

PUBLIC PARTICIPATION AND DEMOCRACY IN PRACTICE—AARHUS CONVENTION PRINCIPLES AS DEMOCRATIC INSTITUTION BUILDING IN THE DEVELOPING WORLD

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In recent years, a number of national and international legal developments have led to the implementation of procedures to ensure the empowerment of private citizens in environmental decision-making processes. In practice, this has meant increased access to information affecting decision-making, the establishment of public fora for discussion, and some broadening of legal standing requirements for individuals and citizens' groups challenging actions based on environmental concerns. These three concepts—*public participation, access to information, and access to justice*—are the three main pillars of the Aarhus Convention, which entered into force in October of 2001, and is administered by the United Nations Economic Commission for Europe (UNECE).¹ In addition to the three pillars, the most notable feature of the Convention is the key role carved out for non-governmental organizations (NGOs), which feature prominently in the Convention's conception of environmental democracy. The Convention has been signed and ratified by more than forty countries from Europe and Eurasia,² and parallel principles are being advocated and applied in a variety of other settings.³

The Aarhus principles grew out of the Rio Declaration's Principle 10 and the United Nations' Agenda 21 program, both of which underscored the importance of the role of the public and the NGO sector in environmental decision-making.⁴

In part I, this paper will introduce how an empowered public can help address various difficulties in confronting environmental issues. This section will emphasize general arguments for procedural rights for the public.

Part II will offer an in-depth look at the three pillars, trace similarities in the United States' federal law, and also look at European Union (EU) implementation efforts at the Member State level through the directive process. A secondary goal of this section will be to assuage some critics' fears about the Aarhus Convention.

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¹ 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 [hereinafter Aarhus Convention].

² For a current list of signatory parties, see UNECE, Multilateral Treaties, http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm (last visited on Jan. 25, 2010).

³ See generally Eisuke Suzui & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2006).

⁴ JUDITH PETTS & BARBARA LEACH, EVALUATING METHODS FOR PUBLIC PARTICIPATION 11 (Environment Agency) (2000).

The section will also look to various Aarhus Convention Compliance Committee decisions, so as to distill a sense of the Committee's interpretation of the Convention. In reviewing the advisory "case law" of the Compliance Committee, the central guiding principle, in line with the goals of the Convention, has been to guarantee a modicum of public participation rights in line with basic procedural rights. The Committee has also hewn a course in line with both the letter and spirit of the Convention, balancing deference to the signatory parties with the broader goals of the three pillars.

Part III will look at the special rights accorded to the NGO sector by the Convention and discuss the benefits of empowering the NGO sector in this manner. The section also addresses key elements of the Convention's compliance mechanisms.

Part IV will focus the implications of the Aarhus convention for the signatories, especially in the former Soviet satellite nations, and includes lessons gleaned from implementation efforts there. The section will also advocate for the continued adoption of Aarhus principles in the developing world.

I. THE CASE FOR PROCEDURAL ENVIRONMENTAL RIGHTS

A. *Democratic Shortcomings*

Democratic practices are based on a number of rather optimistic assumptions. Although representative democracies traditionally account for the will of the people through periodic elections, the democratic process can only be as representative of popular will as politicians are consistent with their election platforms. Voters can, it is hoped, make educated guesses as to how they expect their representatives will act in the future, and must trust that such action is consistent with their own values and interests. Any such consistency is dependent on the foreseeability of future political issues, the predictability of the actions of the politicians, the relative stasis of public opinion, and the fairness of elections. We hope that our elected representatives have adequate time, information, integrity, resources, and wherewithal to assess and balance competing interests, while simultaneously convincing the public of their own sound judgment; the "democratic ideal," indeed. Absent any viable alternatives, we are left to ponder how to better this system.

B. *Problems Presented by Environmental Issues*

Environmental issues, in particular, present a number of ancillary difficulties for political and legal systems. Environmental issues, while often quite technical, nonetheless require value judgments. Decision-makers may be relatively insulated from the democratic process. In addition, environmental harm may be diffuse, such

as in the case of air or water pollution.⁵ In these cases, the harm to health from pollution may be a statistical certainty, but it is nonetheless extremely difficult to attribute individual harm to individual polluters. Just as environmental damage may accumulate remotely from the pollution source, so too may decision-makers be removed from the environmental impact of their decisions. Environmental harm may be slow to develop, irreversible, and in some cases purely aesthetic, and therefore difficult to value. Environmental harm respects no political boundaries, and is often more abundant in impoverished areas. In many cases, environmental interests are diametrically opposed to well-financed development interests, leading to inflated valuations of development over environmental interests. Environmental harm can be extremely expensive and difficult to police and enforce.

In the absence of adequate funding, environmental monitoring and enforcement are especially likely to suffer. Enforcement problems may effectively cripple even the most elaborate domestic and international environmental efforts. Under-funded agencies may simply be unaware of a number of environmental threats, and inexperienced judiciaries may struggle with novel areas of law. Decision-makers may also feel added pressure to accommodate investors, and so development agendas may conflict with environmental and public health concerns.⁶ This pressure may also be an unfortunate by-product of the democratic process, which may reward elected politicians for short-term results (e.g., growth in jobs) over concern for relatively remote environmental problems, whose negative effects may take years to manifest. This remoteness can also lead to accountability problems. Decision-makers, such as technocrats and legislators, who are removed from the firsthand effects of their decisions, may be unaware of or unaccountable for the direct effects of their actions. Even in cases where environmental data is collected, governments may not have the funding to analyze it adequately.

C. Enter the Aarhus Principles

Public procedural rights help educate and inform the public. A public that is predominantly concerned with making ends meet may view strong environmental institutions as a luxury, at least until environmental problems reach crisis levels. But public access and exposure to environmental information, and vocal independent groups with expertise in environmental issues can be instrumental in bringing issues to the forefront of public discourse. An informed public is able to identify and address problems early on, before a crisis point is reached.⁷ Public

⁵ See Hannes Veinla, *Influence of the Aarhus Convention on Access to Justice in Environmental Matters in Estonia*, 14 EUR. ENV. L. REV. 326, 326 (2005) (discussing problematic causation in environmental matters).

⁶ See Barbara Finemore et al., *The Unprotected Environment: Case Studies Illustrating the Need for Solutions*, 15 FORDHAM ENVTL. L. REV. 428, 441 (2004) (discussing Bolivia's failure to respond meaningfully to the Desaguadero River spill in 2000).

⁷ Carl Bruch, *Regional Opportunities for Improving Environmental Governance through Access to Information, Public Participation, and Access to Justice*, Address before the 8th Session of

input therefore may supplement scarce resources for monitoring, inspection, and enforcement of environmental law. Public input can help identify weaknesses or issues with draft legislation. Where environmental risks are small, releasing relevant information to the public can help alleviate unfounded fears and stave off political risk. Relevant statistical and technical knowledge combined with a means for addressing environmental dangers through the courts create accountability mechanisms.

Absent adequate resources for oversight, an empowered public can help bring important environmental decisions to the light of day, and may successfully challenge questionable environmental practices. Public participation in environmental impact assessments also leads to more informed decision-making, as the local community is often better situated to comment on the effects of environmental degradation. Collateral democratic benefits of increased public participation also include greater public scrutiny on decision-makers; increased government, judicial, and private-sector accountability; increased familiarity with formal and informal democratic practices; and a stronger sense of civic engagement. The discourse should ultimately lead to better informed decision-making, and multi-directional feedback mechanisms among the government, public, NGOs, and private sector. The knowledge that one's government is actively involved with environmental risk assessment bolsters public confidence. Thus, another major argument for public participation in environmental decision-making is that it improves government accountability and legitimacy. Ultimately, the goal of procedural rights in the environmental context is to guarantee "the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being."⁸

II. THE THREE PILLARS

A. *The First Pillar: Access to Information*

The Convention's first pillar establishes the principle of access to information. The rationales for the pillar are described in the Preamble, including the need to provide consumers with "adequate product information" for "informed environmental choices," and the promotion of environmental education and awareness.⁹ The Preamble also acknowledges that "public authorities hold environmental information in the public interest."¹⁰ Additional language asserts the necessity of environmental information for the public to be aware of its

the African Ministerial Conference on Environment (AMCEN) (Apr. 3, 2000), available at http://pdf.usaid.gov/pdf_docs/PNACY895.pdf.

⁸ Aarhus Convention, *supra* note 1, art. 1; see Vera Rodenhoff, *The Aarhus Convention and its Implications for the 'Institutions' of the European Community*, 11 REV. OF EUR. COM. & INT'L ENV. L. 343, 344 (2002) (describing this statement as one of the "clearest statements of a right to a healthy environment" in international environmental law).

⁹ Aarhus Convention, *supra* note 1, pmb.; *id.* art. 3 (promoting public awareness and environmental education).

¹⁰ *Id.* pmb.

participatory role under the second pillar. Access to information greatly simplifies the discovery process in environmental suits, but may also help prevent such suits in the first place. Furthermore, public knowledge of pollution activities may lead to self-regulation of industry.¹¹

The Convention's Access to Information provisions are laid out mainly in Articles 4 and 5. Article 4 discusses signatory parties' obligations to provide environmental information upon public request, while Article 5 mandates a more proactive state role in collecting and disseminating environmental information. The two articles are thus commonly distinguished as "passive" versus "active" state obligations.¹²

Article 4 requires that Parties provide environmental information upon request "without an interest having to be stated" and in a timely manner ("as soon as possible").¹³ Article 4(8) further limits fees for accessing environmental information to "a reasonable amount."¹⁴

Article 5 obliges parties to the Convention to provide for "mandatory systems" to ensure "an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment."¹⁵ Further positive obligations on Parties under Article 5 include the establishment of basic procedures for the dissemination of government documents, and for procedures allowing the public to request such information.¹⁶ Where there is an "imminent threat to human health or the environment," Article 5(1)(c) requires that "all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to the relevant authorities and to the affected public."¹⁷

The self-evident aim here is to ensure that environmentally significant information is available to the relevant authorities and to the affected public. The rules set a basic floor of obligations on Parties to the Convention,¹⁸ so that relevant environmental agencies are given the opportunity to assess environmental impact, and so that the public is given notice of environmental developments affecting them. The Compliance Committee, in exercising its advisory role with respect to

¹¹ Ian Rose, *Industry and Access to Information on the Environment*, in *PROTECTING THE EUROPEAN ENVIRONMENT: ENFORCING EC ENVIRONMENTAL LAW* 251, 263 (Somsen Han ed., 1996).

¹² MARTIN HEDEMANN-ROBINSON, *ENFORCEMENT OF EUROPEAN UNION ENVIRONMENTAL LAW* 330 (Routledge-Cavendish 2007) (more precisely distinguishing "reactive" versus "active" state obligations).

