of the broader public opinion" as they may "privilege a narrow elitist pro-environmental orientation over the will of the larger public,"[24] in other words present a "tyranny of the majority" type of situation.

Importantly, one may also wonder if a sufficiently representative slice of the population has the time for, interest in, and/or financial resources to participate in meaningful ways. Public participation may, for example, not be feasible in those parts of the world affected by financial, educational, and technological poverty. "[E]ven governments in developing countries have a hard time participating in important negotiations. It is hardly surprising that impoverished people have a difficult time participating in governmental decisions."[25] In fact, even the Aarhus Convention itself lacks specific commitments to help financially

---

21. Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT'L ENVTL. L. REV. 73, 97–99 (2008).

22. Biodiversity Conservation Ctr., *Risks of Public Participation*, http://www.biodiversity.ru/coastlearn/pp-eng/risks.html (last visited Mar. 26, 2012).

23. *Id.*

24. Toth, *supr*a note 6, at 320.

25. Svitlana Kravchenko, *The Myth of Public Participation in a World of Poverty*, 23 TUL. ENVTL. L. J. 33, 38 (2009).

disadvantaged people take advantage of its formal public participation provisions.[26]

Another concern regarding the efficacy of public participation involves the feasibility of providing access and meaningful participation to a potentially large group of diverse stakeholders. At the international level, it would be very difficult, if not impossible, in practice to meet the participation demands from all interested members of the public.[27]

Similarly, public participation poses the risk of overburdening the Aarhus Convention's already busy Compliance Committees with increased submissions.[28] So far, "the NGO Community [has acted] in a responsible and disciplined manner,"[29] submissions have been moderate, and the right of the public to be involved under the Convention has thus "in no way been misused." [30] However, problems may arise in the future given the increasing amount of submissions being made to the Compliance Committee.[31]

On balance, this Article takes the view that the advantages of public participation outweigh the disadvantages. Unless one fully trusts the democratic workings of traditional "top-down" government rulemaking schemes, involving the public in decisions ultimately affecting everyone is preferable to the alternative.

III. THE ROAD TO AARHUS

The principle of public participation in international environmental law can be traced to the 1992 Rio Declaration and its Agenda 21. According to Agenda 21,

> [o]ne of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions,

26. *Id*.

27. Dupuy & Vierucci, *supra* note 15.

28. Almaty Guidelines, *supra* note 18, ¶ 10.

29. Dupuy & Vierucci, *supra* note 15.

30. *Id*.

31. Veit Koester, *The Compliance Mechanisms—Outcomes and Stocktaking*, 41 ENVTL. POL'Y & L. 196, 200–01 (2011).

> particularly those which potentially affect the communities in which they live and work.[32]

In particular, Principle 10 of the Rio Declaration laid the groundwork[33] for what later would become the Aarhus Convention through the wording that,

> [e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.[34]

These principles were adopted by no less than 172 nations and subsequently incorporated in several MEAs. For example, Article 6 of the United Nations Framework Convention for Climate Change ("UNFCCC") provides that "parties shall promote and facilitate . . . public participation in addressing climate change and its effects and [in] developing adequate responses."[35] Similarly, the UNECE Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention") calls for Parties to provide "an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities.[36] The Protocol on Water and Health to the Convention on the Protection and Use of the Transboundary Watercourses and International Lakes incorporates public participation as well.[37]

---

32. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Agenda 21*, ¶ 23.2, U.N. Doc. A/CONF.151/26 (Vol. III) (Aug. 14, 1992), *available at* http://www.un.org/esa/dsd/agenda21/res_agenda21_23.shtml.

33. U.N. ECON. COMM'N OF EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at 3, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000).) [hereinafter AARHUS CONVENTION: AN IMPLEMENTATION GUIDE].

34. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, ¶ 10, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992) [hereinafter *Rio Declaration*], *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

35. U.N. Framework Convention on Climate Change, art. 6(a), 6(a)(ii)-(iii), *opened for signature*, May 9, 1992, S. Treaty Doc. 102–38, 1771 U.N.T.S. 107.

36. Convention on Environmental Impact Assessment in a Transboundary Context, art. 2(6), Feb. 25, 1991, 1989 U.N.T.S. 309, [hereinafter Espoo Convention], *available at* http://www.unece.org/env/eia/documents/legaltexts/conventiontextenglish.pdf.

37. *See generally* Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22; [hereinafter *Kyoto Protocol*]; *see also* Svitlana Kravchenko, *Procedural Rights as a Crucial Tool to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 613, 646 n.176 (2010) [hereinafter Kravchenko, *Procedural Rights*].

The above instruments, and others like them, are recognized as having helped pave the road to Aarhus.[38] However, one of the main stepping stones of the Convention is the 1995 UNECE Guidelines on Access to Environmental Decision-Making. This identified public participation as "one of seven key elements for the long-term environmental programme for Europe."[39] The same Ministerial Conference that endorsed the Guidelines, decided that a convention dedicated to public participation should be drafted.[40]

The Aarhus Convention negotiations began in 1996 and culminated in the adoption of the treaty just two years later,[41] an impressively short amount of time for the notoriously difficult task of drafting a treaty in a version acceptable to a significant amount of nation-states. The negotiations themselves were an exercise in public participation as they involved an unprecedented level of participation by NGOs.[42] The Convention entered into force in 2001.[43] So far, forty-four Parties have ratified it.[44] The United States has not, even though it is a member of the UNECE.[45]

According to former United Nations Secretary-General Kofi Annan, the Aarhus Convention is,

> "by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations."[46]

---

38. U.N. ECON. COMM'N OF EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at 2–4, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000).

39. *Id.* at 2.

40. *Id*.

41. *Id*. at 1–2; *see generally* Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001), [hereinafter *Aarhus Convention*], *available at* http://live.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

42. AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34.

43. *Aarhus Convention*, *supra* note 42.

44. U.N. Econ. Comm'n for Eur., Status of Ratification (Apr. l 5, 2012), http://www.unece.org/env/pp/ratification.html (the United States and Canada have neither signed nor ratified the Convention).

45. *Id*.

46. AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34.

IV. NUTS AND BOLTS OF THE AARHUS CONVENTION

The following Section will analyze and demonstrate the uniqueness of the Convention and set forth the legal aspects and provisions of the Convention upon which this Article is built.

A. Convention "Pillars" and Provisions Pertinent to this Article

The Convention is founded on three "pillars": access to information, public participation in decision making, and access to justice.[47] The first has been analogized to providing "consumers with adequate product information for informed environmental choices."[48] The third, access to justice, "aims to address common impediments to legal challenges by setting forth provisions designed to assure wide access to justice [by] the public and civil society as a means to ensure enforcement of environmental law, and to reinforce the access to information and public participation pillars of the Convention."[49] However, as the purpose of this Article is to examine the Convention's ultimate potential for substantive change through the public's involvement in government decision-making processes, this Article exclusively focuses on the second pillar. The provisions that form the basis of this pillar are found in Articles 6, 7, and 8 of the Convention.[50]

Article 6 governs public participation in decisions on "specific activities with a possible significant environmental impact." Examples of such activities are listed in Annex I and include decisions on the proposed siting, construction and operation of or changes to many different types of industrial facilities, the licensing of products into the market place, as well as any activity not covered by the specific language of the Annex, but where public participation is governed by environmental impact assessments under national legislation.[51] Article 6 contains by far the most specific public participation requirements of the Convention.

Article 7 covers public participation in the development of "plans, programmes and policies relating to the environment." This Article

47. *Id.* at 49, 85, 125; *Aarhus Convention*, *supra* note 42, art. 4–9.

48. Toth, *supra* note 6, at 298; AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34, preamble.

49. Toth, *supra* note 6, at 311.

50. *See, e.g.*, AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34, at iii.

51. *Id.* at 86, Annex I.

governs sectoral and land-use plans, environmental action plans, and environmental policies at all levels.[52] Article 7 requires "[e]ach Party [to] make appropriate practical and/or other provisions for the public to participate during the preparation" of such plans and programs. Further, "[t]o the extent possible, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment." Articles 6 and 7 feature some overlap. For example, "activities" under Article 6 have also been interpreted to constitute Article 7 "plans, programmes and policies" and have thus been analyzed for possible violations of both articles.

Article 8 seeks to promote public participation in the public authorities' preparation of normative laws and rules with a potentially significant environmental impact.[53] Most importantly, Article 8 states that "[e]ach Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment."[54]

Articles 7 and 8 arguably have the greatest potential for providing the public with the most effective chances of making a true impact on environmental decision making. This is because they address legally binding normative instruments applying to a range of different situations, unlike Article 6, which more narrowly regulates individual activities. Thus, Article 7 and 8 cases will be analyzed in depth. The jurisprudence under these two Articles is relatively scant— the Compliance Committee has decided only six cases under articles 7 and 8 so far.[55] Thus, this Article will also focus on the larger body of jurisprudence under Article 6. Some consider this Article to be the "stronger cousin" of the three because its requirements are much more detailed than those of Articles 7 and 8. Because of this and the overlap between Article 6 and 7 cases mentioned above, some Article 6 jurisprudence is relevant here.[56] It is, however, beyond the scope of this journal Article to analyze all Article 6 cases that have been heard by the Compliance Committee so far; there

52. *Id.*

53. *Id*.

54. *Id.*

55. EUROPEAN ECO FORUM AT AL., CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004-2008) 200-04 (A. Andrusevych et al. eds., 2008).), *available at* http://www.participate.org/downloads/individual_files/CL3_en_web.pdf.

56. Jeremy Wates, *The Future of the Aarhus Convention: Perspectives Arising from the Third Session of the Meeting of the Parties*, *in* THE AARHUS CONVENTION AT TEN: INTERACTIONS AND TENSIONS BETWEEN CONVENTIONAL INTERNATIONAL LAW AND EU ENVIRONMENTAL LAW 383, 406 (Marc Pallemaerts ed., 2011).

are simply too many. Instead, this Article will focus on those Article 6 cases that primarily relate to actual decision-making processes and thus best illustrate the potential for substantive change. In the author's opinion, these are covered by Paragraph 1 (requiring the general scope of Article 6 to be observed), paragraph 3 (setting time frames for public participation procedures), Paragraph 4 (requiring that public participation takes place early in the decision-making process), Paragraph 6 (requiring public authorities to provide the public with access to all information relevant to the decision to be made), Paragraph 7 (setting for specific procedures for public participation where relevant to arguments raised by communicants), and Paragraph 8 (requiring parties to ensure that decisions take due account of the public participation). The focus of the present Article will be on cases where the Compliance Committee found the parties to be in noncompliance in order to be able to examine any further progression of events from procedure (i.e. the finding of noncompliance) to substance (i.e. what, if anything, did the Parties do to rectify the legal problem).

B. Uniqueness of the Aarhus Convention

The Aarhus Convention features several unique mechanisms regarding the role of the general public in environmental decision making and enforcement. First, the Convention is the first MEA that focuses exclusively on the obligations of states towards their *citizens* and not only on Parties' rights and obligations vis-à-vis *each other*.[57] Compliance with the Convention provisions is ensured by the Aarhus Convention Compliance Committee, which currently consists of ten members serving in an individual capacity.[58] The compliance mechanism may be triggered in four ways:

> (1) This a Party may make a submission about compliance by another Party;
>
> (2) a Party may make a submission concerning its own compliance;
>
> (3) the Secretariat may make a referral to the Committee;
>
> (4) *members of the public may make communications concerning a Party's compliance with the convention.*[59]

---

57. Pedersen, *supra* note 22, at 93.

58. U.N. Econ. Comm'n for Eur., Committee Members, http://live.unece.org/env/pp/ccmembership.html (last visited Apr. 1, 2012).

59. U.N. ECON. COMM'N FOR EUR., Background, http://live.unece.org/env/pp/ccbackground.html (last visited Apr. 1, 2012).

Accordingly, any member of the public—even individual citizens—can trigger a review of alleged cases of noncompliance.[60] Further, the communicant needs to show no specific interest in the matter when submitting a case for compliance review.[61] However, the Committee cannot consider "anonymous, manifestly ill-founded and abusive communications or those incompatible with the provisions of the Convention . . . moreover, it shall take into account whether available and effective domestic remedies have been exhausted."[62] Up to the Fourth Meeting of the Parties ("MOP 4"), the Compliance Committee had received sixty communications—ten from individual members of the public and the remainder from civil society organizations including NGOs, as well as one local government body.[63] This ratio shows the effectiveness of involving civil society in compliance matters. Allowing private parties to submit questions of implementation is unique in international environmental law as MEAs typically only allow such submissions to be made by the parties themselves, or, in some cases, by expert review teams.[64] Nonetheless, the aspect of the compliance mechanism whereby communications from the public may be brought before the Committee is not an unpopular one among nation-states as shown by the fact that no Party has opted out of it.[65]

The second unique feature of Aarhus is that Compliance Committee members serve in "an individual capacity."[66] Thus, it is accepted practice that Committee members do not belong to the executive branch of any

60. U.N. Econ. Comm'n for Eur., *Report of the First Meeting of the Parties: Addendum, Decision I/7, Review of Compliance*, Annex ¶ 18, U.N. Doc. ECE/MP.PP/2/Add 8 (Apr. 2, 2004) [hereinafter *Review of Compliance*].