¹³ Aarhus Convention, *supra* note 1, art. 4(1)(a); Susan Rose-Ackerman & Achim Halpaap, *The Aarhus Convention and the Politics of Process; The Political Economy of Procedural Environmental Rights*, in *RESEARCH IN LAW AND ECONOMICS—2001* 1, 4 (Timothy Swanson ed., 2001) (describing the ability to access information without explanation as a key feature of access to information legislation).

¹⁴ Aarhus Convention, *supra* note 1, art. 4(8).

¹⁵ Aarhus Convention, *supra* note 1, art. 5(1)(b).

¹⁶ *Id.* art. 5(2) – 5(5).

¹⁷ *Id.* art. 5(1)(c).

¹⁸ *Id.* art. 3(5) (asserting that the Convention will not prevent the signatory parties from implementing broader access and participatory provisions).

alleged cases of noncompliance brought before it, has further commented that “information within the scope of Article 4 should be provided regardless of its volume.”¹⁹

The Aarhus conception of access to information is perhaps more nominally foreign to the American legal ear than it is conceptually. There are obvious similarities between access to information under Aarhus and the Freedom of Information Act (FOIA).²⁰ Of course, the scope of the Aarhus Convention is limited to “environmental information” as defined narrowly in Article 2(3), while the United States’ FOIA is applicable to any federal government agency. Although the effectiveness of FOIA implementation in the U.S. remains open to debate at both the federal and analogous state level, adoption of similar principles should be welcomed as a critical step in effectuating viable democratic practices.²¹

Indirect Aarhus parallels abound in other areas of U.S. federal law, as well. The Toxic Substances Control Act’s mandatory reporting requirements²² for disclosing the discovery of possible threats presented by chemicals under its purview is analogous to Aarhus principle 5(1)(c), regarding “imminent threat.”²³ The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requires pesticide registrants to report any adverse effects on the environment, and for EPA to publicize the results or significance of any test or experiment performed on pesticides or their ingredients.²⁴

Both the Safe Drinking Water Act’s (SDWA), which requires periodic consumer confidence reports on water contaminant levels,²⁵ and the Resource Conservation and Recovery Act’s (RCRA), which requires the maintenance of

¹⁹ U.N. Econ. & Soc. Council [ECOSOC], Economic Comm’n for Europe [ECE], Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Seventh Meeting, Addendum 3: *Findings and Recommendations with regard to compliance by Ukraine with the obligations under Aarhus Convention in the Case of the Bystre deep-water navigation canal construction*, ¶ 32, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.3 (Feb. 18, 2005), available at <http://www.unece.org/env/pp/compliance/C2004-03/C03findings.doc> [hereinafter *Findings and Recommendations – Ukraine*]. In line with broad access to information principles, Compliance Committee decisions are available on the UNECE website (<http://www.enece.org/env/pp/ccMeetings.htm>).

²⁰ 5 U.S.C. § 552 (2006). For example, a number of FOIA exceptions parallel those found in Aarhus Convention Article 4(4), including national defense and foreign policy issues (5 U.S.C. § 552 (1)), intellectual property and trade secrets (5 U.S.C. § 552 (4)), and private data or files without consent, such as medical files (5 U.S.C. § 552(4)). Also, the 1996 amendments to FOIA required a number of records to be stored electronically. Similarly, Aarhus Convention Article 5(5) mandates progressive availability of electronic environmental data.

²¹ The Investigative Reports and Editors, Inc. methodology for ranking state freedom of information is a great example of public efforts geared towards effectuating government accountability, <http://www.ire.org/foi/bga/> (last visited Feb. 08, 2010).

²² Toxic Substances Control Act (TSCA), 15 U.S.C. § 2607(e) (2006).

²³ Aarhus Convention, *supra* note 1, art. 5(1)(c). Not to be confused with “imminent threat” actions by the government under TSCA.

²⁴ 7 U.S.C. § 136 (2006); see also James Conrad, *Sequestered Science: The Consequences of Undisclosed Knowledge; Open Secrets: The Widespread Availability of Information About the Health and Environmental Effects of Chemicals*, 69 LAW & CONTEMP. PROB. 141, 148 (2006).

²⁵ Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-3(c)(4) (2006).

waste records, are aimed at generating records for use by regulators and the public to ensure accountability.²⁶ Whistle-blower protections, such as those under SDWA, contemplate a key role for the public in environmental regulation. Of course, the Aarhus Convention is somewhat limited by comparison in that the Convention's obligations are limited to actions by the signatory government and therefore can affect industry only in an indirect way. By contrast with this limited mandate regarding industry, the Compliance Committee has frowned upon arguments by Parties to the Convention suggesting that implementation was beyond the power of the executive with respect to other branches of government, reflecting the intended broad reach of the access to information provisions of the Convention to all governing branches and bodies of the signatories.²⁷

In addition to the Convention language, most of the Aarhus signatory parties have also signed the 2003 Pollutant Release Transfer Registers Protocol (Kiev Protocol), which builds on Article 5(9)'s mandate of progressive establishment of a "national system of pollution inventories or registers on a structured, computerized and publicly accessible database." The Kiev Protocol envisions a reporting scheme that is mandatory, annual, facility-specific, pollutant-specific for releases, and pollutant-specific or waste-specific for transfers. The Kiev Protocol also mandates free, "user-friendly" access to the registers.²⁸ The Kiev Protocol aims to provide relevant information to the public so as to strengthen its role in public participation and to provide for legal recourse under the access to justice provisions. Requiring facility-specific information also aims to increase private-sector accountability by exposing large-scale polluters to public scrutiny.²⁹ The Kiev Protocol reflects a global trend toward national Pollutant Release Transfer Registers (PRTRs), the U.S. analog being the EPA's Toxics Release Inventory, mandated by the Emergency Planning and Community Right-to-Know Act.³⁰ Economic research on the provision of environmental information has indicated a number of benefits,

²⁶ Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6923 (2006). *See also id.* § 6965 (requiring annual reporting on EPA compliance activities, fines and penalties under RCRA).

²⁷ *See* ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Twelfth Meeting, Addendum 2: *Findings and Recommendations with regard to compliance by Belgium with the obligations under Aarhus Convention in relation to the rights of environmental organizations to have access to justice*, ¶ 32, U.N. Doc. ECE/MP.PP/C.1/2006/4/Add.2 (June 14-16, 2005) [hereinafter *Findings and Recommendations – Belgium*] (in which the Compliance Committee asserted that an independent judiciary cannot be used by a signatory Party as an excuse for not taking necessary measures under Article 3(1), which states that "the Parties shall take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.").

²⁸ U.N. Econ. Comm'n for Europe (UNECE), *Content of the [Kiev] Protocol*, <http://www.unece.org/env/pp/prtr.ng.htm> (last visited Apr. 5, 2010).

²⁹ UNITED KINGDOM PARLIAMENTARY OFFICE OF SCIENCE AND TECHNOLOGY, PUBL'N NO. 256, POSTNOTE: AARHUS CONVENTION (Jan. 2006), available at <http://www.parliament.uk/documents/upload/postpn256.pdf> (underscoring the PRTR scheme's "corporate accountability" expectations).

³⁰ Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 311-12 (1986).

including net environmental benefits through market pressure, even in the absence of other regulation.³¹

Under U.S. law, the Clean Air Act's (CAA) rules also require that owners and operators of "stationary sources" involved with "producing, processing, handling, or storing certain listed hazardous substances" identify hazards which may result from releases of listed chemicals, and develop risk management plans (RMPs) for dealing with such releases.³² "Emission data" required under the Act must also be made public,³³ not unlike the Clean Water Act's required availability of "effluent data."³⁴

1. EU Implementation

The European Community (EC) first adopted a Directive on Freedom of Access to Information on the Environment in 1990.³⁵ The Directive greatly affected traditional views—such as those held in Germany—that environmental information was strictly the domain of the regulatory agencies.³⁶ However, the effect on the EC institutions themselves was limited, as directive process focuses on the Member States.

In line with its obligations under the Aarhus Convention, the EU has repealed the earlier Directive on Access to Information on the Environment, replacing it with a new Directive.³⁷ The new law sets specific time limits for replying to information requests, and mandates reasonable fees for obtaining them.³⁸ Exceptions are read narrowly, and are *not* applicable where a request concerns information on emissions into the environment.³⁹ Article 7 of the Directive also details periodic reporting requirements and establishes a floor of minimum requirements for necessary information to be made available. The earlier Directive had exhaustively listed examples of environmental information, resulting in a presumption that non-listed information was not covered. The new Directive therefore deliberately leaves the definition of "environmental information" relatively ambiguous.⁴⁰

³¹ Joseph Jacobsen, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 ENVTL. LAW 327, 341 (2003).

³² Clean Air Act (CAA) § 112(r)(1), 42 U.S.C. § 7412(r)(1) (2006).

³³ 40 C.F.R. 2.301(a)(2)(i)(a) (2008).

³⁴ Clean Water Act (CWA), 33 U.S.C. § 1318(b) (2006).

³⁵ Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56.

³⁶ Molly Elizabeth Hall, *Environmental Law in the European Union*, 20 TUL. ENVTL. L.J. 277, 299 (2007).

³⁷ HEDEMANN-ROBINSON, *supra* note 12, at 330.

³⁸ Council Directive 2003/4/EC on Public Access to Environmental Information, 2003 O.J. (L 41).

³⁹ *Id.* art. 4(2).

⁴⁰ Hall, *supra* note 36, at 302.

B. The Second Pillar: Public Participation

The Aarhus Convention's public participation provisions are divided into three main categories. Article 6 addresses public participation in decisions on certain specific activities (as listed in Annex I), or other activities likely to significantly impact the environment, as determined by the Parties to the Convention. Article 7 discusses public participation "concerning plans, programmes and policies relating to the environment"; and Article 8 applies to public participation "during the preparation of executive regulations and/or generally applicable legally binding normative instruments." Of the three articles, Article 6 is by far the most detailed in its public participatory requirements. Article 7 is a pared-down version of Article 6, while Article 8 operates as a set of guidelines only for implementing public participation mechanisms.⁴¹

Article 6 requires public participation in cases relating to proposed "specific activities" listed under Annex I, which enumerates various activities assumed to have an environmental impact *per se*. Such activities include everything from oil and gas refinery projects to mining, metal and chemical production, and large-scale waste management facilities (e.g., for waste-water treatment facilities serving over 150,000 people). Recognizing that these are activities are likely to impact the public, Article 6 confers a positive obligation on its signatories to inform the public of the plan "either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely, and effective manner." The timely notice requirements allow time for meaningful public participation, while also ensuring that objections to the project are raised prior to the decision and implementation stages.⁴² Relevant information required under Article 6 includes information about the proposed activity, the public authority responsible for making the decision, relevant dates (including opportunities for the public to participate and commencement of relevant activities), and relevant authorities to whom public comment may be submitted. Article 6(6) requires that the public be allowed access to information akin to what would be required under a number of Environmental Impact Assessments (EIAs), in addition to a non-technical summary. It is important to note here that the Convention only requires disclosure of an EIA if the signatory Party's law requires

⁴¹ Rodenhoff, *supra* note 8, at 354.

⁴² See ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Eighteenth Meeting, Addendum 6: *Draft Findings and Recommendations with regard to compliance by Lithuania with the obligations under Aarhus Convention*, ¶ 71, U.N. Doc. ECE/MP.PP/2008/5/Add.6 (Feb. 12, 2008) (discussing Article 6, ¶ 4 requirements for "early public participation when all options are open"). See *id.*, ¶ 72 (commending Lithuania's approach to require public participation at scoping stages); see also ¶ 66 (criticizing notice of opportunity for public comment in an official journal rather than a daily local newspaper as not effective notice); see also Nick Tyler, *Practical Experience of Public Participation: Evidence from Methodological Experiments*, 16 INNOVATION 3 253, 258 (2003) (underscoring the potential cost savings benefits of early public participation).

one. There is no actual EIA requirement under 6(6).⁴³ The idea is not to substantively impinge upon individual Parties' sovereign environmental laws, but rather to guarantee the procedural preconditions for their enforcement; for example, through passing important information to the relevant authorities and the public. Article 6(7) requires procedures for public submission of written or oral comment on the part of the public, although the latter obligation is limited by the open-ended "where appropriate" language.

Annex I also includes an important Paragraph 20, which expands the scope of the Annex (and therefore Article 6) to include activities not covered under the listed activities where the national legislation requires public participation in the context of an EIA. The first use of Paragraph 20 of Annex I by the Compliance Committee was the second final report on Kazakh compliance.⁴⁴ In that case, the Mayor of Almaty had adopted a decision to replace a faulty underground electrical line with an overhead line running through a residential neighborhood, apparently contravening a local law against the use of overhead high power lines in residential areas. The Compliance Committee used Annex I, Paragraph 20 to bring the issue within the ambit of Article 6. That Kazakh law required an EIA in such cases further suggested to the Committee that Kazakhstan considered the activities to have had a significant effect on the environment, and therefore, also justified possible treatment of the issue under Article 6(1)(b).⁴⁵ The Committee never commented on Kazakhstan's compliance with its own EIA law; rather it questioned only whether that law implicates Article 6's procedural requirements. Indeed, the Committee specifically refused to comment on possible substantive

⁴³ See generally The Convention on Environmental Impact in a Transboundary Context (Espoo Convention) Feb. 25, 1991, 1989 U.N.T.S. 310 (1997) (Espoo is often considered closely related to the Aarhus Convention, and requires an EIA in the transboundary environmental context); see Tanya D. Sobol, *An NGO's Fight to Save Ukraine's Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 123, 125 (2005).

⁴⁴ See ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Seventh Meeting, Addendum: *Findings and Recommendations with regard to compliance by Kazakhstan with the obligations under Aarhus Convention in the case construction of high-voltage power line*, ¶ 122, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.2 (Mar. 15, 2005), available at <http://www.unece.org/env/pp/compliance/C2004-02/C02findings.doc> [hereinafter *Findings and Recommendations – Kazakhstan II*]. See also ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Eleventh Meeting, Addendum 1: *Findings and Recommendations with regard to compliance by Armenia with its obligations under Aarhus Convention in relation to the development of the Dalma Orchards area*, ¶ 30, U.N. Doc. ECE/MP.PP/C.1/2006/2/Add.1 (May 10, 2006), available at <http://www.unece.org/env/pp/compliance/C2004-08/ece.mp.pp.c.1.2006.2.add.1.e.pdf> [hereinafter *Findings and Recommendations – Armenia I*] (noting the Convention's applicability under either Annex I ¶ 20, or article 6(1)(b)).

⁴⁵ Aarhus Convention, *supra* note 1, art. 6(1)(b) (states that each party "shall . . . also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment."). The language here is limited by the "in accordance with its national law" language, but is consistent with Annex I ¶ 20, which requires application of the treaty where an EIA would be required.

violations of Kazakh law, although noting that proper Aarhus procedures would have made a public challenge to any violations more feasible.⁴⁶

Perhaps the vaguest aspect of the Convention is Article 6(8)'s requirement that "due account" be taken of the public participation. Other international agreements may offer some insight in this regard. In discussing the increasing importance of NGOs in the context of various multilateral agencies and international treaties, Steve Charnovitz notes a number of trends suggesting future adoption of "a duty to consult" NGOs. He notes that the term "consultation" has been defined as "a duty to listen" with a "good faith commitment to consider the information provided by the consulting partner."⁴⁷ The Compliance Committee decisions have been somewhat less helpful in narrowing the meaning of the term. However, the decisions have made clear that in cases where the public was not offered relevant information or any procedure for comment, such "due account" was plainly not possible.⁴⁸

The Compliance Committee noted the overlap between Articles 6 and 7 in Armenia's first case. There, the Committee found violations of both Article 6 and 7, in the context of a large-scale land use reclassification of the historic Dalma orchards. Although the Committee noted that a land use decision would normally come under Article 7's "plans, programmes, and policies" provision,⁴⁹ the government decree included specific instructions in some cases for designating specific activities in designated areas, and even named individual companies to undertake named activities.⁵⁰

The Committee also found shortcomings in public participation procedures in a case involving a large-scale development project on the Albanian coast implicating both Articles 6 and 7.⁵¹ The Committee's focus on public participation regarding three different decisions made by Albania's Council of Territorial Adjustment offers further indication of the Committee's understanding of the scope of necessary public participation under the Convention. Although these were not the only three decisions made by the Council, the Committee focused on these three, noting that they were "crucial for the entire decision-making in relation to

⁴⁶ *Findings and Recommendations – Kazakhstan II*, *supra* note 44, ¶ 29.

⁴⁷ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 368 (2006); *see also* Hungarian EIA Law, Governmental Decree No. 314/2005 (XII. 25) (stating that the EIA decision of the environmental inspectorate shall contain an analysis from the factual, professional and legal aspects of the public comments).

⁴⁸ *Findings and Recommendations – Ukraine*, *supra* note 19, ¶ 34.

⁴⁹ *Findings and Recommendations – Armenia*, *supra* note 44, ¶ 21.

⁵⁰ *Id.* ¶ 26.

⁵¹ ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Sixteenth Meeting, Addendum 1: *Findings and Recommendations with regard to compliance by Albania*, U.N. Doc. ECE/MP.PP/C.1/2007/4/Add.1 (Jul. 31, 2007), available at http://www.unece.org/env/documents/2007/pp/ECE_MP.PP_C_1_2007_4_Add_1.pdf [hereinafter *Findings and Recommendations – Albania*]; *see id.* ¶ 65 (indicating the imprecise boundary between Articles 6 and 7 of the Convention); *id.* ¶ 70 (clarifying that Article 7 is a subset of Article 6); *id.* ¶ 74 (emphasizing that noncompliance with Article 6 paragraphs 3, 4, and 8 led to a breach of Article 7 in this case).

these sites, constructions, and activities,” and would by implication, all require public participation.⁵² Thus, per the Compliance Committee’s understanding, multi-part and multi-stage projects would therefore appear to require multiple opportunities for public involvement, to be organized by the developer.⁵³

1. Public Participation in U.S. Law

The National Environmental Policy Act (NEPA) compels the President’s Council on Environmental Quality to consult with the Citizen’s Advisory Committee on Environmental Quality, “and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups as it deems advisable, *so as to avoid the duplication of the Presidential Council’s effort and expense.*”⁵⁴ This would seem to indicate that American law also contemplates the potential for financial savings from civil society expertise. Public comment and hearings often accompany environmental impact statement drafting. By contrast with Article 6(8)’s “due account” requirement, NEPA offers a bit more guidance on the measure of public participation to be used. More specifically, NEPA asserts that the input from the public and private agencies and organizations should be utilized “to the fullest extent possible.”⁵⁵ Further comparisons between Aarhus and NEPA are somewhat tenuous, in that the Convention does not directly affect environmental impact statements. However, both are essentially procedural laws aimed to ensure adequate attention to environmental concerns.⁵⁶

The Clean Water Act likewise mandates the use, assistance, and encouragement of public participation in the development, revision, and enforcement of any regulation at both federal and State levels. Public participation is in fact one of the main goals mentioned in the Congressional declaration of goals and policy of the Act.⁵⁷ Therefore, consultation and cooperation with “interested organizations and persons” and “recognized experts,” as well as development of minimum standards for public participation (in cooperation with the States) is required.⁵⁸

⁵² *Id.* ¶ 65.

⁵³ See Association Kazokiskas Community (Lithuania), Draft Findings and Recommendations with regard to compliance by the European Community with the obligations under Aarhus Convention in relation to certain directives, ¶ 41 (Feb. 27, 2008), available at <http://www.unece.org/env/pp/compliance/C2006-17/C17DraftFindings2008.02.27topartiesconcerned.doc> (discussing the possible need for multiple opportunities for public comment at different permitting stages).

⁵⁴ National Environmental Policy Act (NEPA), 42 U.S.C. § 4345 (2006) (emphasis added).

⁵⁵ *Id.* § 4345(2).

⁵⁶ Compare *Findings and Recommendations – Kazakhstan II*, *supra* note 44, ¶ 27 (noting that an adverse court decision does not necessarily constitute a denial of access to justice) with *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989) (reiterating that NEPA is a procedural act, and does not mandate particular results).

⁵⁷ Clean Water Act (CWA), 33 U.S.C. § 1254 (2006).

⁵⁸ *Id.* § 1254(a). The CWA further authorizes the Administrator of the EPA to collect and make available information, cooperate with private agencies, institutions, organizations, involved

The Convention's greater focus on Article 6 "specific plans" over Article 7 "plans, programmes, and policies" is reminiscent of the Supreme Court's limits on standing to challenge agency action. In *Lujan v. Nat'l Wildlife Fed'n*, the Supreme Court dismissed a suit aimed at a federal policy of non-enforcement of mining statutes.⁵⁹ The court clarified that agency action must be challenged on a case-by-case basis in a particularized fashion, rather than on a wholesale basis.⁶⁰ Similar efficiency concerns and deference to the executive seem to underlie the reasoning of the Convention. Standing requires an actual case or controversy, just as more stringent public participation requirements only come into play under Article 6 when a specific plan is at issue. In both cases, the decision-making role of the executive (or in some cases the legislature) is preserved, and the public's role is less intrusive in the context of broader-based agenda planning. Arguably, public participation in setting broader agendas is already effectuated through the normal democratic process and accountability is ensured by periodic election.