61. Attila Tanzi*, Controversial developments in the field of public participation in the international environmental law process*, *in* NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? 135, 152 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008).

62. *Id*.

63. Veit Koester, *The Compliance Mechanisms—Outcomes and Stocktaking*, 41 ENVTL. POL'Y & L. 196, 201 (2011).

64. *See, e.g.*, U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its First Session:, held at Montreal from 28 November to 10 December 2005, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session, Decision 27/CMP.1 Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, ¶ 1, U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006); *and* U.N. Framework Convention on Climate Change, An Introduction to the Kyoto Protocol Compliance Mechanism (2012), http://unfccc.int/kyoto_protocol/compliance/items/3024.php (last visited April 1, 2012).

65. U.N. Econ. Comm'n for Eur., Report of the Second Meeting of the Parties, Addendum, Decision II/5, General Issues of Compliance, U.N. Doc. ECE/MP.PP/2005/2/Add.6 (June 13, 2005).

66. *Review of Compliance*, *supra* note 61, Annex ¶ 1,1.

government and that they are completely independent from any government, as far as their work with the Committee is concerned.[67] The purpose of this structure is to avoid potential conflict of interest situations that might arise if government representatives serving as Committee members had to hear cases against their government employers. In such situations, the individual capacity of the Committee members makes it more likely they will issue findings of noncompliance against their own nations.

Third, NGOs may nominate candidates for election to the Committee.[68] This is an obvious boon to public participation, especially within environmental affairs, which are well known to be of great interest to a significant number of highly motivated and socio-politically active members of the public.

Fourth, communicants do not need to be represented by legal counsel, and communications to the Compliance Committee need not be prepared with legal assistance.[69] This facilitates participation by stakeholders with limited financial resources, one of the general concerns about public participation discussed previously.

Finally, the Aarhus Convention Compliance Committee has taken the lead among international agreements in opening its meetings to observers, including those from the nongovernmental sector.[70] The purpose of this is to lead by example. A treaty that calls for public participation by governments should also allow insight into its own internal mechanisms. It does

C. Who is "the public?"

It is important to bear in mind exactly *who* the intended "public" is under the Convention framework. The Convention defines "the public" as "one or more natural *or* legal persons, *and*, in accordance with national legislation or practice, their associations, organizations or groups."[71]

The issue of whether a *particular* member of the public is affected or has a specific interest in a particular matter is not significant where

67. Wates, *supra* note 57, at 388.

68. *Review of Compliance*, *supra* note 61, Annex ¶ 4.

69. U.N. Econ. Comm'n for Eur., Guidance Document on the Aarhus Convention Compliance Mechanism 32, *available at* http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf.

70. NGOs Tanzi, *supra* note 62.

71. *Aarhus Convention*, *supra* note 42.

rights under the Convention apply to "the public" in general.[72] *Each* individual, natural or legal person enjoys all the collective rights covered by the Convention. [73] Thus, public authorities have not met their obligations by, for example, providing information to just one particular representative selected by the government.[74] In contrast to other UNECE conventions, the Aarhus Convention considers associations, groups, or organizations without legal personality to be members of the "public" under the Convention, subject to national legislation or practice.[75]

In contrast, Article 6(5)-(6) uses the narrower phrase "public concerned." The Convention specifies that "[t]he public concerned" means "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."[76] Article 9(2) also uses the term "public concerned" and clarifies that this may be anyone "having a sufficient interest" or "maintaining impairment of a right" under the Convention. [77] How these thresholds are met "shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of [the] Convention."[78]

Thus, "the term 'public concerned' refers to a subset of the public at large with a special relationship to a particular environmental decision-making procedure."[79] But "[w]hile narrower than 'the public,' 'the public concerned' is nevertheless still very broad."[80] "It appears to go well beyond the kind of language that is usually found in legal tests of 'sufficient interest.'"[81] It even seems to apply to a "category of the public that has an unspecified interest in the decision-making procedure."[82] The Convention thus operates with relatively broad standing requirements. Further, the Convention does not require that a person shows a *legal* interest in a given issue; *factual* interests as defined under continental

72. U.N. ECON. AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34, at 39.

73. *Id*.

74. *Id*.

75. *Id*. at 39–40.

76. *Aarhus Convention*, *supra* note 42, art. 2(5).

77. *Id*. art. 9(2).

78. *Id*.

79. AARHUS CONVENTION: AN IMPLEMENTATION GUIDE *supra* note 34, at 40.

80. *Id.*

81. *Id.*

82. *Id.*

legal systems suffice.[83] This is noteworthy as persons with mere factual interests normally do not enjoy the same procedural and judicial rights as do persons with legal interests.[84]

Second, whereas both public interest nongovernmental organizations ("PINGOs") and business interest nongovernmental organizations ("BINGOs") can claim a right to participate under Articles 7 and 8, Articles 6 and 9 appear to limit such participation to PINGOs. However, whereas the"[t]he Convention treats environmental NGOs advantageously in some places, [it] usually signals that individuals and persons not organized into formal groups can equally participate in environmental decision making. This would apply to businesses as well as to non-environmental NGOs."[85] Parties may set requirements for NGO participation under national law, but these must be consistent with the overall goals of the Convention.[86]

A common concern among legal environmental scholars and environmentalists in general is whether it is expedient to let BINGOs play a role in public participation in environmental work. In this context, it is, however, important to recall that, in former UN Secretary-General Kofi Annan's words:

> Action starts with Governments . . . [b]ut Governments cannot do [this] alone. Civil society groups have a critical role, as partners, advocates and watchdogs. So do commercial enterprises. Without the private sector, sustainable development will remain only a distant dream.[87]

In short, it is important to remember that in participation discourse, the "public" may cover a both broad and narrow range of actors, not all of whom necessarily have the same objectives in mind.

V. PUBLIC PARTICIPATION PROVISIONS IN NON-AARHUS CONTEXTS

Although the Aarhus Convention is unique in several aspects, it is far from the only instrument that calls for public participation in environmental and other law. For example, codified law in both the United States and the EU feature public participation provisions, just as

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 41.
87. Tanzi, *supra* note 62, at 136.

some courts in the United States and beyond have upheld public participatory rights.

A. United States Federal and State Law

The second pillar of the Aarhus Convention (public participation in decision making) features stipulations resembling several United States acts. For example, the National Environmental Policy Act ("NEPA") requires the President's Council on Environmental Quality to "consult with the Citizens' Advisory Committee on Environmental Quality … [as well as] with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable."[88] It also mandates that the Council shall "utilize, to the fullest extent possible, the services, facilities, and information … of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided."[89]

The Clean Water Act ("CWA") calls for cooperation and consultation with, i.a., "private agencies, institutions, and organizations, and individuals, including the general public" as well as "recognized experts in various aspects of pollution and representatives of the public."[90] In fact, public participation is one of the main goals mentioned in the Act's "Congressional Declarations of goals and policy."[91]

The Administrative Procedure Act ("APA") requires "each agency [to] give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[92] The APA also requires agency business to be conducted in accordance with "open meetings" requirements, which include timely advance notice to the public, publicly available transcripts, and that agencies create their own procedures for open meetings.[93]

Other acts such as the Freedom of Information Act, the Federal Advisory Committee Act, and the Endangered Species Act feature provisions governing access to information and justice (equivalent to Aarhus Convention pillars one and three, respectively).[94] It is, however,

88. 42 U.S.C. § 4345(1) (2006).

89. *Id.* § 4345(2).

90. 33 U.S.C. § 1254(a) (2002)(2), (4) (2006).

91. *Id.* § 1251(e); *see also* Toth, *supra* note 6, at 306.

92. 5 U.S.C. § 553(e) (2006). "'Person' includes an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

93. *Id.* § 552b(b), (e),(g)–(h), (f)–(g).

94. *Id.* § 552 (access to information); *Id.* (access to justice).

important to bear in mind that in similarity with Article 9(2) of the Convention, these Acts also present significant hurdles to public participation, for instance, in the form of, for example, standing requirements.[95]

Additionally, some states in the United States have enacted laws embracing principles governing the decision making and access to information aspects of public participation. For example, if a development project in a minority or low-income housing community (an "environmental justice" or "EJ" community) in New York carries the potential for at least one significant, adverse environmental impact, the permit applicant must submit a public participation plan describing how the applicant intends to identify and notify stakeholders. [96] The permit applicant must also produce easily understood project information, schedule meetings for public input, and make documents available.[97] In Connecticut, facilities located in EJ communities must file and obtain approvals for "meaningful" public participation plans before applying for general siting permits.[98] Project proponents are specifically instructed to undertake "reasonable, good faith effort[s]" to provide clear and accurate information about the project and financial resources for the mitigation of environmentally negative project impacts.[99] The California APA requires rulemaking agencies to "consider" public input on regulatory proposals and to "involve" the public through hearings and public comments.[100] The California law does not, however, address environmental issues per se. Perhaps quite the contrary, it requires agencies to assess "whether and to what extent the regulation will create or eliminate jobs or businesses"[101] and thus, in those instances where perceived or real conflicts may exist between promoting business and environmental interests emphasizes the former.

---

95. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

96. N.Y. ST. DEP'T OF ENVTL. CONSERVATION, COMMISSIONER POLICY 29, ENVIRONMENTAL JUSTICE AND PERMITTING, (2003), *available at* http://www.dec.ny.gov/publicregulations/51.html.

97. *Id.*

98. 2008 Conn. Pub. Acts 08–94.

99. *Id*.

100. CAL. GOV'T CODE § 11340. (West 2011).

101. HOW TO PARTICIPATE IN THE RULEMAKING PROCESS: THE STATUTES, REGULATIONS AND CASE LAW YOU NEED TO MAKE YOUR VOICE HEARD IN THE CALIFORNIA RULEMAKING PROCESS 6 (2006), *available at* http://www.oal.ca.gov/res/docs/pdf/HowToParticipate.pdf.

B. European Union Law

In the EU, several instruments require member nations to allow public participation in decision-making processes at the EU level. For example, the 2001 Directive on the Assessment of the Effects of Certain Plans and Programs on the Environment stipulates that draft plans and programs covered by the Directive must be made available to the public before they are adopted, that the public is given an opportunity to comment on such plans and programs, and, importantly, that the final plan or program "shall take[] into account" the consultations made by the public.[102] Council Directive 2003/35/EC on Public Participation further provides for public participation in the creation of certain plans and programs relating to the environment.[103] This Directive also added PINGOs to the definition of "public" and provides for access to the review of public participation decisions made under specific EU directives.[104] Further, EU Environmental Impact Assessments commonly incorporate public participation requirements.[105]

Other directives cover access to information and justice. For example, the 2003/4 Directive on Freedom of Access to Information on the Environment sets specific time limits for government replies to information requests as well as reasonable fees for obtaining information.[106] It reads exceptions to the right to information narrowly.[107] In contrast, the continued failure to adopt a 2003 draft directive on access to justice in national environmental matters means that this matter is left "firmly in the hands of member states' national law."[108] On the other hand, the EU Directive on Environmental Liability "allows the public and non-governmental environmental organizations to request competent authorities to intervene in cases of environmental damage or imminent threat. Standing requirements are identical to the Aarhus Convention's

---

102. Council Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, 2001 O.J. (L 197) 30, 33–34 (EC).

103. Council Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 on Providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programmes Relating to the Environment and Amending with regard to Public Participation and Access to Justice Council Directives 83/337/EEC and 96/61/EC, 2003 O.J. (L 156) 17 (EC).

104. *Id.* at 19, 20.

105. Toth, *supra* note 6, at 309.

106. Council Directive 2003/4/EC, of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information, 2003 O.J. (L 41) 13 (EUEC) [hereinafter Directive 2003/4].

107. *Id.* art. 4.

108. Pedersen, *supra* note 22, at 105–07.

Article 9(2)." [109] Importantly, every EU citizen also has the right to bring a complaint before the European Ombudsman.[110] This brings the EU in line with the Aarhus Convention.

Certain EU Directives even go beyond the Aarhus Convention requirements. For example, the 2003 Directive on Public Access to Environmental Information adds specific pieces of information to the definition of environmental information that are not included in the Convention[111] and adds specific access to justice provisions that were missing from previous EU directives.[112] On the other hand, it should also be noted that attempts to bring conformity on the member state level with some of the Aarhus Convention's provisions have failed.[113] Nonetheless, "the procedural environmental rights enshrined in EU legislation remain significant and represent a noteworthy indication of the importance attached to such rights in Europe."[114]

C. Court Decisions

In addition to legislative and agency rulemaking enhancing public participation activities, some courts in the United States and beyond have issued holdings clearly supporting public participation.

For example, plaintiffs in an EJ community in Rhode Island challenged the conduct of the Rhode Island Department of Environmental Management ("DEM") in issuing a permit for a school to be built on a former landfill without providing an opportunity for effective public participation as required by Rhode Island statutory law.[115] Specifically, the plaintiffs alleged that the DEM did not provide local residents with sufficient and substantively adequate notice of the adoption of a work plan proposal and the completion of a site investigation and, further, that the DEM did not make all relevant public records adequately available under Rhode Island public participation

109. Toth, *supra* note 6, at 319.

110. Pedersen, *supra* note 22, at 107 n.212 (2008).

111. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information, 2003 O.J. (L 41) 13 (EU); *see also* Toth, *supra* note 6, at 328 n.206; *and* Directive 2003/4, *supra* note 107, at 10.

112. Pedersen, *supra* note 22, at 106.

113. *Id.*

114. *Id.* at 107.

115. Hartford Park Tenants Ass'n v. R.I. Dep't of Envtl. Mgmt., No. 99-3748, 2005 WL 2436227, at *17, *19, *20 (R.I. Sept. 28, 2005) (The Rhode Island Industrial Property Remediation and Reuse Act stipulates that "[t]he department of environmental management will develop and implement a process to ensure community involvement throughout the investigation and remediation of contaminated sites.").

law. The plaintiffs also argued that DEM's failure to adhere to the community involvement mandate resulted in such a lack of information that interested parties were not able to come forward in time and that, furthermore, DEM did nothing to ensure that attendants at public hearings remained informed.[116] The court agreed that the DEM violated public participation law "by failing to develop and implementing [sic] a process that ensured community involvement throughout the investigation and remediation of the contaminated sites where the schools were built."[117] In particular, the court frowned upon DEM's failure to ensure that local residents received adequate notice of the impending actions and failure to provide access to the relevant public records near the site.[118]

Further, four cities and two NGOs have sued the Export-Import Bank and the Overseas Private Investment Corporation in the United States for defendants' failure to evaluate the effects of their financial support of certain energy projects on global climate change. The court ruled that defendants are not completely exempt from the requirements of NEPA, but did not make a decision as to whether defendants had sufficient authority over the specific projects to subject the projects to environmental impact assessment requirements and thus to public participation.[119]

In Thailand, twenty-seven residents living in one of the world's largest petrochemical production areas filed suit against the Thai National Environment Board to stop the construction of sixty-five industrial projects. The Thai Constitution guarantees "[t]he right of a person to participate with the State and communities in the preservation and exploitation of natural resources."[120] Further, no activity which may seriously affect communities with respect to the quality of the environment may be permitted "unless its impacts have been studied and evaluated and "consultation with the public and interested parties have [sic] been organized, and opinions of an independent organization, consisting of representatives from private environmental and health organisations . . . have been obtained."[121] The Supreme Administrative Court declared the proposed projects unconstitutional for lack of public

116. *Id.* at *24.

117. *Id.* at *56.

118. *Id.* at *27–28.

119. Friends of the Earth, Inc. v. Mosbacher, 488 F. Supp. 2d 889, 891–92 (N.D. Cal. 2007).

120. CONST. OF THE KINGDOM OF THAI. § 67, B.E. 2550 (2007), *available at* http://www.asianlii.org/th/legis/const/2007/1.html.

121. *Id.*

participation and granted an injunction to stop the proposed projects.[122] Subsequent decisions based on this case have halted approximately $9 billion worth of industrial projects in Thailand,[123] highlighting the financial and legal importance of observing public participation requirements where they exist.

D. Other International Agreements

Public participation provisions have not only become a feature of national and international environmental law; major trade, financial, and human rights instruments embrace the principle as well. For example, the 1993 North American Free Trade Agreement's Side Agreement on Environmental Cooperation has established recommendatory bodies for public participation in the work performed under the auspices of the agreement.[124] The World Bank's Participation and Civic Engagement Group, the Global Environment Fund, and the Dispute Settlement Mechanism of the World Trade Organization also apply public participation requirements, as do several human rights instruments.[125]

VI. POTENTIAL FOR EFFECT OF PROCEDURAL REQUIREMENTS ON SUBSTANTIVE RIGHTS AT THE NATIONAL AND INTERNATIONAL LEVELS

This Section will examine how public participation in *procedural* aspects of environmental decision-making mechanisms also has a potential for effect on *substantive* rights. The Aarhus Convention is the natural focal point of this Section although comparisons to select aspects of other MEAs will also be made.

A. National Level

Although the objective of the Convention is to protect "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being,"[126] it is important to recall

122. Daniel Ten Kate & Suttinee Yuvejwattana, *Thai Court Upholds Suspension of Industrial Projects (Update 1)*, BLOOMBERG (Dec. 2, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aX8Jgyoem28Q.

123. U.N. Framework Convention on Climate Change, National Reports (2012), *available at* http://unfccc.int/national_reports/items/1408.php.

124. AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34, at 4.

125. *Id.; see, e.g.*, Kravchenko, *Procedural Rights*, *supra* note 38, at 613.

126. *Aarhus Convention*, *supra* note 42, art. 1.

that the Aarhus Compliance Committee does not sit as a court of review on the *substantive* merits of individual environmental lawsuits under national law.[127] "The idea is not to [substantively] impinge upon individual Parties' sovereign environmental laws, but rather to guarantee the procedural preconditions for their enforcement."[128] Substantive change brought about by the Convention must thus come *indirectly* through its procedural provisions. But is it realistic to hope that what are, after all, mere procedural provisions in an MEA will also result in substantive environmental change, whether in the form of legislative and normative changes or ad hoc decisions on specific activities?

First, the Aarhus Convention has been criticized for only referring to a substantive right to live in an adequately healthy environment on an aspirational level. [129] In fact, "[t]he Aarhus Convention's aim is [simply] to *contribute* to the protection of this right."[130] "[A]lthough the Convention recognizes the right to live in an adequate environment, it does so without pointing towards where such a right is to be found in other international or European law."[131] For example, the implementation guide to the Convention claims that "the convention is the clearest statement to date in international law pointing towards a human right to the environment," but does not explicitly state that any such right even exists or where to find it.[132] This appears to make the Convention somewhat ineffectual in leading to substantive changes with the goal of obtaining a healthy environment. It is possible that the right to healthy environment is a generally recognized one in environmental law circles, but to presume that legislators and law enforcement bodies would also find this to be the case requires a leap of faith that, as history shows, is not yet warranted.

Further, compliance mechanisms under MEAs have, in general, been said to be "weak," "toothless,"[133] and unlikely to be the tool upon which to rely for significant environmental progress. For example, the Facilitative Branch of the Kyoto Protocol Compliance Committee uses only "dialogue," "advice," and "facilitation" to reach its goals, [134]

---

127. Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, [hereinafter Aarhus Convention and Innovations].

128. Toth, *supra* note 6, at 304.

129. Pedersen, *supra* note 22, at 99–102.

130. *Id.*; *Aarhus Convention*, *supra* note 42, art 1.

131. Pedersen, *supra* note 22, at 99.

132. *Id*. at 99–102.

133. Kravchenko, *Procedural Rights*, *supra* note 38, at 616.

134. *See generally Kyoto Protocol*, *supra* note 38; *see also* Kravchenko, *Procedural Rights*, *supra* note 38, at 616.

arguably mere "carrots" without much real impetus for change. The Kyoto Protocol Enforcement Branch is legally situated to use more "stick," but even so, the most stringent measure that can be undertaken against a noncompliant Party is to deduct excess emissions from its future emission allowances and suspending the Party's eligibility to participate in international emissions trading.[135] Most international legal scholars would agree that the current version of the Kyoto Protocol is not very far-reaching seen from an environmental point of view (which, of course, has not made it uncontroversial seen from a political one).

In comparison, if a dispute arises under the Aarhus Convention, the parties shall "seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties."[136] If this fails, the dispute may be resolved by the International Court of Justice ("ICJ") or by binding arbitration as per each Party's previous stipulations.[137] This step is "compulsory."[138] Thus, the Aarhus Convention has some legal "teeth." The ability to eventually refer disputes to resolution by the ICJ or binding arbitration is arguably a stronger deterrent than if the last recourse had been for the Compliance Committee to resolve the cases with the possible, but not guaranteed, assistance and cooperation of the involved parties.

So far, however, no Aarhus Convention disputes have been resolved by the ICJ or arbitration. One may fear that in order to avoid this, parties might choose to officially accept a "solution by negotiation" only to subsequently *not* undertake a good faith effort to live up to the dispute resolution stipulations after all. Such concerns may cause some to look to legal instruments other than MEAs for substantive change. Nonetheless, the argument that a legal instrument or provision is per se ineffectual simply by being procedural must fail. For example, procedural provisions can function as a guarantee of the right to have an underlying substantive right adjudicated with at least the potential for the expansion upon substantive rights through national adjudication. This is not only evidenced by vast American jurisprudence in the area of procedural and substantive due process in general, but also by substantive/procedural provisions under, for example, the Endangered Species Act, the CWA, NEPA, and the APA (see also below).

Similarly, although the Aarhus Convention does not specify any narrowly defined environmental rights, it does—through the access to justice pillar—guarantee citizens of ratifying nations a right to have

135. *See generally Kyoto Protocol*, *supra* note 38.

136. Convention on Access to Information, *supra* note 42.

137. *Id*.

138. *Id*.

issues of *national* environmental law heard by a court of law or by other independent and impartial review.[139] It is exactly through its procedural provisions that the Aarhus Convention has "the potential to facilitate the same outcome as a substantive right in terms of assisting citizens in enforcing and pursuing environmental norms."[140] Obtaining the targeted healthy living environment would, of course, be more easily reached if governments around the world would pass laws aimed more strictly at sustainable development. Until that happens, the use of procedural rights work as at least a short-term method of enforcing already existing substantive provisions, and as a way of drawing attention to the creation of substantive rights in the longer term.[141] In this way, the procedural rights set forth in the Convention have been recognized to "contribute to the objective of [achieving] an adequate environment for every person which, in itself, adds an extra layer to the status of a substantive . . . right to a healthy environment."[142]

Perhaps most importantly, involving the general public more in actual government decision-making is not and should not be seen as an empty promise. It is an important stepping stone on the way to more informed and thus better substantive decision-making. It is also a method of not passively relying on lawmakers to live up to their democratic promises, and of actively making them aware of the necessity to make environmentally sound decisions and of putting highly visual pressure on them to do so. Of course, public participation also involves the risk that lawmakers may be influenced negatively by interest groups seeking to limit environmental regulations, but such is democracy at its best and its worst. In short, procedural provisions have the potential for assisting in avoiding poorly founded "ivory tower decisions" and ensuring oversight from a bottom-up perspective.

Finally, as many European nations are beginning to recognize procedural environmental rights as part of regional customary law, although not yet binding statutory law, the Aarhus Convention's objective of eventually creating a substantive right to a healthy environment through procedural provisions represents "a significant step in elevating environmental rights to the level of customary norms."[143] A journey of a thousand miles still begins with a single step. The Aarhus Convention and similar public participation provisions represent significant headway having been made toward giving the public an

139. AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, *supra* note 34, at 125.

140. Pedersen, *supra* note 22, at 93, 108.

141. *Id*. at 99–102.

142. *Id*.

143. *Id*. at 92–94.

important say in national environmental decision making. Formal public participation policies are "a useful means for civil society and NGO advocacy efforts to push for further improvement. Therefore, the codification of public participation policies, even if not yet translated into practice, is still an important indicator of success."[144]

B. International Level

The Aarhus Convention also has potential for advancing the concept of public participation in international environmental decision making.