The Convention's Article 8 guidelines for preparation of "executive regulations and/or generally applicable legally binding normative instruments" are also comparable to the common agency practice of notice-and-comment rulemaking.⁶¹ Notice-and-comment rulemaking was designed as a public check on the power of agencies, and typically allows for a 90 day (60 day comment and 30 day reply) period, during which proposed administrative rules (published in the Federal Register) are open to comment.⁶² Congress created agency rulemaking in the Administrative Procedure Act (APA) in order to help address perceived threats to government legitimacy caused by the rapid expansion of agency powers during the New Deal Era.⁶³

Under the APA's notice-and-comment rulemaking scheme, an "interested person" has the right "to petition for the issuance, amendment, or repeal of a rule."⁶⁴ "Person" is broadly defined to include individuals, partnerships, corporations, associations or public or private organizations.⁶⁵ The rule in question may be "of general or particular applicability,"⁶⁶ but public participation is not

industries, and individuals in the preparation of research, make grants, contracts with, and provide for "research fellowships with public or nonprofit private educational institutions or research organizations." *Id.* § 1254(b)(5). Coordination with private agencies, institutions, organizations, individuals, and the general public is discussed throughout the Act, for example in § 103, regarding interstate Cooperation, and in § 104(g)'s discussion of training programs, and for the "prevention, reduction, and elimination of pollution in each region, State, or area of the United States." *Id.* § 1254(g)(2). The Act also mandates compulsory reporting requirements which must be made available to interested parties on request, such as those required for presentation to Congress on the effects of estuaries. *Id.* § 1254. Thus, public participation rules overlap with access to information requirements in the Act.

⁵⁹ 497 U.S. 871 (1990).

⁶⁰ *Id.* at 894.

⁶¹ Aarhus Convention, *supra* note 1, art. 8.

⁶² Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006).

⁶³ Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADM. L.J. AM. U. 89, 97 (1996).

⁶⁴ 5 U.S.C. § 553(e).

⁶⁵ *Id.* § 551(2).

⁶⁶ *Id.* § 551(4).

required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁶⁷ Agencies have discretion to forgo notice and public procedure requirements where “impracticable, unnecessary, or contrary to the public interest.”⁶⁸ The APA also mandates that “agency business” be conducted in accordance with Section 552(b)’s “open meetings” requirements, which include timely advance notice to the public,⁶⁹ publicly available transcripts of such meetings, and requirements that agencies create their own procedures for open meetings.⁷⁰

Despite statutory limits, the idea that the public can act directly as another legitimizing check on the rapidly expanding power of a branch of government is evident in this aspect of the APA, and is also one piece of the logic of public participation under the Aarhus Convention’s second pillar. But scholars have observed that public participation can also help address legitimacy concerns caused by under-powered or complacent governments. Daniel Esty notes that legitimacy concerns abound where governance activities result in significant transfers of authority away from the national level.⁷¹ In advocating for global adoption of administrative law standards as a means to effectuate legitimacy through improved policy-making, Esty’s “toolbox” of suggested global administrative rules therefore includes public participation directly and indirectly by NGOs through hearings and notice and comment procedures, clearly identified procedures, a focus on dialogue, access to information, and institutionalized review or appeal rights. This wish-list reads quite like the language of the Aarhus Convention. Esty’s additional listed suggestions could be strengthened by increasing empowerment of the general public and the NGO sector—structured fact-finding, evaluation of policy, data collection and benchmarking are all functions performed by NGOs.⁷²

Kate Getliffe views the Aarhus agreement as a step forward in implementing “reflexive” legal systems, which favor procedural and structural coordination of internal discourse and external coordination with the public as a way to address the shortcomings of the top-down, bureaucratic regulatory state: “reflexive law achieves its aims by replacing substantive regulation with principles and processes which encourage a philosophy of self-criticism, self-reflection, communication and learning at all levels of the legal system.”⁷³ Aarhus procedures aim to make the

⁶⁷ 5 U.S.C. § 553(b)(3)(A) (2006).

⁶⁸ *Id.* § 553(b)(3)(B). *See also id.* § 553(a) (exempting military or foreign affairs functions, agency management or personnel issues, or public property, loans, grants, benefits, or contractual issues).

⁶⁹ *Id.* § 552b(e).

⁷⁰ *Id.* § 552b(g).

⁷¹ Daniel C. Esty, *Globalizing Administrative Law*, 32 ADMIN. & REG. L. NEWS 2 (2006), available at http://www.abanet.org/adminlaw/news/adlaw_fall2006.pdf. *See* William A. Wilcox, Jr., *Access to Environmental Information in the United States and the United Kingdom*, 23 LOY. L.A. INT’L & COMP. L. REV. 121, 195 (2001) (discussing the “public reassurance” benefits arising from the provision of environmental information).

⁷² Esty, *supra* note 71, at 3-4.

⁷³ Kate Getliffe, *Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-Making Process Lead to More Effective EU Environmental Law?* 4 ENV. L. REV. 101, 105 (2002).

environmental regulatory scheme more responsive through informational feedback mechanisms. This reflexive approach also parallels organizational learning principles. For example, the knowledge management literature focuses on the ability of institutions to systematize knowledge-sharing to adapt to change and think creatively and innovatively.⁷⁴

2. *EU Implementation*

It is perhaps somewhat unsurprising that the EU has championed the expansion of the role of the public through its adoption of the Aarhus Convention, given the limits on the reach of the European institutions, voter rebellion against integration in recent years, and lingering negative perceptions of the European institutions as undemocratic and technocratic.⁷⁵ In the new EU Member States, open borders will no doubt continue to provide incentive and opportunity for well-established western European multi-nationals to move eastward in search of labor and resources. A major environmental risk is that these firms will move to areas that are least regulated under environmental law, leading to a classic race to the bottom. This issue is compounded by the fact that the former Soviet satellite nations are likely to privilege economic development and job creation over environmental concerns. Furthermore, the local populace may be completely unfamiliar with how to assert novel environmental and democratic rights. The adoption of Aarhus norms therefore serves a number of purposes in these areas. Empowering the local populace and grassroots environmental organizations leads to more consistent enforcement of Brussels' environmental agenda. This serves EU-wide market goals, in that harmonization of environmental law leads to greater consistency and predictability for investors, while preventing the race to the bottom. Because of the democratic nature of the Aarhus principles, and because the implementing directives create essentially local structures, the increased enforcement of EU environmental law need not result in a perception of "creeping integration" or of a loss of local sovereignty vis-à-vis Brussels. Increasing familiarity with democratic practices and a voice in development issues may further help market these "western" ideals to a skeptical developing world. The European public participation requirements are sprinkled throughout a number of the environmental directives. In addition to common public participation requirements in EIAs, the European Strategic Environmental Assessment (SEA) Directive requires an environmental assessment at the planning stage of development plans.⁷⁶ Members of the public must be given early opportunities for

⁷⁴ Ingie Hovland, *Knowledge Management and Organisational Learning: An International Development Perspective, an Annotated Bibliography* 8 (Overseas Dev. Inst., Working Paper No. 224, 2003).

⁷⁵ See generally Joseph H.H. Weiler, *The State "über alles": Demos, Telos and the German Maastricht Decision*, at III (1995), available at <http://www.jeanmonnetprogram.org/papers/95/9506ind.html> (discussing the existential impossibility of Europe-wide democratic legitimacy).

⁷⁶ Council Directive 2001/42/EC on Strategic Environmental Assessment, 2001 O.J. (L 197) 3.

expressing an opinion on the plans.⁷⁷ The Integrated Pollution Prevention and Control (IPPC) Directive includes a requirement that permit applications be made available “for an appropriate period of time” to the public to enable comment prior to a decision by the competent authority.⁷⁸ The Water Framework Directive also requires public participation and consultation in creating River Basin Management Plans.⁷⁹

A recent Directive on public participation affecting certain plans and programs was adopted in 2003.⁸⁰ It fully incorporates Aarhus Article 6 regarding “plans and programmes” verbatim but completely leaves out Article 7 and 8. The Directive also does not clarify the “due account” to be accorded to the public any further than the Convention. It mandates that public access to “express comments and opinions when all options are open before decisions on the plans and programmes are made.” The Directive also leaves discretion to competent authorities in Member States to make reasonable efforts to inform the public about the decisions following participation.⁸¹ The Directive further amends an earlier public participation Directive (85/337/EEEC) to bring it up to date with Aarhus language.⁸²

A second complaint regarding one aspect of the Albanian development project (discussed above) before the Compliance Committee surfaced afterward, this time brought against the European Investment Bank (EIB) and its public participation procedures.⁸³ The complaint singled out the EIB's role in the process, though the project also involved the United States Trade and Development Agency (USTDA), the World Bank, and the European Bank for Reconstruction and Development (EBRD).⁸⁴ The Compliance Committee never found that the EC failed to comply with the Convention, but its findings indicate that the Committee treated the EIB as an arm of the EC in its assessment.⁸⁵ The complaint brought by the Albanian NGO (Civic Alliance for the Protection of the Bay of Vlora) also led to independent review of environmental procedures at both the EBRD and the World Bank.⁸⁶ The EBRD claimed to have made prospective changes to the Bank's

⁷⁷ *Id.* art. 6(2).

⁷⁸ Council Directive 2008/1/EC on Integrated Pollution Prevention and Control, 2008 O.J. (L 257) art. 15.

⁷⁹ Council Directive 2000/60/EEC on Water Framework, 2000 O.J. (L 327) 1.

⁸⁰ Council Directive 2003/35/EC on Public Participation, 2003 O.J. (L 156) 17.

⁸¹ *Id.* at 18; *see also* Aarhus Convention, *supra* note 1, art. 4.

⁸² Council Directive 2003/35/EC, *supra* note 80, at 17.

⁸³ *See* ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Twenty-Third Meeting, Addendum: *Findings of the Compliance Committee concerning compliance by the European Community with its Obligations under the Convention*, ¶ 15, available at http://www.unece.org/env/pp/compliance/C2007-21/DRFcomments/findingsACCC-C-2007-21asadoptedCC-23_advance.doc [hereinafter *Report on Twenty Third Meeting*].

⁸⁴ *See* MWH CONSULTING, FINAL ENVIRONMENTAL IMPACT ASSESSMENT – VLORË COMBINED (2003), available at <http://www.unece.org/env/pp/compliance/C2005-12/Response/FinalEIA.pdf>.