According to Article 3.7, "[e]ach Party shall promote the application of the principles of this Convention in international decision-making processes and within the framework of international organizations in matters relating to the environment."[145] Unfortunately, the Convention contains no specific mandates as to how that should be done. Some direction comes in the form of the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums. In pertinent part, this encourages nations to allow the public to participate "effectively" and at an "early stage," including during the "negotiation and application of conventions, the preparation, formulation and implementation of decisions; and substantive preparation of events."[146] It further calls for "due account" to be taken of the outcome of public participation in decisions[147] without, however, pinpointing exactly what this really means. The problem with these Guidelines is that they are "soft law" instruments only. Nation-states thus retain a large amount of discretion in whether to apply them as a form of good practice or not to follow them at all.

Some international bodies have chosen to follow the spirit of Article 3.7. For example, after the Working Group of the Aarhus Convention emphasized the application of the Aarhus principles to the UNFCCC and encouraged participation by civil society in the Sixteenth Conference of the Parties of the UNFCCC ("COP-16"), the UNFCCC secretariat invited submissions on how to enhance the engagement of observer organizations and public participation in the conference itself.[148] Although UNFCCC sessions are, as a general rule, not open to the public, observer organizations—including civil society groups—can

144. Crescencia Maurer et al., *WRI Issue Brief, Aligning Commitments: Public Participation, International Decision-making, and the Environment*, WORLD RESOURCES INST. May 2003 at 3.

145. *Aarhus Convention*, *supra* note 42, preamble, art. 3(7).

146. Almaty Guidelines, *supra* note 18, at § 5, ¶ 32–35.

147. *Id*. § 5, ¶ 37

148. Kravchenko, *Procedural Rights*, *supra* note 38, at 637–39.

apply for admission to the sessions on an ad hoc basis.[149] At COP-16, no less than 594 NGOs represented by 4,560 individuals participated as observers.[150] NGOs have been actively involved in the workings of the UNFCCC since its early days, "attending sessions and exchanging views with other participants, including delegates."[151] It is recognized that this involvement allows "vital experience, expertise, information and perspectives from civil society to be brought into the process to generate new insights and approaches."[152] Still, merely observing a meeting is of course not the same as actually being part of the decision-making processes. On the other hand, and as described above, enabling a potentially very large amount of interested members of civil society to actively participate in such processes may simply be impractical. This line drawing issue needs to be resolved by the parties for future substantive improvements of the Convention.

In short, the Aarhus Convention represents significant opportunities for civil society to become more involved in both national and environmental decision-making processes. However, more work is needed in order to create a legal framework that makes this not only feasible, but also more effective and accepted than is currently the case. So far, the irony of the Convention is that attempts to involve the public in negotiations at the *international* level have been relatively modest,[153] while attempts have been much more successful at the *national* level—as will be shown next.

149. U.N. Framework Convention on Climate Change, Civil Society and the Climate Change Process (2012), http://unfccc.int/parties_and_observers/ngo/items/3667.php. (last visited 6 Apr. 2012).

150. U.N. Framework Convention on Climate Change, *Conference of the Parties: List of Participants*, U.N. Doc. FCCC/CP/2010/INF.1 (Dec. 10, 2010), *available at* http://unfccc.int/resource/docs/2010/cop16/eng/inf01p01.pdf.

151. *Guidelines for the Participation of Representatives of Non-governmental Organizations at Meetings of the Bodies of the United Nations Framework Convention on Climate Change,* U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, (March 2003), http://unfccc.int/files/parties_and_observers/ngo/application/pdf/coc_guide.pdf. [hereinafter Guidelines for Participation].

152. *Id*.

153. Dupuy & Vierucci, *supra* note 15.

VII. CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE: SUCCESSES AND SHORTCOMINGS

This Section analyzes the outcome of cases relating to the public's involvement in decision-making processes under the Convention. It is important to recall that the Compliance Committee does not sit as a substantive tribunal hearing cases on particular issues of national or international environmental law. Accordingly, no case has directly changed, or even suggested changes to, such law. Rather, the forte of the Convention lies in its ability to empower civil society to work with legislators and government officials on both procedural *and* substantive change through existing democratic channels. In this way, the Convention is seen as the "high water mark" for environmental democracy.[154] After describing the successes reached during the first decade of case law as well as highlighting a few select examples of other interesting lessons to be learned, this Section will briefly analyze the cases in which no successes were reached and consider why this may have been so. Finally, the Section will identify cases which are still undergoing developments at the national level and which will thus be interesting to observe in future scholarly work.

A. Successes

1. Landfill in Lithuania

In early 2002, the Vilnius County Council approved a new landfill with a proposed capacity of almost seven million tons of waste over twenty years in a sand quarry already being used as a municipal landfill.[155] The landfill is located in the immediate proximity of a residential area with some of the installations a mere 500 yards from private houses.[156] The communicants living in the affected residential area alleged that the information about the possibilities to participate in the Environmental Impact Assessment ("EIA") and other planning and permitting processes was ineffective. This was in par the case because the participation possibilities were only announced in a government publication *not* normally read by the general public instead of, for

154. AARHUS CONVENTION AT TEN, *supra* note 20.

155. U.N. Econ. Comm'n for Eur., *Report by the Compliance Committee: Compliance by Lithuania with its Obligations Under the Convention*, ¶ 17, U.N. Doc. ECE/MP.PP/2008/5/Add.6 (Apr. 4, 2008).

156. *Id*.

example, in a popular daily local newspaper. Further, the communicants complained that the few working days required for notice and the notice actually given were not reasonable, that the public was only informed when certain options had already been decided upon and only two possible landfill locations were being discussed, that no alternatives were considered, and that no detailed data on the impact on human health was provided.[157] Finally, the communicants also alleged that they did not have public participation opportunities during the preparation of the plan for future waste management.[158]

The Compliance Committee found that the public should be informed in a manner that represents a true and reasonable chance to participate.[159] Publication in a weekly official journal is *not* effective under the Convention.[160] It was also a violation of the Convention that the project proponents (i.e., the actual developers) were made responsible for organizing the public participation.[161] The public authorities must remain in control of this area at all times. In addition, it was inadequate to only notify the public of the possibility of participating in a decision-making process concerning the "development possibilities of waste management in the Vilnius region" rather than specifying that this was a process concerning a major landfill to be established in the specific neighborhood in question.[162]At the time, Lithuanian legislation limited the right to submit comments to the "public concerned," and these comments had to be "motivated proposals," containing reasoned argumentation. As the pertinent Convention provision requires that "public participation procedures shall allow *the public* to submit … *any* comments, information, analyses or opinions," the Lithuanian law failed to guarantee the full scope of the rights envisaged by the Convention.[163] The Committee further noted that whereas Lithuania's current legislation appears to be in line with Article 7, there is no evidence that national public participation requirements cover plans and programs relating to the environment other than strategic environmental assessments ("SEAs").[164] The Committee thus found Lithuania in noncompliance with Articles 6(2), (3), (6), and (7).[165]

Subsequently, Lithuania implemented a number of measures to

157. *Id.* ¶¶ 43–46.
158. *Id.* ¶ 50.
159. *Id.* ¶ 67.
160. *Id.*
161. *Id.* ¶ 90.
162. *Id.* ¶ 37.
163. *Id.* ¶ 80 (emphasis added).
164. *Id.* ¶ 86.
165. *Id.* ¶ 90.

reach compliance with the Convention. The nation took measures to improve the existing legal framework with the aim of informing the public of decision-making processes in an adequate, timely, and effective manner.[166] Similarly, Lithuania introduced legislation to ensure that the responsibility for informing the public about the participation procedures no longer remains solely with the developer, but rests on *both* the developer *and* the public authorities.[167] The public may now submit "any comments and proposals" without a requirement that these be "reasoned."[168] Additionally, Lithuania implemented a number of measures to ensure broader public participation in plans and programs regarding general environmental assessment procedures, and thus not only for SEAs, as before the complaint.[169]

Most importantly, Lithuania has assured the Committee of its revised policy to ensure public participation in "all draft legislation."[170] Accordingly, any draft legislation must now initially be published on a centralized Information System of Draft Legislation.[171] The public will then have the opportunity to submit comments and proposals on such proposed acts.[172] Notably, the next versions of the draft laws will then be published with modifications on the basis of these comments.[173] After these changes in policy, Lithuania was found to have "seriously and actively engaged" in following the decision recommendations and is now in compliance with the Convention in all aspects concerned.[174] This is obviously a positive outcome in and of itself, but more importantly, this shows that Lithuania has enhanced the general public's procedural ability to participate in the preparation of new legislation. The outcome also shows that the Convention's requirements and subsequent compliance efforts have helped convince the Lithuanian government of the importance of taking public comments into account when preparing new legislation. These policy changes allow the general public to help shape new legislation substantively. Thus, this case shows the potential for

166. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-first Meeting: Compliance by Lithuania with its Obligations Under the Convention, ¶ 15, U.N. Doc. ECE/MP.PP/C.1/2011/2/Add.5 (Aug. 24, 2011), *available at* http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-31/ece.mp.pp.c.1.2011.2.add.5_as_submitted.pdf.

167. *Id.* ¶ 18.

168. *Id.* ¶ 19.

169. *Id.* ¶ 22.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* ¶ 24.

procedural requirements to eventually lead to substantive legal changes as well.

2. Hydropower and Nuclear Power Plant Construction in Belarus

In 2009, two NGOs filed a communication alleging that no public participation had taken place before a decision to construct a power plant was made, that the public was not made properly aware of this decision, and that the public was not allowed to submit views and comments during post-decision public hearings in violation of Articles 6(2), (4), (6), and (7) of the Convention.[175] The communicants further alleged that the government had taken no steps to allow the public to participate in the adoption of generally applicable national rules on public participation regarding nuclear power, which also violated Articles 7 and 8 of the Convention.[176]

The Committee preliminarily found Belarus noncompliant in several regards. First, the Committee found it unacceptable that access to the full version of the EIA report had been limited to the relatively far-away nuclear power plant headquarters in Minsk with no copying allowed.[177] Second, the Committee found it unacceptable that while a hundred-page EIA report was available, the government failed to inform the public about an additional thousand-page report.[178] Third, Belarus was noncompliant in only allowing one hearing at the EIA stage, limiting the public's input to the mitigation of environmental impacts, and precluding the public from having any input on the decision on whether the nuclear plant should be constructed at the selected site in the first place.[179] Finally, the Committee expressed its discontent with the fact that the government entity responsible for making the final decision was given only a summary of the public's comments generated by the project developer.[180] The Committee recommended that Belarus improve its framework for public participation in relation to nuclear activities and make appropriate practical and other provisions allowing the public to

175. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-third Meeting: Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2009/44 Concerning Compliance by Belarus, ¶ 1, U.N. Doc. ECE/MP.PP/C.1/2011/6/Add.1 (June 28, 2011), *available at* http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2009-44/Correspondence/C44Findings.20.07.2011.pdf.

176. *Id.* ¶ 3.

177. *Id.* ¶ 68.

178. *Id.* ¶ 74.

179. *Id.* ¶ 78.

180. *Id.* ¶ 88.

actively participate during the preparations of plans and programs relating to the environment.[181]

Belarus subsequently notified the Committee that it has adopted new legislation in order to improve its national environmental legislation with "the aim of achieving the closest compliance with the Aarhus . . . Convention[]."[182] Among other things, this legislation clarifies the enhanced public participation procedures and the time frames of such procedures in relation to EIA reports.[183] Now, local authorities must publish their decisions on proposed activities on the internet.[184] Updated EIA regulations clearly cover nuclear energy projects.[185] Notably, Belarus indicated its "very positive spirit"[186] toward the Aarhus oversight activities and expressed its "gratitude for the constructive and fruitful cooperation to improve Belarusian legislation on environmental impact assessment and public participation in the impact assessment process and decision-making."[187]

Such relatively rapid change of national legislation in ways that appear to facilitate more effective and meaningful public participation must be characterized as a success, especially given Belarus' status as a newly democratized country. Furthermore, expanding public participation requirements to cover nuclear activities is significant in a part of the world where the public has traditionally not had insight into nuclear energy activities. Perhaps most importantly, given some nations' apparent laissez-faire attitudes toward the findings of the Committee, Belarus' positive attitude towards the Aarhus Convention sets an important example to others and shows that some nations take their requirements under international law seriously.

A separate case against Belarus concerned the construction of a hydropower plant on the Neman River.[188] This river constitutes the

---

181. *Id.* ¶ 90.

182. Letter from V.V. Kulik, First Deputy Minister of the Ministry of Natural Res. and
Envtl. Prot. Environmental Protection of the Republic of Belarus, to the Compliance Comm. for the Convention on Access to Info., Pub. Information, Public Participation in Decision-making and Access to Justice in Envtl. Matters (June 20, 2011) (on file with the U.N. Econ. Comm'n for Eur.).

183. *Id*.

184. *Id*.

185. *Id*.

186. *Id*.

187. *Id*.

188. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee: Findings and Recommendations with Regard to Communication ACCC/C/2009/37 Concerning Compliance by Belarus, ¶ 2, U.N. Doc. ECE/MP.PP//2011/11/Add.2 (May 12, 2011), *available at*

natural border between Lithuania and the Russian Federation's Kaliningrad Oblast.[189] It is a habitat for 250 bird species, including 156 breeding species and up to 50 species of special conservation status.[190] In the Spring of 2008, locals noticed that construction work had begun on the first phase of the project, provoking a number of local initiatives against the construction as well as requests for information related both to the activity itself and its approval procedures.[191] The communication alleged that by failing to make information about the proposed hydropower plant available to the public, Belarus had failed to comply with Article 6(6) of the Convention.[192] Furthermore, by failing to notify and consult adequately with the public in the decision-making process for the project, Belarus had failed to comply with the requirements of Articles 6(2), (3), (7), (8), and (9).[193] Belarus countered that the general public had been informed of the project in both the written press and on television a few years before project start-up, and that national legislation does not require any *specific* type of public notice of a final decision on planned activities.[194] Moreover, Belarus stated that under the *expertiza* conducted, the developer—not the government—was to carry out public consultations at a later stage of the project.[195] According to Belarus, the developer had issued sufficiently reasoned arguments as to why the public comments had been accepted or rejected.[196] Belarus also cited the fact that the developer had previously conducted an *OVOS* (directly translated, an "assessment of impact upon the environment") signifying compliance with the Convention.[197]

---

http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp.pp_2011_11_eng_add2.pdf.

189. *Id*. ¶ 34.

190. *Id*.

191. *Id*. ¶ 40. Belarusian environmental law requires that planned activities that have a potential impact on the environment be evaluated by the competent environmental authorities or by external experts nominated by the relevant environmental authorities prior to their approval. This is known as *expertiza*. The proposed activity can be implemented only if the conclusion is positive. *Id*. ¶ 19–20.

192. *Id*. ¶ 72.

193. *Id*. ¶ 103.

194. *Id*. ¶ 58. In accordance with the Laws of the Republic of Belarus "On the media" and "On the legislation of the Republic of Belarus", in each specific case, the final decision may be notified to the public through: publication in official newspapers of record, posting on the website of the National Centre for Legal Information of the Republic of Belarus, posting on the official websites of Republic-level State administrative bodies and local executive and administrative bodies, and general notification through the print media, television and radio.

195. *Id*. ¶ 56.

196. *Id*.

197. *Id*.

The Compliance Committee found Belarus in noncompliance with the above paragraphs of the Convention.[198] The Committee noted that Belarusian legislation improperly provides that the main means of public consultation are public discussions at meetings with the developer, the *OVOS* consultant, and the interested authorities.[199] Under national law, the developer is responsible for the organization of the meetings.[200] Comments by the public can only be submitted during these hearings and not directly to the authorities responsible for issuing the conclusions of the *expertiza*.[201] The Committee found that making developers rather than the relevant public authorities responsible for informing the public, organizing public participation, and collecting comments does not comply with the requirements of the Convention.[202] Furthermore, sporadic journalistic comments on a project in the printed press or on television do not constitute public notice under the Convention.[203] Importantly, Belarus was found to be in noncompliance for not establishing mandatory requirements for the public authorities that issue the *expertiza* conclusion to take the public comments into actual account when making their decision.[204] The Committee instructed the government to develop an action plan by 2012 to address these recommendations.[205]

Although this case is not currently finalized, it still shows that governments cannot simply delegate the responsibility for public participation to developers; such activities must remain in the public realm. Stakeholders concerned about the possible on-the-ground effects of not only developers and other commercial parties, including BINGOs supported by financially motivated local developers, will applaud this outcome, although undoubtedly also maintaining some healthy skepticism about the influence of such parties in future cases. Furthermore, this case makes it clear that public participation requirements are not to be taken lightly. Authorities must make sure that the public is informed about proposed activities at a sufficiently early point and by truly effective methods.

The recommendation to "take into account" the comments made by the general public is aimed at giving the general public a venue for effecting substantive change through procedural channels. This interface

198. [198] *Id*. ¶¶ 83–99.
199. *Id*. ¶ 94.
200. *Id*.
201. *Id*.
202. *Id*. ¶ 104.
203. *Id*. ¶ 86.
204. *Id*. ¶ 104.
205. *Id*. ¶ 106.

between procedural and substantive requirements again shows how procedures are not mere formalities, but rather carry a potential for "real," on-the-ground change as well.

It should be noted that this latter case is still too new to classify as a definite success until 2012 hearings have shown whether the results just mentioned have actually cemented nationally. Nonetheless, the case is at least a temporary success because of the potential for effectuating substantive change through procedures and because of the Committee's clear indications that it will not "rubber stamp" meager attempts by governments to follow the Convention requirements. Because Belarus has previously indicated its willingness to follow the recommendations of the Compliance Committee, there is reason to be cautiously optimistic that Belarus will also bring the concerns of the latter case into final compliance with the Convention.

3. Industrial and Energy Parks in Albania

In this case, an Albanian NGO submitted a communication alleging violation by Albania in connection with the planning and construction of an industrial park inside a national park on the Adriatic coast.[206] The park is located near a lagoon immediately north of the city of Vlora and is comprised of oil and gas pipelines, installations for the storage of petroleum, three thermal power plants, and a refinery.[207] The communicant alleged that the government conducted no public participation whatsoever regarding the site of the park but instead notified its ministries that the "decision comes to force immediately."[208] Whereas the communicant acknowledged that the public had been able to participate in three subsequent meetings regarding certain activities within the national park, it alleged that the government lacked the willingness to "listen and to take into consideration the opinion and will of the people" and that the decision-making process was thus "a mere rubber stamp" of a decision previously made.[209] Furthermore, the communicant alleged that meetings regarding the power plant part of the development project were not publicly announced, and therefore members of the public opposing the construction could not take active part in the decision-making process.[210] Finally, the government allegedly

206. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Sixteenth Meeting: Findings and Recommendations with Regard to Compliance by Albania, ¶ 6, U.N. Doc. ECE/MP.PP/C.1/2007/4/Add.1 (July 31, 2007).

207. *Id.* ¶ 4.

208. *Id.* ¶ 31.

209. *Id.* ¶ 34.

210. *Id.* ¶ 81.

did not explain why the strong local opposition to the project, indicated by no less than 14,000 people calling for a referendum, was not heard at any of the meetings. [211] In short, the communicant claimed that the invitation process had been "selective" and insufficient under the Convention.[212]

The Committee found Albania in noncompliance with Articles 6(3), (4), (8), and Article 7.[213] It pointed out that even if public participation opportunities had eventually been provided with respect to decisions on specific activities within the park, the requirement that the public be given the opportunity to participate at an *early* stage when all options are open was not met in this case.[214] No reasonable explanation had been provided as to why the many people calling for the referendum were not represented or heard at any relevant meeting.[215] The Committee recommended that Albania take legislative, regulatory, administrative and other measures to ensure, inter alia, that national legislation regarding public participation is improved, that the public is identified properly and invited to participate at an early stage, that public opinions are heard and taken into account by the public authority making the relevant decision, and that Albania invites relevant international and regional organizations and financial institutions to provide advice and assistance regarding the implementation of the measures recommended.[216] The Committee also noted with appreciation the constructive contribution of relevant international financial institutions, in particular the World Bank and the European Bank for Reconstruction and Development.[217]

After some initial unwillingness to correct these concerns,[218] Albania prepared an action plan addressing the recommendations of the Committee with two main areas of emphasis: (1) to improve the existing legal public participation framework and (2) to undertake training, capacity-building and awareness raising activities in relation to the national implementation of the Convention.[219] In improving the existing

211. *Id.*

212. *Id.*

213. *Id.* ¶ 92.

214. *Id.* ¶ 71.

215. *Id.* ¶ 73.

216. *Id.* ¶ 101.

217. *Id.* ¶ 90.

218. *See generally* U.N. Econ. Comm'n for Eur., Report of the Compliance Committee: Compliance by Albania with its Obligations Under the Convention, U.N. Doc. ECE/MP.PP/2008/5/Add.1 (Apr. 2, 2008); CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2011) 139–40 (A. Andrusevych et al. eds., 2d ed. 2011).

219. Letter from Gavrosh Zela, Albanian National Focal Point of Aarhus

legal framework, Albania undertook a "deep participatory process" involving both NGOs and the Organization for Security and Co-operation in Europe in the discussions.[220] It also took their suggestions into consideration when drafting its decision on public participation.[221] The ensuing regulations took effect in 2008.[222] Similarly, Albania cooperated with both PINGOs and BINGOs, as well as local government units, in planning and implementing various training and awareness raising activities for an improved national implementation of the Convention.[223] The Committee subsequently found that Albania has fully implemented the recommendations.[224]

This case is arguably a multifaceted success. First, it again shows the willingness of a democratizing nation to incorporate public participation in its national framework as well as the interest in such participation by the general public, even in newly democratizing nations without a strong tradition for public participation in government affairs. Second, it shows how the procedures of the Aarhus Convention can help put pressure on nations to allow for timely and effective publication more quickly than what would likely have been the case without Compliance Committee intervention. Third, the case shows how Albania has realized the value of involving the local community in its lawmaking efforts. Granted, in this case, the involvement only pertained to procedural rules, but public participation requirements are easily transferable to the preparation of substantive laws as well. In combination with Albania's awareness raising, capacity-building, and training activities aimed at government officials, the positive effect reached so far in this area has the potential to cross over into the substantive arena. So far, opportunities for public participation in Albania went from clearly insufficient to what hopefully will turn out to be significant and permanent improvements, a clear indicator of how procedural requirements can relatively quickly lead to legislative improvements that few may have foreseen just years ago.

Convention, to Jeremy Wates, Secretary of Aarhus Convention (Jan. 30, 2009) (on file with the U.N. Econ. Comm'n for Eur.).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-first Meeting: Compliance by Albania with its Obligations Under the Convention, ¶ 22, U.N. Doc. ECE/MP.PP/C.1/2011/2/Add.1 (Aug. 24, 2011).

4. Gold Mining and Intellectual Property Rights in Romania

This case concerns requests for information during the early stages of a decision-making procedure regarding gold mining activities.[225] The Romanian Copyright Office had informed the Romanian National Environmental Protection Agency that environmental impact studies were scientific studies protected by copyright law and therefore could only be made publicly available with the express agreement of the author, who could request the payment of copyright fees.[226] During the compliance process, Romania took the position that in order to "balance interests protected by the copyright and the need of the relevant authorities and the public to be aware of the potential environmental effects of a certain activity, only the outcome of the EIA study, and not the complete study, is provided."[227] The Committee found this to be a violation of, inter alia, Article 6(6) of the Convention.[228] EIA studies are to be prepared for the use of the general public and public authorities. "Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law."[229] They must be released in their entirety, especially when they form part of information relevant to the decision making.[230] Requests for specific information may only be refused in narrow circumstances where the competent authority believes that disclosure adversely affects intellectual property rights.[231] The Committee doubted "very much that this exemption could ever be applicable in . . . connection with EIA documentation."[232]

The Romanian National Environmental Protection Agency remedied this situation by introducing new official instructions making EIA documentation publicly available, exempting certain data only in few circumstances.[233] The Party is now in compliance with the Convention.[234]

---

225. U.N. Econ. Comm'n for Eur., Report by the Compliance Committee: Compliance by Romania with its Obligations Under the Convention, ¶ 17, U.N. Doc. ECE/MP.PP/2008/5/Add.7 (Apr. 16, 2008).

226. *Id.* ¶ 21.

227. *Id.* ¶ 22.

228. *Id.* ¶ 33.

229. *Id.* ¶ 28.

230. *Id.* ¶ 27.

231. *Id.* ¶ 30.

232. *Id.*

233. *Id.* ¶ 23.

234. *Id.* ¶ 33.

This case illustrates how environmental concerns can and do win over economic ones, a point of concern for many environmentalists. Granted, this case only related to procedural aspects and not substantive environmental law, but the adage that a journey of a million miles starts with a single step still holds true. If, as this Article argues, substantive change can be reached through procedural means, it is significant that the relevant procedures here were improved, thus allowing for further public input on environmental activities.

B. Shortcomings

Whereas the last decade of compliance hearings under the Convention resulted in several successes and is thus grounds for optimism, it should be noted that in some instances, the results were much less productive. This Section will look at some compliance shortcomings from which lessons, hopefully, can be learned.