⁸⁵ *Report on Twenty Third Meeting*, *supra* note 83.

⁸⁶ *Id.* ¶ 15.

practices based on apparent non-compliance with its own procedures with respect to the case.⁸⁷ The case therefore highlights the potential for public (or in this case NGO) triggering of accountability mechanisms bearing on environmental decision-making based on Convention procedures.

The Albanian complaint has potential implications for EU responsibilities related to development projects in non-EU Member States.⁸⁸

C. *The Third Pillar: Access to Justice*

Aarhus Convention Article 9 aims to address common impediments to legal challenge by setting forth provisions designed to assure wide access to justice from 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. Broad access to justice for citizens' groups and NGOs often allows for lawsuits when individual plaintiffs may not be able to afford suit. The deterrent effect of insufficient funds is an even greater concern in countries where winning parties to a lawsuit can recover attorney's fees. Despite these concerns, the language of Article 9 is quite porous and exceedingly deferential to procedural laws in the signatory Parties' legal systems, and its effects will likely vary depending on the domestic laws of the signatories.⁸⁹

Perhaps the strongest language in Article 9 is found in the first paragraph, and is designed to reinforce Article 4's access to information mandate. Article 9(1) requires that signatory Parties to the Convention provide access to a free or inexpensive "review procedure before a court of law or another independent and impartial body established by law" in the case where "any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or full, inadequately answered, or otherwise not dealt with the provisions of that article." This paragraph clearly only addresses access to justice as it relates to access to information, and cannot be said to greatly expand access to justice or standing in terms of broader access to the courts. That said, the language clearly results in positive procedural obligations on the signatory parties, and non-compliance is easily determined.⁹⁰ By contrast with Article 9(1), both the

⁸⁷ *Id.*

⁸⁸ See ECOSOC, Aarhus Convention Compliance Committee, Memorandum to the Compliance Committee in response to questions of compliance regarding EC decision-making by the European Investment Bank, available at <http://www.unece.org/env/pp/compliance/C2007-21/communication/Memorandum ACCC-EIB.doc>.

⁸⁹ Maria Lee & Carolyn Abbot, *Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention*, 66 MOD. L. REV. 80, 106 (2003) (critiquing "watered-down" article 9(2) and 9(3) access to justice provisions as "disappointing," and questioning the effect on UK law).

⁹⁰ ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Seventh Meeting, Addendum 1: *Findings and Recommendations with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of information requested from Kazatomprom* ¶ 1, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.1 (Mar. 11, 2005), available at <http://www.unece.org/env/pp/compliance/C2004-01/C01findings.doc> [hereinafter *Findings and Recommendations – Kazakhstan I*].

language and the implications of Articles 9(2) and 9(3) are rather opaque. Article 9(2) is designed to provide for access to justice to ensure the integrity of the public participation pillar.

Article 9(2)(b) mandates that Parties to the Convention ensure access to a review procedure “to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of [A]rticle 6 and, *where so provided for under national law . . .* of other relevant provisions of this Convention.”⁹¹ Thus, under Article 6, the Convention allows for a right of appeal to challenge decisions on “specific activities” subject to Annex I, or where the Parties themselves determine that there is a “significant effect on the environment” under Article 6(1)(b). However, the language in Article 9(2) limits its application to either Parties having “a sufficient interest,” or “maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition.” Both “sufficient interest” and “maintaining impairment of a right” are to be defined by the signatory Parties under the Convention, “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 this Convention.”⁹² The wording here confusingly defers to the signatories’ procedural laws, while simultaneously re-asserting the goal of wide access to justice. The apparent compromise between the principle of wide access to justice and the broad-based appeal of the Convention through deference to signatory procedures is evident here. Article 9(2) also defers to the Parties’ right to require the exhaustion of “administrative review procedures” prior to invocation of “judicial review procedures,” as required by national law.

Article 9(3), which is essentially a guideline, mandates that parties ensure that members of the public have access to “administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” But the language is again limited by the conditional “where they meet the criteria, if any, laid down in its national law.”⁹³ It is unclear whether this limiting language refers only to criteria for standing or forming and operating an NGO, or whether it offers signatory parties a *carte blanche* for raising any obstacles they wish. By contrast with Article 9(2), there is no balancing of the national law against “wide access” principles, seemingly rendering Article 9(3) largely symbolic.⁹⁴

Article 9(4), which applies to each of Article 9’s first three paragraphs, asserts the need for “adequate and effective remedies” that are “fair, equitable, timely and not prohibitively expensive.” Injunctive relief is also mentioned as a possible avenue for an effective remedy, to be used “as appropriate.”⁹⁵ Slightly more concrete obligations under Article 9(4) include requirements that the decisions arising out of Article 9 obligations be recorded in writing, and publicly accessible

⁹¹ Aarhus Convention, *supra* note 1 (emphasis added).

⁹² *Id.* (emphasis added).

⁹³ Aarhus Convention, *supra* note 1, art. 9(3).

⁹⁴ Rodenhoff, *supra* note 8, at 349 (describing article 9(3) as a “soft recommendation”).

⁹⁵ Aarhus Convention, *supra* note 1, art. 9(4).

“whenever possible.” Also, Article 9(5) mandates availability of information to the public on access to administrative and judicial review procedures, and suggests consideration of “appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

Given the rather deferential language of Article 9, it is perhaps not surprising that the Compliance Committee’s tone has been somewhat muted with respect to these provisions, especially with respect to Article 9(3). In a recent case involving limitations on the standing of environmental groups to challenge environmental decisions under Belgian law,⁹⁶ the Compliance Committee’s draft report (now finalized) clarified that Article 9(3) does not use the “public concerned” language, which would explicitly confer Article 9(3) rights to environmental NGOs per definition of the term in Article 2(5). Article 9(3) only mentions “the public.”⁹⁷ With respect to rights of the public under Article 9(3), the draft findings note that the Convention “is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice,” and that broad “*actio popularis*” requirements are not mandated under the Convention.⁹⁸ However, the Committee did note that if no member of the public is in a position to challenge possible breaches of environmental law, Belgium would not be in compliance with its obligations under the Convention.⁹⁹ The Committee went on to note that the Belgian judicial practice (but not the relevant Belgian laws) implied “a too restrictive access to justice for environmental organizations,” because the restrictions of the Council of State effectively barred “most, if not all environmental organizations” from claiming contravention of Belgian environmental law.¹⁰⁰ However, because the evidence submitted to the Committee by the “communicant” (a Belgian NGO) involved court decisions made prior to entry into force of the Convention, the Committee further reined in its language to find that no noncompliance had yet taken place, essentially setting the question aside on ripeness grounds.¹⁰¹ Thus, the case suggests that the Compliance Committee, while not willing to read Article 9(3) obligations out of the Convention completely, is well aware of its limitations.

Such limits are further evident in a recent complaint against Denmark, brought by a Danish citizen who had invoked Article 9(3) to challenge his apparent

⁹⁶ *Findings and Recommendations – Belgium*, *supra* note 27, ¶ 14. The Belgian standing requirements required a direct, personal interest, and a coinciding geographic reach and specific organizational goal narrower than a general interest. NGOs with organizational objectives that encompassed broad geographic areas could not challenge administrative acts not affecting the entire area. Arguably, the standing requirement was meant to reinforce environmental localism.

⁹⁷ Compare Aarhus Convention, *supra* note 1, art. 2(4) definition of “the public” with *id.* art. 2(5) definition of “the public concerned” (the latter definition specifically includes “NGOs promoting environmental protection and meeting any requirements under national law,” suggesting that the definition of “the public,” which includes “associations, organizations, and groups,” nonetheless does not include NGOs).

⁹⁸ *Findings and Recommendations – Belgium*, *supra* note 27, ¶ 34.

⁹⁹ *Id.* ¶ 38.

¹⁰⁰ *Id.* ¶ 40.

¹⁰¹ *Id.* ¶ 44.

lack of a remedy to challenge the culling of birds protected under EC legislation.¹⁰² The Committee indicated that it had not found an Article 9(3) violation because the Danish law did not bar “all or almost all members of the public, in particular all or almost all non-governmental organizations . . . from challenging the culling of wild birds.”¹⁰³ Thus, an individual remedy is not required, so long as the Danish law had not clearly prevented the possibility of a hypothetical suit to be brought, for example by a local NGO, within Denmark’s standing rules.¹⁰⁴ In looking over Denmark’s procedure for handling appeals to the Nature Protection Board, the Committee further suggested that an administrative remedy might have been preferable to a judicial review procedure in promoting the objective of the Convention.¹⁰⁵

In the Turkmen case, the Committee addressed a law greatly restricting the number, the membership, and the territorial scope of the operation of nonprofits, as part of “an overtly acknowledged [government] policy to have only one NGO per sector.”¹⁰⁶ The law had resulted in widespread court-ordered suspension of NGO activities by government authorities without prior written notice or legal remedy for challenging the actions. Although the Compliance Committee still noted that some regulation and monitoring of NGO activities was entirely consistent with the “sovereign powers of each Party” to the Convention,¹⁰⁷ the Compliance Committee emphasized the clear conflicts with the Convention’s Article 3 General Provisions, specifically Paragraph 3, requiring “appropriate recognition of and support to associations, organizations or groups promoting environmental protection” and a “legal system . . . consistent with this obligation.”¹⁰⁸ Viewed together with the Belgium opinion, the Compliance Committee seems willing to defer to limitations on standing that appear to serve some purpose, while viewing obvious attempts to limit NGO action with greater scrutiny.

In the second Kazakh case, the Compliance Committee specifically addressed the concern that the Aarhus Convention procedures would be invoked whenever an environmental challenge failed in court. In that case, the Committee explicitly

¹⁰² ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Third Meeting, Addendum 4: *Compliance by Denmark with its obligations under the Aarhus Convention*, ¶ 21 ECE/MP/PP/2008/5/add.4 (Jan. 25, 2005), available at http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_4_e.pdf [hereinafter *Findings and Recommendations – Denmark*].

¹⁰³ *Id.* ¶ 41.

¹⁰⁴ *Id.* ¶ 21.

¹⁰⁵ *Id.* ¶ 39.

¹⁰⁶ ECOSOC, ECE, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Report on the Seventh Meeting, Addendum 5: *Findings and Recommendations with regard to compliance by Turkmenistan with the obligations under the Aarhus Convention in the case of Act on Public Associations*, ¶ 12(a), U.N. Doc. ECE/MP/PP/C.1/2005/2/Add.5 (Mar. 14, 2005), available at <http://www.unece.org/env/pp/compliance/C2004-05/C05findings.pdf> [hereinafter *Findings and Recommendations – Turkmenistan*].