In one case, the Compliance Committee found Kazakhstan in violation of Article 6(1) of the Convention by failing to provide for adequate public participation procedures in connection with the permitting procedures for the construction of high-voltage overhead electric power lines.[235] Upon Compliance Committee recommendation that the government adopt regulations setting out more precise public participation procedures, Kazakhstan actually adopted a new Environmental Code.[236] However, this features a number of rather severe shortcomings. First, the Code differs little from the previous Environmental Protection Act and may actually lead to a *worsening* of the possibilities for the public to participate in decision-making processes. For example, the environmental review that can be initiated and conducted independently by the members of the public appears to have been weakened.[237] Second, the Committee notes with "particular concern" that some of the procedural options for the public to participate can be narrowly interpreted as being limited to public hearings.[238] Further, the public has alleged continued government failures to ensure

235. U.N. Econ. Comm'n for Eur., Report on the Seventh Meeting: Findings and Recommendations with Regard to Compliance by Kazakhstan with the Obligations Under the Aarhus Convention, ¶ 2, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.2 (Mar. 14, 2005).

236. U.N. Econ. Comm'n for Eur., Report by the Compliance Committee: Compliance by Kazakhstan with its Obligations under the Convention and its Implementation of Decision II/5a of the Meeting of the Parties, ¶¶ 10, 27, U.N. Doc. ECE/MP.PP/C.1/2008/5/Add.5 (Apr. 2, 2008).

237. *Id.* ¶ 11.

238. *Id.* ¶ 13.

that activities are not initiated until authorization and permitting have been carried out with proper public involvement.[239] Such failures undermine public confidence in decision-making processes and in the effectiveness of the public's own involvement[240] and thus run counter to the objectives of the Convention. Kazakhstan has been issued a caution that will take effect on May 1, 2012 unless Kazakhstan has, by then, fully satisfied a condition related to implementation of the recommendations previously given to it.[241] The notion of a "caution" has never been defined in the Aarhus Convention's compliance contexts, but may be perceived as either a signal that a Party's rights and privileges may be imminently suspended or that a Party is in noncompliance with the final decision to be taken by a MOP.[242] In MEA contexts, the issuance of a caution is rare and thus, along with noncompliance declarations, functions as a "naming and shaming" measure.[243]

Although this case must be said to demonstrate a legislative and practical failure at the national level thus far, it at least shows the positive role of the Compliance Committee as an alternative legal venue in instances where domestic measures have proven unsuccessful. Although the communicant disagrees with the final Committee assessment, the case demonstrates the Committee's willingness to listen to and, at least in part, base its findings and recommendations on NGO input.[244] This presents at least some procedural value.

Perhaps the incurable "bad boy" in Aarhus compliance contexts, Ukraine stands out as an example of just how difficult it can be to implement effective public participation procedures lacking a nation's genuine interest. In a case concerning a navigation canal in the Danube Delta passing through internationally recognized wetlands, Ukraine was found in noncompliance with Article 6(1) and (2)–(9) for, among other things, its failure to properly inform national, foreign and international governmental and nongovernmental organizations interested in the project, for having time frames that failed to allow the public to effectively study the information on the project and submit its comments, for not allowing public officials sufficient time to take any public

239. *Id*. ¶ 15.

240. *Id*.

241. U.N. Econ. Comm'n for Eur., *Draft Decision IV/9 on General Issues of Compliance*, ¶¶ 4–5, U.N. Doc. ECE/MP.PP/2011/L.11 (Apr. 13, 2011).

242. KOESTER, *supra* note 32, at 199–200.

243. *Id.* at 200.

244. U.N. Econ. Comm'n for Eur., Report by the Compliance Committee: Compliance by Kazakhstan with its Obligations under the Convention and its Implementation of Decision II/5a of the Meeting of the Parties, ¶¶ 9–13, U.N. Doc. ECE/MP.PP/C.1/2008/5/Add.5 (Apr. 2, 2008).

comments into account in a meaningful way, for providing only a two-page summary of conclusions of the environmental expertise because of "technical reasons," and, in general, for having a lack of clear domestic regulation of the time frames and procedures for commenting.[245] The latter seemed to be "at the heart of this problem."[246] In 2008, four years after the initial communication, Ukraine was issued a caution—one of the strongest measures under the compliance mechanism—conditioned on the country satisfying four specific requirements related to an action plan previously submitted by Ukraine on its implementation and observance of the Convention.[247] Although this caution did not become effective because Ukraine implemented the key requirements, the nation is still not in compliance with the Convention itself.[248] An updated action plan submitted to the Committee in early 2011 demonstrates that to date, most of the laws called for are still only at the drafting stage and, with the exception of a few training activity related laws and activities, none have actually been implemented.[249] Worse, members of the public who commented on a draft decree on the approval of public participation within environmental protection were never told how their comments were processed.[250] Another national law does not provide for public participation either at the *expertiza* stage or during the procedure for issuing building permits.[251] The Committee has thus noted "with regret the very slow progress" by Ukraine in implementing its decisions.[252] Indeed, Ukraine recognizes that it is currently only "studying programs" devoted to Aarhus implementation issues, conducting a "seminar" on the access to environmental information, drafting a budget for the preparation and publishing of a "handbook" regarding the Convention as well as a "brochure" on the environment and the law. [253] It excuses itself

245. U.N. Econ. Comm'n for Eur., Report on the Seventh Meeting: Findings and Recommendations with Regard to Compliance by Ukraine with the Obligations Under the Aarhus Convention, ¶¶ 15, 19, 29, 30, 38, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add. 3 (Mar. 14, 2005).

246. *Id*. ¶ 30.

247. U.N. Econ. Comm'n for Eur., Report of the Third Meeting of the Parties: Decision III/6f on Compliance by Ukraine with the Obligations Under the Convention, ¶ 5, U.N. Doc. ECE/MP.PP/2008/2/Add.14 (Sept. 26, 2008).

248. CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2011), *supra* note 220, at 126–27.

249. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-first Meeting: Compliance by Ukraine with its Obligations Under the Convention, ¶ 26, U.N. Doc. ECE/MP.PP/C.1/2011/2/Add.8 (Aug. 24, 2011).

250. *Id.* ¶ 29.

251. *Id.*

252. *Id.* ¶ 31.

253. Letter from M. Romanov, First Deputy Minister of Ukraine, to the Compliance Committee of the Aarhus Convention (2011) (on file with author).

with its Ministry of Ecology and Natural Resources still being in the process of "reorganization."[254] In effect, Ukraine appears to be stalling its own public participation improvement process whether deliberately so or not. The Committee recommended that Ukraine either be issued a caution or that the rights and privileges accorded to it thus far be removed (the latter is the strongest measure provided by the compliance mechanism).[255] Accordingly, the Fourth Meeting of the Parties ("MOP4 ") cautioned Ukraine, with the caution to be lifted on June 1, 2012 if Ukraine fully implements certain requested measures.[256]

In two interrelated cases,[257] the Committee found Spain in noncompliance with Article 6(3), (4), and (6) for setting inhibitive conditions on public participation. Among other things, Spain required the public to travel between 20 and 125 miles (30–200 km) to obtain access to the desired information. [258] Access to thousands of pages of documentation was only available on two computers without the public being able to make electronic copies.[259] Only one month was given to inspect the documents over Christmas, a recognized holiday in many UNECE region countries.[260] Spain is still not in compliance.[261] The Spanish government did take the arguably insignificant step of simply creating a website to, among other things, allow for public participation and create awareness of global climate change issues. In other respects, Spain appears to be paying only lip service to the requirements of the Convention. The author personally observed hearings against one of the

254. *Id.*

255. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-first Meeting: Compliance by Ukraine with its Obligations Under the Convention, ¶ 34, U.N. Doc. ECE/MP.PP/C.1/2011/2/Add.8 (Aug. 24, 2011).

256. U.N. Econ. Comm'n for Eur., *Draft Decision IV/9h on Compliance by Ukraine with its Obligations Under the Convention*, ¶ 7, U.N. Doc. ECE/MP.PP/2011/CRP.9 (June 28, 2011).

257. *See generally,* U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-eighth Meeting: Findings and Recommendations with Regard to Communication ACCC/C/2009/36 Concerning Compliance by Spain, U.N. Doc. ECE/MP.PP/C.1/2010/4/Add.2 (Feb. 8, 2011).

258. *Id.* ¶ 62.

259. *Id.*

260. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-sixth Meeting: Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain, ¶ 90, U.N. Doc. ECE/MP.PP/C.1/2009/8/Add.1 (Feb. 8, 2011).

261. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-eighth Meeting: Findings and Recommendations with Regard to Communication ACCC/C/2009/36 Concerning Compliance by Spain, ¶ 70, U.N. Doc. ECE/MP.PP/C.1/2010/4/Add.2 (Feb. 8, 2011); CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004-2011), 175.

cases against Spain and noted Spain's absence during the hearings. This provides yet another indication that Spain is not taking its national public participation processes and Convention requirements as seriously as could have been hoped for.

The more difficult question is *why* these cases led to the shortcomings just outlined. An exact answer to this question is beyond the scope of this Article. It is arguably impossible to produce such an answer at all as noncompliant Parties, for obvious reasons, do not state on any record *why* they may choose action (or inaction) that eventually leads to findings of noncompliance with the mandates of a Convention that they themselves have ratified. Rather, such Parties will likely either argue that they *are* in compliance or are seeking to become so, without, however, taking effective steps in the right direction. This may be so for a combination of image and practical reasons: nations may consider it to look better to the surrounding world to ratify treaties such as the Aarhus Convention, but have a difficult time implementing the requirements in reality. In some cases such as the former Soviet satellite states, one simple, yet of course inexcusable, explanation may in the author's opinion be that these nations are not used to and thus may resist what they see as the public "intermeddling" in "government affairs." The lack of public participation in such countries is certainly not for want of interest by the general public, as shown. Another reason for noncompliance in some countries is arguably the slowness with which democracies develop and improve their national legislation, including public participation legislation. Yet another reason may, in some cases, be a government disinterest in environmental affairs given the perhaps greater interest in economic development and the erroneous belief that the two cannot go hand in hand. Regardless, as with any legal proceedings and potential intervention, not all cases will be successful at first. That, however, is not reason to give up long-term positive procedural *and* substantive change through various channels, including Aarhus Convention mechanisms and ideals.

C. Other Lessons Learned

The past decade of case law sheds light on a few further noteworthy aspects of Aarhus Convention compliance. For example, the Committee has emphasized that the Parties should observe both the letter *and* the spirit of the Convention. Thus, in a case where France was found to have complied de jure with the procedures of the Convention, the Committee still pointed out that several other types of decisions and acts in the case may de facto have affected the scope of options to be considered in a

permitting decision under Article 6 of the Convention.[262] The same concern was pointed out in a case against Austria.[263]

Further, it is important to bear in mind that the Committee takes a deferential view regarding the application of the Convention. If it is possible that the provisions *could be* applied in compliance with Convention, the Committee will not interpret the case as one of noncompliance.[264]

What should be obvious, but what has nonetheless still been pointed out to both litigants and the nations concerned, are that the procedural aspects of the Convention are also important to the Committee itself and may affect the outcome of cases brought before it. In one case against Poland, the parties were thus told that because the communicant had failed to provide the additional information sought by the Committee and because neither the party concerned nor the communicant were present at the compliance hearing, the Committee was not able to consider whether the allegations were regulated by the Convention.[265] In another, Spain did not show up to represent itself during the hearings.[266] Needless to say, if either the communicant or the nation involved consider their case to carry any weight, they should, out of respect for their treaty obligations, play an active role throughout the hearing phase and present sufficient documentation to the Committee. As noted previously in this Article, the Committee is one of limited, yet precious resources. These resources should not be wasted by meaningless and counterproductive displays of ignorance of the Convention requirements.

---

262. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-fourth Meeting: Findings with Regard to Communication ACCC/C/2007/22 Concerning Compliance by France, ¶¶ 39–40, U.N. Doc. ECE/MP.PP/C.1/2009/4/Add.1 (Feb. 8, 2011).

263. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-fifth Meeting: Findings with Regard to Communication ACCC/C/2008/26 Concerning Compliance by Austria, ¶ 57, U.N. Doc. ECE/MP.PP/C.1/2009/6/Add.1 (Feb. 8, 2011).

264. *See generally* U.N. Econ. Comm'n for Eur., Report on the Eleventh Meeting, U.N. Doc. ECE/MP.PP/C.1/2006/2 (May 10, 2006); CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2011), *supra* note 219, at 141.

265. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-fifth Meeting: Findings Adopted by the Compliance Committee on 25 September 2009 with Regard to Compliance by Poland with its Obligations Under the Convention, ¶ 19, U.N. Doc. ECE/MP.PP/C.1/2009/6/Add.2 (Dec. 11, 2009).

266. Author observing hearings against Spain. *See generally,* U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Twenty-sixth Meeting: Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain, U.N. Doc. ECE/MP.PP/C.1/2009/8/Add.1 (Feb. 8, 2011).

After years in the pipeline, some cases have still not been ultimately resolved, but are worth future scholarly observance. For example, in a relatively new case against Slovakia, the Committee pointed out that the mere formal de jure possibility for the government to turn down an *operational* permit when the *installation* of nuclear power plant reactor blocks had already been completed is not sufficient to meet the Convention requirement if, de facto, denying the operational permit would never or hardly ever happen.[267] In a 2004 case against Armenia, the nation was found in noncompliance with Article 7 and with certain provisions of Article 6 for failure to provide for practical public participation in contravention of both the Convention and national Armenian legislation.[268] The Compliance Committee noted Armenia's "cooperative spirit . . . in its correspondence with the Committee" and that the Party has "seriously and actively engaged to follow the recommendations" of a prior decision.[269] Nonetheless, the Committee expressed concern at the slow process for finalizing and enacting a new law providing for public participation and requested Armenia to present a draft version of the law to the Committee as soon as possible.[270] So far, Armenia has not yet fully implemented the recommendations given to it.[271] After almost a decade with few results other than a training program for the judiciary and other public officials,[272] one would be warranted in seriously questioning Armenia's true interest in providing for public participation in its environmental decision making and enforcement. In this and similar cases, it appears that the Parties sometimes merely pay

267. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee: Findings and Recommendations with Regard to Communication ACCC/C/2009/41 Concerning Compliance by Slovakia, ¶ 63, U.N. Doc. ECE/MP.PP/2011/11/Add.3 (May 12, 2011). Incidentally, Slovakia was the first country to challenge the Committee's competence and expertise, but this did not change the final decision of the Committee. CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2011), *supra* note 219, at 183–84.

268. U.N. Econ. Comm'n for Eur., Report on the Eleventh Meeting: Findings and Recommendations, ¶¶ 1–2, U.N. Doc. ECE/MP.PP/C.1/2006/2/Add.1 (May 10, 2006); *see also* U.N. Econ. Comm'n for Eur., Report of the Compliance Committee: Findings and Recommendations with Regard to Communication ACCC/C/2009/43 Concerning Compliance by Armenia, ¶ 83, U.N. Doc. ECE/MP.PP/2011/11/Add.1 (May 12, 2011).

269. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-first Meeting, ¶¶ 16, 24, U.N. Doc. ECE/MP.PP/C.1/2011/2/Add. 2 (Aug. 24,Apr.__, 2011).

270. *Id.* ¶ 25.

271. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee: Findings and Recommendations with Regard to Communication ACCC/C/2009/43 Concerning Compliance by Armenia, ¶ 83, U.N. Doc. ECE/MP.PP/2011/11/Add.1 (May 12, 2011).

272. U.N. Econ. Comm'n for Eur., Report of the Compliance Committee on its Thirty-first Meeting, ¶¶ 19, 20, U.N. Doc. ECE/MP.PP/C.1/2011/2/Add.2 (Aug. 24, 2011).

lip service to the requirements of the Convention. The full explanation for this is outside the scope of this Article but may lie in national image and comity considerations whereby it may be preferable for nation states to ratify treaties to be among the "in" group of comparable nations having done so in the hope that they can comply. Once cases of noncompliance are brought against them, the true test of whether or not they sincerely wish to follow public participation requirements arises. As shown, some truly do, whereas others stall at best or effectively refuse to follow their *pacta sunt servanda* obligations at worst. It is first and foremost a problem for civil society when parties do not implement the recommendations issued to them, but it is also a problem for the Convention system as a whole, which is forced to keep track of such implementation for years, at times when the Compliance Committee is seeing an increased caseload.[273]

VIII. FUTURE OF THE AARHUS CONVENTION

After a little over a decade of existence, the Convention has proved to be a success within environmental procedural law, especially at the national level. Looking to the future, does this mean that the Convention has potential to grow and have an expanded impact on environmental decisions, or is it more likely that its relevance, both as perceived by the public and to substantive matters, will be limited? In other words, what may lie ahead for the Aarhus Convention?

A. Geographical Expansion

The Convention itself contemplates three-fold development in the areas of implementation, geographical scope, and thematic innovation.[274] As for potential geographical expansion, the 2009–2014 Strategic Plan stipulates that the long-term vision of the Parties is "to secure the enjoyment of the rights [of public participation in environmental matters] . . . throughout the pan-European region *and beyond*."[275] Similarly, one of the missions listed in the Strategic Plan is "[t]o increase the impact of the Convention and the [PRTR] Protocol by *increasing the number of parties within the UNECE Region and by encouraging States outside the region to accede* to the Convention and the Protocol or implement their

273. KOESTER, *supra* note 32, at 201–02.

274. Pallemaerts, *supra* note 20, at 391.

275. U.N. Econ. Comm'n for Eur., Report of the Third Meeting of the Parties: Decision III/8 on Strategic Plan 2009–2014, Annex ¶ 6, U.N. Doc. ECE/MP.PP/2008/2/Add.16 (Sept. 26, 2008) (emphasis added).

principles."[276]

Two UNECE Region members that have not ratified the Aarhus Convention stand out: the United States and Canada. Both announced early in the Convention negotiation process that they did not intend to participate because their existing legal systems already adequately provided for public participation.[277] Further, the United States has indicated its concerns with the workings of the Compliance Committee, especially the "variety of unusual procedural roles that may be performed by non-state, non-Party actors, including the nomination of members of the Committee and the ability to trigger certain communication requirements by Parties under these provisions."[278] The United States has clearly stated to the MOP that it "will not recognize this regime as precedent."[279] Because of their role as highly visual players in the global environmental arena, it would be preferable if the United States and Canada would accede to the Convention, but to date, neither has shown any interest in doing so.[280] The two nations have, however, provided significant contributions to the establishment and operation of the so-called Aarhus Centres. These centers provide a forum for government officials from Ministries of the Environment to meet with members of environmental NGOs to build cooperative approaches in order to tackle environmental issues.[281]

In contrast, the Russian Federation played an active role in the negotiation of the Convention.[282] In fact, many parts of the Convention text were drafted specifically to meet the needs of the Russian negotiators, but at the end of the process, the Russian Federation pulled out and did not sign the Convention.[283] Since then, Russia has also shown "little serious interest" in acceding to it.[284] At the risk of sounding trite, it goes without saying that international legal regimes such as the Aarhus Convention would benefit from major nations such as Russia, the United States, and Canada acceding. This would benefit local law development

---

276. *Id.* Annex ¶ 7 (emphasis added).

277. Pallemaerts, *supra* note 20, at 400.

278. Dupuy & Vierucci, NGOs IN INTERNATIONAL LAW, *supra* note 15, at 197.

279. *Id.*

280. Pallemaerts, *supra* note 20, at 400; *see also* U.N. Econ. Comm'n for Eur., Status of Ratification (Nov. 23, 2011), *available at* http://www.unece.org/env/pp/ratification.html (the United States and Canada have neither signed nor ratified the Convention).

281. U.N. Econ. Comm'n for Eur., Aarhus Centres (2012), *available at* http://www.unece.org/env/pp/acintro.html.

282. Pallemaerts, *supra* note 20, at 399.

283. *Id.*

284. *Id.* at 400.

in those nations with a significant "spillover" effect to other nations as well. At the same time, the decision to accede is obviously a political one which the global community can only hope for currently.

In Western Europe, only Ireland, Iceland, and Switzerland have not yet ratified the Convention.[285] EU nations and the United States enjoy relatively good financial and democratic positions, and could thus serve as champions for better public participation and, through this and other venues, environmental and intergenerational justice. These considerations are important in both the developing and the developed worlds, as well as in already established democracies and democratizing nations. Nonetheless, they were often forgotten in historic top-down developments of legal regimes. The time has come to put civil society at the forefront of, or at least further up the hierarchy in, environmental democratic developments both nationally and internationally.

Currently, the Convention is open to ratification only by UNECE members. Giving the Convention a global reach would be advantageous for the global public, especially—with proper financial and other support systems—in democratizing and developing nations. Currently, environmental discourse relating to these nations centers heavily around two notions that are often perceived to conflict, but which may actually not, namely the right to develop at all costs versus the necessity to develop sustainably. It would be natural to involve civil society more in the development of future substantive and procedural environmental laws decisive to the economic *and* sustainable development of these nations.

Attempts have already been made to expand the Convention at a global scale. As mentioned, the 2009–2014 Strategic Plan set the goal of having non-UNECE members accede to the Convention.[286] This has not happened yet. Why not?

First, the general perception is that the Convention is a European or, at best, a "European-plus" creation.[287] This stems in part from the fact that non-UNECE members may only accede "upon approval by the Meeting of the Parties."[288] To avoid sovereignty concerns, it is necessary to clarify that this "approval" does not include a substantive, but rather a procedural, review of the potentially acceding state's national legal

285. WORLD INTELL. PROP. ORG., *Treaties Database*, http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=261&group_id=22 (last visited Apr. 3, 2012).

286. U.N. Econ. Comm'n for Eur., Report of the Third Meeting of the Parties: Decision III/8 on Strategic Plan 2009–2014, Annex ¶ 10(d), U.N. Doc. ECE/MP.PP/2008/2/Add.16 (Sept. 26, 2008).

287. Pallemaerts, *supra* note 20, at 401.

288. *Aarhus Convention*, *supra* note 42.

system and administrative practices.[289]

More work is needed in order to obtain accession by non-UNECE members. Interest in accession could be promoted by, initially, inviting representatives (including NGOs) of interested non-UNECE states to participate in some Convention activities.[290] Advice and support could also be given to interested nations regarding the Convention requirements and measures that such parties would need to take to accede. [291] Finally, bilateral cooperation ("twinning") projects between the Aarhus Convention Parties and interested non-UNECE parties could be undertaken to stimulate interest levels and knowledge of the Convention.[292]

Further, states that have not been involved in negotiating a treaty are less likely to accede to it. Accordingly, some have suggested the development of a new, potentially global treaty that could implement Principle 10 of the Rio Declaration in even better ways than Aarhus.[293] However, little, if any, progress has been made in that respect.[294] Thus, it remains more realistic to focus on improvement and geographical expansion of the Convention rather than starting over.

For now, one of the most significant steps toward imparting a more global scope to the Aarhus Convention has been the 2010 adoption of the United Nations Environment Programme guidelines for the development of national legislation on public participation.[295]

B. Thematic Scope of the Convention

One of the stated visions of the Parties is to "consider further development of the Convention to ensure that it continues to provide an adequate instrument to achieve its objectives."[296] What should such thematic development encompass?

First, the Convention instruments should specify what is meant by such loose terms as a "healthy" environment, "significant impact on the environment," and taking "due account" of the public participation

289. Pallemaerts, *supra* note 20, at 401.

290. *Id*. at 403.

291. *Id.*

292. *Id.*

293. *Id*. at 402.

294. *Id.*

295. *Id.*

296. U.N. Econ. Comm'n for Eur., Report of the Third Meeting of the Parties: Decision III/8 on Strategic Plan 2009–2014, Annex ¶ 7(c), U.N. Doc. ECE/MP.PP/2008/2/Add.16 (Sept. 26, 2008).

efforts.[297] Second, the number of activities mentioned in Annex I could be expanded. Currently, the threshold for triggering public participation requirements is quite high. Some activities that arguably should be subject to such requirements thus escape review by the Compliance Committee. A graduated framework could be implemented so that smaller scale activities carry less stringent public participation requirements than more encompassing ones.[298] The flip side of proposing these two steps may be that existing Parties may be reluctant to adopt these, just as new Parties may not accede to a Convention with stricter requirements than those currently in place. It is well known that in treaty negotiations and adoption stages, language is often deliberately left vague in order to reach compromises between reluctant Parties. Something is better than nothing. It may be more pragmatic to let the wording of the Convention be as it is instead of hoping for specifications that will not be politically acceptable at the international level but instead just stir up the virtual hornet's nest. This, of course, is a decision to be made at treaty negotiation level by the parties involved.

Further, the requirements of Articles 7 and 8 are recognized to be less specific than those of Article 6.[299] Again, Articles 7 and 8 address generally applicable legally binding instruments and policies whereas Article 6 more narrowly addresses on-the-ground activities. Although Article 7 incorporates certain Article 6 provisions by reference, both Articles 7 and 8 could be strengthened by, for example, being more specific as to what exactly is meant by "appropriate provisions" (Article 7), "relating to the environment" (Article 7), "fair framework" (Article 7), and that "[t]he result of the public participation shall be taken into account *as far as possible*" (Article 8) (emphasis added). Because public participation is recognized to improve the quality of environmental decisions and the enforcement thereof, it is important—seen from an environmental point of view—to be as specific and far-reaching as possible in framing public participation provisions. This goes for the Convention and its future versions as well, although it is also important to remember that in international contexts, experience has shown that nations may be more likely to ratify more loosely worded treaties that they perceive to allow them some flexibility in implementation rather than more stringent ones, as discussed above.

Perhaps most importantly, the Convention currently has a predominantly "environmental" scope. This could be broadened to encompass "sustainable development" without a specific link to

297. *Aarhus Convention*, *supra* note 42.

298. Pallemaerts, *supra* note 20, at 406.

299. *Id.*

environmental issues.[300] The Meeting of the Parties has indicated some interest in this expansion: the 2009–2014 Strategic Plan contains the goal of "explor[ing] the possibilities for the development of measures under the Convention to ensure greater opportunities for public participation in policy formulation and implementation contributing to sustainable development."[301] Environmental laws and sustainable development naturally go hand-in-hand. It follows that the Convention scope could be expanded upon and/or clarified to cover better opportunities for public participation in sustainable development measures in general. On the other hand, the phrase "under the Convention" also appears to signal that the parties do not currently envision a wholesale expansion of the scope of the Convention."[302]

C. Role of NGOs in Public Participation Frameworks

Should NGOs play an expanded role in future Aarhus contexts or is their role already too expansive? That depends on whom one asks. Obviously, the NGOs advocate for a greater say. However, states' stances towards NGOs in at least compliance procedure contexts remain predominantly negative.[303] This applies not only to developing countries whose traditional opposition to NGOs may be founded on their perceived reliance on "Western" values, but also to countries with a more liberal democratic structure.[304] For example, the United States ensured that a statement be annexed to the first decision of the MOP expressing the nation's concerns with the compliance mechanism.[305] Among other things, the United States, indicated concerns with "the variety of unusual procedural roles that may be performed by non-state, non-Party actors, including . . . the ability to trigger certain communication requirements by Parties."[306]

European nations also seem to take a cautious approach towards this issue, with only some arguing in favor of an expanded role for NGOs in compliance contexts.[307] Similarly, the decision not to incorporate Aarhus noncompliance procedures into the Kiev Protocol on Pollutant Release

300. *Id.* at 411.

301. U.N. Econ. Comm'n for Eur., Report of the Third Meeting of the Parties: Decision III/8 on Strategic Plan 2009–2014, Annex ¶ 11(g), U.N. Doc. ECE/MP.PP/2008/2/Add.16 (Sept. 26, 2008).

302. Pallemaerts, *supra* note 20, at 412.

303. Dupuy & Vierucci, *supra* note 15, at 152.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

and Transfer Registers ("PRTR Protocol")[308] but, rather, to create separate compliance procedures was in large part based on the desire to avoid an automatic extension of NGO rights from the Aarhus Convention to the PRTR Protocol.[309]

Thus, it appears that fears prevail among nation states as to possible overreaching by NGOs in compliance contexts, and beyond. However, it is important to recall that so far, NGOs have, in fact, exercise very good self-restraint in this regard and have thus *not* overburdened the Compliance Committee with submissions. If NGOs could be trusted to exercise similar good self-governance in other aspects as well, their role could arguably be expanded. It is imperative that NGOs realize the importance of this issue. However, the status quo seems to prevail. Not many nation-states or other stakeholders have suggested that an expanded role be given to NGOs. Reform may be more easily reached if NGOs were willing to, for example, implement ethical codes of conduct calling for not only self-restraint, but also transparency as to their origins, true objectives, and sources of financing, as these have been contentious areas of concern in the past.[310]

Further, an improved framework for public participation may be needed for use in international contexts in particular. Such a framework could, for example, better address practical concerns such as the maximum number of compliance submissions available to NGOs, govern the minimum and potentially maximum size of participating NGOs, stipulate how NGOs could exercise co-decision-making powers in international negotiations, and call for external review of the actual observance by NGOs of their possible codes of conduct.

Non-state actors could be even more involved in future developments of the Convention and similar treaties. For example, Article 3 of the Economic, Social, and Cultural Council of the African Union fully integrates civil society in the institutional machinery of an intergovernmental organization.[311] Although NGOs did, as mentioned

---

308. The PRTR is an initiative developed by the parties to the Aarhus Convention. However, the Protocol is open to accession by non-parties to the Convention and nation states from outside the UNECE region. "Thus, despite its important link to the Aarhus Convention, the Protocol has some of the characteristics of an independent treaty with a potentially global scope." Press Release, U. N. Econ. Comm'n for Eur., U.N. Doc. ECE/ENV/10/P15, *available at* http://www.unece.org/press/pr2010/10env_p15e.html.

309. Dupuy & Vierucci, *supra* note 15, at 152.

310. *Id.*

311. *Id.*; *see also* AFR. UNION, *Statutes of the Economic, Social and Cultural, Council of the African Union*, art. 3, *available at* http://www.africa-union.org/ECOSOC/STATUTES-En.pdf ("ECOSOCC shall be an advisory organ of the African Union composed of different social and professional groups of the Member States of the African Union. These [groups] include . . . social groups, professional

above, play an unprecedentedly large role in the negotiations preceding the Aarhus Convention, there is room for improvement regarding how NGOs may contribute to the workings and further development of the Convention.

Strengthening the role of civil society will likely require the allocation of more financial and other resources to NGOs and relevant segments of civil society, especially in developing countries. Article 3(4) of the Convention currently requires each Party to "provide for . . . support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation." Those requirements have been met in many cases, yet "far more could and should be done to strengthen NGO capacity in order to facilitate the more effective implementation of the Convention.[312] Needless to say, this is not only a controversial issue, but also one of difficult line drawing. For example, *which* NGOs should be supported? PINGOs only, or arguably better heeled BINGOs as well? And how? With money only, or also technical and/or legal support? Who should provide such support? These and similar issues remain to be resolved before an expansion of the roles played by NGOs becomes likely.

D. General Nature of Public Participation under the Convention and Similar Treaties

Whereas discourse regarding the scope of the Convention itself mainly relates to procedural *participation* improvements, steps allowing for civil society to have more actual *co-decision* powers have also been contemplated by external experts.[313] For example, some countries "not only afford their citizens the right to be *consulted* over environmentally significant proposals and to have their views taken into account by public authorities who will make the final decision[,]… they also give their citizens the right to [actually] *decide* on certain environmentally significant matters through referenda[.]"[314] Similar measures could be incorporated into future versions of the Convention or similar agreements to further empower civil society and give the agreements more "bite." Additionally, the concerned public could help generate the set of options that would be considered in environmental decision-

groups, NGOs, community-based organizations, voluntary organizations and cultural organizations.").

312. Dupuy & Vierucci, *supra* note 15, at 152.

313. Pallemaerts, *supra* note 20, at 408.

314. *Id.* (emphasis added).

making processes, instead of governments merely presenting top-down, predetermined menus.[315] These steps would obviously be controversial, especially in nation-states that do not have long histories of democratic processes. However, they would help bring the Convention and similar agreements from their current solely procedural stage to a future with more potential for substantive environmental change brought about directly through such instruments by civil actors.

The Convention could also be developed to more clearly address public participation within specific fields such as climate change, GMOs, overpopulation, and species extinction for better public governance of and involvement in the particular problems that arise in those areas. Last, but not least, the Convention is relatively unknown in national and international law. It would benefit from further publicity.

IX. CONCLUSION

This Article has demonstrated the theoretical and practical advantages of public participation in government decision-making and enforcement at the national and international levels. Public participation is widely considered a fundamental aspect of good governance. Drawing on the public's specialized knowledge and insight helps ensure procedurally and substantively improved lawmaking. Public participation is a useful tool in holding governments accountable for their promises, especially because traditional top-down solutions have frequently proved ineffective. Conversely, a greater amount of citizen compliance with new legal provisions is ensured through better and earlier consensus building with a well-informed public.

At the international level, public participation has proved highly effective in allowing citizen groups to trigger compliance review procedures where national governments often refrain from doing so out of comity and other concerns. It is an effective method of putting pressure on internal actors through external channels. In particular, citizen empowerment through public participation is of internationally recognized importance to environmental democracy and sustainable development. This has never been more important than currently with a demonstrated urgent need for *both* economic development *and* environmental protection. Public participation can help coax law- and policymakers towards greening and innovating the global economy. Both business interest and public interest NGOs have a crucial role to play in this aspect, and allowing input by public interest NGOs helps balance concerns that powerful business interest groups have too much influence

315. *Id.*

over government policy-making.

Public participation is, however, not only of theoretical importance. This Article has demonstrated that procedural public participation provisions also create a significant potential for the improvement of substantive laws and decision making. In doing so, this Article analyzed the first ten years of case law under the UNECE Aarhus Convention Compliance Committee. This Article demonstrated how nation states that have been found in noncompliance of the Convention have demonstrated their willingness to take its provisions into consideration in improving national public participation frameworks. And although these are, strictly seen, procedural in nature, they do, as demonstrated, have the clear potential for positive *substantive* change as well. For example, such change can be accomplished by allowing the general public to comment on draft legislation *and* requiring the competent authority to take these comments into serious consideration at an early point in time before finalizing the legislation in question. The Lithuanian case illustrated this point. Cases against Belarus and Albania further illustrated how public participation requirements help put pressure on competent authorities to update national legislation in order to facilitate more effective and meaningful public participation faster than would have been the case without the Convention. Thus, even newly democratized or democratizing nations are realizing the value of public participation in policy and lawmaking efforts.

At the enforcement level, public participation provisions and instruments such as the Aarhus Convention help give citizens access to an international venue where national options have been exhausted. This is important from a national perspective as well, since nations may not bring otherwise well-founded compliance cases against each other out of comity concerns, where civil society groups have no such hesitations. Compliance cases have also shown that NGOs have not submitted an unduly large amount of cases as had been the fear. Further, this Article has shown that under the Convention, business interests do not necessarily win over what may be seen as traditional environmental interests in spite of the former arguably being better funded, and in spite of heavy emphasis on economic development in most nations. Thus, economic and environmental concerns can coexist.

This Article also identified a few public participation and compliance weaknesses. Typically, these have taken the form of nation states unduly stalling public participation improvement efforts for extended periods of time. This is not surprising given the fact that many Aarhus Convention Parties do not have strong histories of civil society participation in what has traditionally been seen as a sphere reserved for the government only. Further, it is not unusual that some nations may at least initially resist intergovernmental oversight of national governmental

activities. With increased awareness of the advantages of public participation at both the national and international levels and the sanctions available under the Convention, this situation will hopefully improve.

This Article also looked to the future of the Aarhus Convention and demonstrated room for growth in the geographical and thematic scope of the Convention. For example, major nation states such as the United States, Canada, and Russia have not yet ratified the Convention, despite being members of the UNECE region. Doing so would lend more credence to public participation in general and the Convention in specific. A more global reach would be desirable not only from a treaty legitimization point of view, but also to citizens in non-ratifying nations who could benefit from public participation provisions at national levels. Thematically, the Convention provisions could be broadened to cover nonenvironmental aspects of sustainable development. Some provisions should, at a minimum, be clarified for a better understanding of such vague terms as "taking due account of" public participation in relation to "a healthy environment." Public participation could perhaps be redefined to cover not only insight into government affairs and the triggering of compliance mechanisms, but also governmental and intergovernmental advisory functions, and even allow citizen groups to play a role in actual decision making. However, the actual role and nature of involved groups should be carefully considered. So far, NGOs have demonstrated laudable self-restrain in Aarhus compliance contexts, but if they were to be given broader powers up to, and perhaps even including, appropriate co-decision-making authority, it would become necessary to carefully consider whether any framework could sufficiently address both legal and practical concerns in relation to such greatly enhanced empowerment of civil society. In doing so, the many advantages of involving civil society in government decision making should be counterbalanced against current resistance by some nations towards giving NGOs an expanded role.

Public participation poses some challenges, but an even greater amount of advantages. It is a concept that should be applied in more contexts, both nationally and internationally. After all, governments govern for the people. It is both rational and fair to involve citizens more in decisions that significantly affect both current and future generations.