¹⁰⁷ *Id.* ¶ 20.

¹⁰⁸ *Id.* ¶ 3.

stated that “having an adverse court decision does not in itself necessarily translate into a denial of access to justice.”¹⁰⁹ The case underscores the exclusively procedural nature of the Convention.

In viewing the language of the Article 9 provisions, as well as the Compliance Committee’s interpretation of this language in the context of the cases brought before it, the picture of the Convention that emerges is that of a basic procedural floor,¹¹⁰ or a set of very basic procedural obligations available for the public to influence environmental decision-making. Article 9’s main function is to ensure compliance with the access to information and public participation pillars by requiring parties to the Convention to provide a remedy for challenging noncompliance with those pillars. The emerging Compliance Committee pattern seems to be to find noncompliance in Article 9(3) access to justice-related cases only in the case of blatant inconsistencies with obligations under the Convention. The Committee’s actions in this regard seem entirely consistent with the porous language of Article 9(3), and should assuage any fears that the Convention might be used to force open the doors of the courts in favor of large-scale adoption of *actio popularis* or to seriously undermine traditional limits on standing in the environmental context.

1. Access to Justice Parallels under U.S. Federal Environmental Law

Given the relatively broad remedies available for enforcing access to information, public participation, and environmental law in general in the U.S., the Aarhus Convention’s access to justice provisions seem rather weak by comparison.

Both the APA and federal environmental statutes include provisions for challenging the withholding of environmental information. If an agency decides to deny a Freedom of Information Request (FOIA) under one of the exceptions, then the requester may appeal to the head of the agency, and thereafter in federal court. The integrity of the right is further bolstered by yearly reporting to the Attorney General, requiring inclusion of data on the number of denials of information requests.¹¹¹ In theory, the FOIA requires timely handling of appeals,¹¹² but is often bogged down by backlogs of requests at agencies.¹¹³ However, given that EPA retains authority over state and local authorities with respect to public registers and public records required by federal environmental laws, environmental information is more readily available to the public than through the FOIA procedure.¹¹⁴ The right to access this information is safeguarded by citizen suits in a number of statutes. For example, the Clean Water Act allows for standing in suits against the

¹⁰⁹ *Findings and Recommendations – Kazakhstan II*, *supra* note 44, ¶ 27.

¹¹⁰ Getliffe, *supra* note 73, at 16.

¹¹¹ See APA 5 U.S.C. § 552 (2006).

¹¹² See *id.* § 552(a)(6)(a).

¹¹³ Wilcox, *supra* note 71, at 238.

¹¹⁴ *Id.* at 190.

EPA or its state equivalent for failure to carry out non-discretionary duties required by the Act.¹¹⁵

Regarding access to justice in the public participation context, the APA's "open meetings" requirements, allow "any person" to challenge agency implementation of the statute in the D.C. Circuit of the U.S. District Court of Appeals. The APA rules also create remedies for "any person" challenging noncompliance with open meetings requirements through equitable, declaratory, and "other relief as may be appropriate."¹¹⁶ Where agencies have discretion to close the meeting under one of the exceptions, a redacted transcript must be promptly made available to the public.¹¹⁷ As mentioned above, regulations promulgated under notice-and-comment rules allow any "interested person" the right "to petition for the issuance, amendment, or repeal of a rule."¹¹⁸ The "interested person" language is analogous to Aarhus' article 9(2)'s "sufficient interest," although the Convention is alternatively also triggered by the "maintaining impairment of a right" language, which is an alternative standard used by some signatories to limit standing.¹¹⁹ Matching the APA's broad definition of "person," Article 9(2)(b) clarifies that NGOs are capable of having rights impaired and of having "sufficient interests" in acts or omissions pertaining to Article 6.

The obvious analogy to Article 9 access to justice provisions in federal environmental law are the large number of statutory citizen's suit provisions, which essentially allow citizens to take the role of "private attorneys general" in enforcing environmental law. In the decade between 1993 and 2002, roughly 75 percent of federal court opinions regarding environmental law derived from citizen suits,¹²⁰ and citizen suit provisions are found in 16 of the major federal environmental laws.¹²¹ In recent years, the Supreme Court has reined in the historically wide reach of the *actio popularis* action, through strict interpretation of statutory language¹²² and stricter standing requirements.¹²³ But despite the resulting

¹¹⁵ Congressional Research Service: *Clean Water Act: A Summary of the Law* 1, 7 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL30030.pdf>.

¹¹⁶ APA, 5 U.S.C. § 552b(h) (2006).

¹¹⁷ *Id.* § 552b(f)(2).

¹¹⁸ *Id.* § 553(e).

¹¹⁹ HEDEMANN-ROBINSON, *supra* note 12, at 307.

¹²⁰ James May, *Now More than Ever: Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 8 (2003).

¹²¹ James May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RESOURCES & ENV'T 53, 53 (2004).

¹²² *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987) (holding that Clean Water Act violations cannot be brought through citizen's suits for past violations).

¹²³ *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 560 (1992) (holding that for standing to exist, a favorable decision must be likely to redress the alleged harm). *See* Timothy Hodits, *The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims*, 84 WASH. U. L. REV. 1907, 1932-33 (2006) (critiquing standing doctrine as a poorly-defined judicial limit on legislative power); *but see* Friends of the Earth v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 185 (2000) (finding that retroactively imposed civil penalties' future deterrent effect satisfied the redressability requirement for Article III standing).

drop in the number of citizen suits brought, U.S. access to justice remedies seem to reach well beyond the recommendations of Article 9(3) of the Aarhus Convention.

2. Access to Justice and the European Union

Historically, the process of European integration was largely limited to economic integration. Until the Single European Act of 1987, passage of most environmental legislation required an absolute majority of the Members. Since then, qualified majority voting and gradual acceptance of the environmental legitimacy of the EU institutions has led to a number of legal developments in this area.¹²⁴ But despite being responsible for drafting the bulk of Europe's environmental law, the Commission usually uses the directive process to drive its environmental agenda. Directives, by contrast with EU regulations, allow Member States to implement EU law into national law themselves.¹²⁵ By 1992, the EC (now EU) had issued 220 directives dealing with the environment.¹²⁶ Although the Commission is formally the guardian of the EC Treaty (now the Treaty on the Functioning of the European Union) under Article 211, it has traditionally deferred to the Member State responsibility under Article 175 to ensure implementation of EU law.¹²⁷ Enforcement of environmental law is largely left to the Member States.¹²⁸ In light of the budgetary difficulties posed by the addition of the new Member States, the empowerment of civil society may function as a proxy for a more expensive regulatory apparatus.

Individual standing rights under EU law was traditionally quite limited, because the original scope of the EC obligations was framed as an international agreement among sovereign states. Although national courts could bring "preliminary ruling" questions to the European Court of Justice (ECJ) in cases concerning interpretation of the EC Treaty, individual rights to bring cases implicating EU law were not established until the ECJ first held that the EC Treaty could be invoked in Member State courts, provided there was "direct effect" on the plaintiff.¹²⁹

Although in theory the Member States should have control over implementing procedural rules such as standing in the directive context, the ECJ has expanded direct effect doctrine to apply to directives.¹³⁰ This allows the expansion of individual rights to invoke EU law against Member States so as to prevent incorrect, tardy, or non-implementation of directives. In practice, however, strict requirements of "sufficient precision" and "unconditionality" often preclude individual invocation of EU law in domestic courts.¹³¹ The ECJ has also limited

¹²⁴ Hall, *supra* note 36, at 282.

¹²⁵ *Id.*

¹²⁶ *Id.* at 283.

¹²⁷ *Id.* at 287.

¹²⁸ *See id.*

¹²⁹ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1.

¹³⁰ Case 41/74, *Yvonne van Duyn v. Home Office*, 1974 E.C.R. 1337.

¹³¹ HEDEMANN-ROBINSON, *supra* note 12, at 226.

harm to narrowly defined individual economic harm, and Member State standing requirements further complicate the matter.¹³² With respect to civil society, the ECJ traditionally required that NGOs be affected in a way that made them “individually concerned.”¹³³ This meant that NGOs had to be exclusively affected as a closed class.¹³⁴

In response to these limitations, the Commission has made strides toward codifying a Directive on Access to Justice in Environmental Matters, in line with Aarhus Convention treaty obligations. In practice, the draft device would allow individuals and entities to forgo “direct effect” requirements.¹³⁵ However, the draft Directive “has been received very badly” by a number of Member States, who have argued that no additional Directive is necessary for ratifying the Convention;¹³⁶ as a result the draft legislation has been blocked in Council.¹³⁷ In response, some NGOs are considering challenging the EU’s implementation of the Convention before the Compliance Committee.¹³⁸

The proposed Access to Justice Directive calls upon EU Member States to establish “appropriate criteria” for allowing access to justice on the part of the public, in line with Article 9(3) requirements relating to domestic environmental law. With respect to EU environmental law in individual Member States, the draft proposal would grant substantive and procedural review rights regarding “[a]cts and omissions by a public authority.”¹³⁹ To bring a review action, entities and members of the public with standing rights would first notify the relevant public authority for reconsideration of the act in light of the relevant environmental law. Absent such reconsideration, a case could be brought under the expanded framework minimum standards provided for by the Directive. Perhaps most significantly, environmental NGOs meeting certain requirements *need not* meet traditional standing requirements of either “impairment of a right” or “sufficient interest.”¹⁴⁰ The Draft legislation would also allow for cases brought by individuals against other individuals, allowing for remedies traditionally blocked under the

¹³² *Id.* at 231 (clarifying that “direct effect” doctrine determines whether EU law may be invoked in Member State courts, while standing rules determine who may bring cases before the courts).

¹³³ Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 *COLO. J. INT’L ENVTL. L. & POL’Y* 47, 51 (2001).

¹³⁴ *Id.* at 52.

¹³⁵ HEDEMANN-ROBINSON, *supra* note 12, at 319.

¹³⁶ The Law Societies, *The Brussels Office Law Reform Update Series: EU Legislation on Environmental Law* (2006), available at http://www.lawsociety.org.uk/secure/meeting/149366/Item_16-ENVT_Update_January_2006.doc.

¹³⁷ The Law Societies, *The Brussels Office Law Reform Update Series: EU Legislation on Environmental Law*, 7 (2007).

¹³⁸ UNITED KINGDOM PARLIAMENTARY OFFICE OF SCIENCE AND TECHNOLOGY, *supra* note 29, at 1, 4.

¹³⁹ *Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, at 7, COM (2003) 624 final (Oct. 24, 2003), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0624en01.pdf.

¹⁴⁰ *Id.* at 8.

horizontal direct effect doctrine.¹⁴¹ Although the Commission has removed some controversial language in response to Member State criticisms, it appears unwilling to compromise on this issue.¹⁴² This goes beyond the Aarhus Convention requirements, but also creates some limiting criteria for recognizing “qualified entities” accorded privileged standing.¹⁴³

The Commission has included new language ensuring legal remedies for reinforcing the public’s rights under the recent Access to Information and Public Participation Directives, also including standing provisions for enforcing the updated public participation requirements under the Environmental Impact Assessment Directive, and the Integrated Pollution and Control (IPPC) Directive.¹⁴⁴ The new language is comparable to the Draft AJEM Directive, in that it affords privileged access to NGOs beyond the rights of the public.¹⁴⁵

Although the Draft AJEM remains held up indefinitely, some public environmental enforcement rights have been included in the new Directive on Environmental Liability.¹⁴⁶ More specifically, Article 12 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 Article 9(2).

In light of the budgetary difficulties posed by the addition of the new Member States, the empowerment of civil society may function as a proxy for a more expensive regulatory apparatus. In the United States, the EPA has had the authority to conduct inspections and bring suits against states and municipalities since its inception in 1970.¹⁴⁷ The Commission’s responsibility is to ensure Member State transposition of the law, that is, the incorporation of the provisions of an EU directive into a Member State’s domestic law, rather than enforcement of the law, *per se*. For example, the Commission may not conduct inspections or administrative hearings, although it may bring noncompliance issues against the Member States before the European Court of Justice (ECJ) for failing to implement European law.¹⁴⁸ The traditional view of Europe as a preventative ex-ante regulator and the US as an ex-post punitive or judicial enforcer of law may therefore be inapposite in the environmental law context. This is reflected in recent budgetary comparisons between the EPA and the EC’s environmental budget. In 2001, the

¹⁴¹ *Id.* at 19.

¹⁴² *See id.* at 9.

¹⁴³ To become a “qualified entity,” an organization must “be an independent and non-profit-making legal person which has the objective to protect the environment,” “have an organizational structure which enables it to ensure the adequate pursuit of its statutory objectives”; “have been legally constituted and worked actively in environmental protection, in conformity with its statutes, for a period to be fixed by the Member State in which it is constituted, not exceeding three years”; and “have its annual statement of accounts certified by a registered auditor for a period to be fixed by each Member State” *Id.* at 20-21.

¹⁴⁴ HEDEMANN-ROBINSON, *supra* note 12, at 322; Council Directive 2003/35/EC, *supra* note 82, at 20-21.

¹⁴⁵ *Id.* at 323.

¹⁴⁶ Council Directive 2004/35/EC on Environmental Liability, 2004 O.J. (L 143) 56.

¹⁴⁷ HEDEMANN-ROBINSON, *supra* note 12, at 287.

¹⁴⁸ *Id.* at 291.

former spent \$7.8 billion and employed over 18,000 employees, while the EC only spent about 600 million euro in sum for its environmental budget.¹⁴⁹ From this perspective, the EU seems even more dependent on civil society to help bring recalcitrant Member States and private sectors to heel with respect to environmental enforcement. It bears mention that in 2009, various UK courts have begun looking at the question of whether forcing plaintiffs to bear the costs of unsuccessful suits violated the Aarhus Convention's Article 9(4), which provides for access to justice that is not "prohibitively expensive," and the European Commission is also looking at UK infringement of the Environmental Impact Assessment Directive and access to justice.¹⁵⁰

III. NONGOVERNMENTAL ORGANIZATIONS: THE FIFTH ESTATE?

The Aarhus Convention's recognition of the role of nongovernmental organizations reflects the increasing importance of these organizations domestically and internationally.¹⁵¹ The Convention's Preamble specifically recognizes "the importance of the respective roles that individual citizens, nongovernmental organizations and the private sector can play in environmental protection." The Convention's General Provisions also mandate "appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation."¹⁵²

The Convention's definitions further illustrate the key role that nongovernmental organizations play. Under Article 2(5), "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" in environmental decisions, and Article 2(4) defines the public as "one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups." The Convention's definitions directly recognize NGOs as belonging to the "public concerned" in environmental decision-making where they meet the dual requirements of "promoting environmental protection and meeting any requirements under national law."¹⁵³

In underscoring the pro-NGO language of the Convention, legal scholars Lee and Abbot have cautioned against wholesale acceptance of the notion that NGOs are truly reflective of broader public opinion. They assert that the Convention should be read foremost as an environmental (rather than democratic) agreement, and that it may therefore privilege a narrow elitist pro-environmental orientation

¹⁴⁹ *Id.* at 285.

¹⁵⁰ Aidan Thompson, *United Kingdom: Costs in Environmental Cases – Some Encouragement for Claimants*, BARLOW LYDE & GILBERT – ENVIRONMENTAL & ENERGY, Dec. 10, 2009, available at <http://www.mondaq.com/article.asp?articleid=90820>.

¹⁵¹ See generally Charnovitz, *supra* note 47.

¹⁵² Aarhus Convention, *supra* note 1, art. 3(4).

¹⁵³ *Id.* art. 2(5).

over the will of the larger public.¹⁵⁴ Getliffe likewise notes that overly technical scientific language may restrict policy disputes to a narrow community.¹⁵⁵ In discussing the EU Commission, Strauss also notes the tendency for “technocracy to displace democracy.”¹⁵⁶ To the extent that the NGO sector’s technical work informs the decision-making processes, it can also be thought of as an extension of the technocracy, and perhaps an intermediary between the government and the broader public.¹⁵⁷ This intermediary role may also guard against the “tyranny of the majority” through education.

Furthermore, adding another expert voice to the table, even a partisan one, only strengthens the dialog—a collection of partisan voices is fundamental to deliberative bodies and to democracy. In adversarial US legal practice, scientific experts are assumed to be partisans before the court, and their opinions are weighed against one another. In any case, the notion of objectivity in the political arena seems more of an ideal than a practical construct, hence the need for checks-and-balances.

The dangers of an elitist vanguard of environmental NGO are further mitigated by the structure of public participation and consultation proceedings. Public hearings, such as those envisioned under Article 6(7), can help ensure a continuous dialogue with the public at large, regulatory agencies, NGOs, and industry.¹⁵⁸ In practice, these proceedings often entail town-hall style meetings where developers, government officials, and NGOs all present findings to the public. While the interests of NGOs and developers are often diametrically opposed, the same cannot be said of the public, which both benefits from development and suffers its environmental consequences. Both the public and the relevant decision-makers are therefore more likely to balance these interests, rather than side automatically with either side.

Pitting environmental NGOs, often armed with contrary or with novel statistical data (or interpretations of that data), against developmental interests

¹⁵⁴ Lee & Abbott, *supra* note 89, at 86-87.

¹⁵⁵ Getliffe, *supra* note 73, at 109 (citing D. Chambers, *Inhabitants in the Field of EC Environmental Law*, in THE EVOLUTION OF EU LAW 653 (P. Craig and G. de Burca eds., 1999) (noting that broader access has led to increased consultation and negotiation through the use of expert groups as policy-makers, resulting in increased sophistication in lobbying skills, but also to the politicization of scientists and epistemic communities).

¹⁵⁶ Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa*, 12 COLUM. J. EUR. L. 645, 683 (2006).

¹⁵⁷ Tanya D. Sobol, *An NGO’s Fight to Save Ukraine’s Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 COLO. J. INT’L ENVTL. L. & POL’Y 123, 136 (2005) (“NGOs are closer to the people affected by environmental degradation and better able to represent them than their governments.”).

¹⁵⁸ Some legal environmental NGOs, such as the Environmental Management and Law Association (EMLA) in Budapest, do not initiate environmental cases, taking on only such disputes as are requested by members of the public. The idea is to maintain proximity to and reinforce the connection with the public. See Svitlana Kravchenko, *Citizen Enforcement of Environmental Law in Eastern Europe*, 10 WIDENER L. REV. 475, 477 (2004) for a discussion of how environmental “public interest” organizations have wrestled with decisions regarding the scope of their activities in eastern Europe.

before decision-makers and the general public functions as a check against traditionally lopsided processes less likely to take diffuse or local environmental consequences into account. The effect is a better-informed public and greater accountability and pressure on developers and policy-makers to explore more environmentally-conscious alternatives. Secondary NGO/nonprofit expertise can help ensure that the methodologies of risk assessment are sound. Public participation therefore naturally implicates issues of government legitimacy and accountability. Since public participation proceedings precede and inform the decision-making process, policy-makers are also in a better position to mitigate or prevent the classic economic dilemma of negative externalities, where industry neglects to internalize the costs of its damage to the environment.

While the view of the press as a “fourth estate” is commonly repeated, the relationship of the press to power has always been indirect. The benefit in a democracy of the press depends on its ability to motivate voters to engage their representatives themselves and to strengthen accountability. Although such abilities are also necessary to broad-based coalition building and grassroots campaigns—both of which seem increasingly important to NGO activity—the NGO sector’s relationship to power is often a more direct one than that of the press. NGOs may in some cases bring lawsuits directly, lobby government directly, and even draft legislation. In this sense then, they are more of an “estate” than the press. NGOs also may have expertise in environmental issues that the press usually lacks, and they often work directly with clients. In cases where individuals cannot afford suit for fear of excessive legal costs, NGOs are often in a better financial position to assume the risks of environmental litigation.

Assuming for a moment that NGOs are less beholden to large financial interests than the media, they may be better positioned to provide a counterweight to narrow, but perhaps disproportionately influential large financial interests on behalf of more dispersed interests.¹⁵⁹ This role may even play out on the supranational or international level through the increasingly transnational character of NGOs and their networks. Part of Weiler’s lament on the EU’s “democratic deficit” is that the lack of Europe-wide parties presents accountability and legitimacy problems.¹⁶⁰ Despite the relative insularity of the European Commission to members of the public,¹⁶¹ it is nonetheless subject to major lobbying efforts, and therefore vulnerable to capture by the industries it aims to be regulating.¹⁶² NGOs and their transnational networks may help with this accountability gap, either through direct lobbying efforts or through grassroots campaigning efforts and technical expertise. In a transnational context, local NGO expertise may be better situated to assess the environmental risk of development

¹⁵⁹ Lee & Abbott, *supra* note 89, at 105 (describing NGOs as “an important counterweight to the presence of industry” in addressing the “diffuse nature of ‘environmental interests’”).

¹⁶⁰ Weiler, *supra* note 75, at III.

¹⁶¹ Strauss, *supra* note 156, at 670 (comparing the accessibility of Congress to that of the Commission).

¹⁶² Getliffe, *supra* note 73, at 112 (describing the Commission as “an attractive institution to lobby”).

projects. For example, BancAmerica securities backed out of investing in the Chinese Three Gorges Dam project, in response to pressure from environmental and human rights groups.¹⁶³

NGOs also have an increasingly important relationship to international law, multilateral environmental agreements (MEAs), and their enforcement. Civil society can help trigger compliance investigations, especially where parties to international enforcement are often unwilling to bring complaints against other parties due to comity concerns.¹⁶⁴ Various scholars have addressed the role of NGOs in the international legal context. Szell discusses the important role of the public and NGOs where MEA secretariats are not given “triggering power” to initiate compliance investigations, and in positively impacting the quality of MEA reporting.¹⁶⁵ Charnovitz notes that aiding enforcement of international law is the latest development in the evolution of NGOs.¹⁶⁶ Finally, Hobe discusses in detail how NGOs are intimately involved with “pre-normative” agenda and standard setting, as well as treaty-making.¹⁶⁷

A. *The Aarhus Convention’s Compliance Mechanism*

The Aarhus Convention includes a formal compulsory dispute settlement mechanism and general reporting requirements, as well as a system for compliance review with some novel elements. The only compulsory dispute resolution requirement in the Convention is negotiation, which may arise upon the request of one Party vis-à-vis another Party. In the case of a dispute among the negotiating parties regarding the interpretation or application of the Convention, the dispute may be submitted to either arbitration or the International Court of Justice, or may be resolved “by any other means of dispute settlement acceptable to the parties to the dispute.”¹⁶⁸ Submission requires the consent of both parties. In such cases, other State Parties may intervene in the proceedings with the consent of the relevant tribunal.¹⁶⁹ Non-performance of Convention obligations rarely affects another State Party, as the aim of the Convention “is to impose obligations on

¹⁶³ Energy Probe Research Foundation, *Who’s Behind China’s Three Gorges Dam*, List of Financiers, http://www.eprf.ca/pi/documents/three_gorges/who.html#us (last visited Feb. 08, 2010).

¹⁶⁴ A.B.A. Continuing Legal Educ., *MEA Enforcement and Compliance Meeting Bulletin. A Summary Report of the High-Level Meeting on Compliance With and Enforcement of Multilateral Env’tl Agreements*, SL098 ALI-ABA 461, 465 (2006).

¹⁶⁵ *Id.*; see also Thomas Buergenthal, *The U.N. Human Rights Committee*, Max Planck UNYB 5, at 356 (2001) (discussing the inadequacy of reporting with respect to international human rights treaty obligations).

¹⁶⁶ Charnovitz, *supra* note 47, at 355.

¹⁶⁷ Stephan Hobe, *The Role of Non-State Actors, in Particular of NGOs, in Non-Contractual Law-Making and the Development of Customary International Law*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING, 319, 329 (Rüdiger Wolfrum & Volker Röben eds., Springer 2002).

¹⁶⁸ Aarhus Convention, *supra* note 1, art. 16.

¹⁶⁹ *Id.* annex II(15). However, the Convention makes no mention of the possibility for *amicus curiae* briefs for non-State parties.

States in respect of their own citizens.”¹⁷⁰ As a result, the dispute settlement had, as of 2007, never been used.¹⁷¹ Judicial procedures would lead only to an assessment of a State’s failure to comply, and Parties therefore have little interest in pursuing such cases.¹⁷²

In practice, compliance issues are handled under the Convention’s Compliance Committee mechanism. This mechanism grew out of Article 15 of the Convention: “The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention.” The first Meeting of the Parties led to a decision on review of compliance and election of the first Compliance Committee.¹⁷³ Subsequent meetings by the Compliance Committee led to establishment of procedural rules governing the Committee’s works.¹⁷⁴ Having been allowed some discretion to develop its own agenda, the Compliance Committee has worked out its procedures by building on its own experience,¹⁷⁵ while slowly developing something akin to a precedential jurisprudence. Additional rules on annual country reports on compliance have also been adopted. The process mandates that signatory parties use transparent and consultative procedures for drafting the reports.¹⁷⁶

The composition of the Committee reflects the significance the Convention accords to the NGO sector. In addition to nominations from State parties and signatories, NGOs may submit nominations to the Meeting of the Parties, who elect members by consensus or secret ballot.¹⁷⁷ Committee members are chosen to serve in a personal capacity, rather than in the interests of their home countries. The Committee has the power to consider any of three types of statements concerning compliance. These three submissions include referrals by the Secretariat, submissions by the signatory Parties, and most significantly—direct

¹⁷⁰ Veit Koester, *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, 179, 187, in *MAKING TREATIES WORK, HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL* (Geir Ulfstein ed., Cambridge Univ. Press 2007).

¹⁷¹ *Id.* at 188.

¹⁷² *Id.* at 189.

¹⁷³ ECOSOC, ECE, Meeting of the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Annex to the Addendum to the Report of the First Meeting of the Parties: *Decision I/7 Review of Compliance*, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004) [hereinafter *Decision I/7 Review of Compliance*], available at <http://www.unece.org/env/pp/compliance.htm>.

¹⁷⁴ Veit Koester, *The Compliance Committee of the Aarhus Convention, An Overview of Procedures and Jurisprudence*, 37 *J. ENV. POL. & LAW* 83, 85 (2007).

¹⁷⁵ *Id.* at 92.

¹⁷⁶ Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 *COLO. J. INT’L ENVL. L. & POL’Y* 1, 32 (2007).

¹⁷⁷ Decision I/7 on Review of Compliance, *supra* note 173.

submissions from the public.¹⁷⁸ This is the first provision of its kind in any MEA.¹⁷⁹

Both the Secretariat and the Compliance Committee may request further information regarding a compliance issue, but the Committee alone has the power to examine, report on, assess, and make recommendations to the Meeting of the Parties.¹⁸⁰ The periodic Meeting of the Parties ultimately decides on adoption of Compliance Committee reports, and appropriate measures for handling non-compliance issues. The Meeting may request compliance strategies and reporting on implementation from parties.¹⁸¹ In line with the first pillar of the Convention, the Compliance Committee conducts open meetings, and makes available all draft findings and recommendations available to the public on the web.¹⁸²

Where signatory party law or practice clearly contravenes obligations under the Convention, the Committee includes a number of suggestions for compliance.¹⁸³ The Committee is in contact with the signatory party throughout its compliance-related activities, and does not commonly release a finalized version of its findings and recommendations until the party has had an opportunity to comment. The result has been consistent, unanimous adoption of the findings and recommendations at the periodic meetings of the parties.¹⁸⁴

IV. AARHUS PRINCIPLES AS DEMOCRATIC INSTITUTION BUILDING IN THE DEVELOPING WORLD

Whether Aarhus truly signals a major democratic institutional change at the EU level is at best highly questionable, although Europhiles have little reason to discourage such notions. Brussels would no doubt happily promote the adoption of Aarhus principles as a remedy to the oft-maligned democratic deficit at the EU institutions.

Even after Aarhus, however, the Commission's decision-making apparatus is rather well-insulated from direct public comment.¹⁸⁵ Strauss also notes that the EU has rejected any mandatory compulsion to consult the public on the part of the European Commission.¹⁸⁶ Although the EU now claims full compliance with the Aarhus Convention, the Convention will likely affect Member State compliance

¹⁷⁸ Elisa Morgera, *An Update on the Aarhus Convention and its Continued Global Relevance*, 14 REV. OF EUR. COMM. & INT'L ENV. L. 138, 140 (2005).

¹⁷⁹ *Id.* at 141; *see also* Kravchenko, *supra* note 176, at 18 (noting the history of public compliance communications in human rights instruments).

¹⁸⁰ Morgera, *supra* note 178, at 141.

¹⁸¹ *Id.*

¹⁸² Koester, *supra* note 174, at 85.

¹⁸³ *Findings and Recommendations – Armenia I*, *supra* note 44, ¶ 45 (listing an exhaustive list of recommendations for Armenian compliance and requesting provision of implementation information).

¹⁸⁴ Morgera, *supra* note 178, at 142.

¹⁸⁵ Getliffe, *supra* note 73, at 108 (noting that scholars have argued that the EU itself would be rejected if it were to apply for EU membership because of its undemocratic organizational structure).

¹⁸⁶ Strauss, *supra* note 156, at 666.

with EU law more than democratization at the EU level.¹⁸⁷ But the transnational reach of civil society, an empowered grassroots environmental culture has the power to directly affect EU institutions. In addition, Aarhus principles have the potential to result in better governance at the Member State level and greater understanding of and appreciation for democratic practices in the newest Member States. In turn, public opinion of the European project benefits, with important implications in the new Member States, where many citizens have yet to reap the benefits of EU accession.

The democratic spirit of public consultation in environmental decision-making is significant, and the Aarhus Convention undoubtedly also has an implicit agenda of democratic institution building. In addition to a more responsive environmental governance apparatus, the promotion and adoption of procedural democratic practices have the potential to lead to a fundamental re-evaluation of the role of the citizen and its relation to the state.

A. Implementing the Aarhus Convention

A closer look at some of the difficulties states have and may expect to encounter while implementing the Convention offers insight into the current status of environmental governance. With respect to Western Europe, perhaps the biggest potential conflict lies in the access to justice provisions. A recent UK Parliamentary report identifies cost as the most significant barrier to accessing justice, specifically the risk of high legal costs.¹⁸⁸ Indeed, a recent pending case before the Aarhus Committee would challenge the UK's practice of awarding court costs to a defendant in a failed attempt to secure an injunction in a nuisance action.¹⁸⁹ The Parliamentary report also identifies the lack of civil penalties and interim relief, a lack of judicial expertise with environmental law, and restrictive standing requirements (especially with respect to NGOs) as common problems.¹⁹⁰ Aine Ryall has noted "well-documented" problems enforcing EU environmental law, such as problematic implementation of the Environmental Impact Assessment (EIA) Directive.¹⁹¹

¹⁸⁷ See generally Rodenhoff, *supra* note 8, for an in-depth discussion of the effect of the Convention on Community Law.

¹⁸⁸ UNITED KINGDOM PARLIAMENTARY OFFICE OF SCIENCE AND TECHNOLOGY, *supra* note 29, at 4.

¹⁸⁹ See Communication to the Compliance Committee, ACC/C/2008/23 (United Kingdom), available at <http://www.unece.org/env/pp/compliance/C2008-23/communication/Morgan.v.HO.order.21.12.2007.pdf> (asserting on behalf of losing plaintiffs that judicial awards of court costs should be reconsidered in the environmental context as inconsistent with Article 9(4)'s requirements that access to justice be "not prohibitively expensive").

¹⁹⁰ *Id.*

¹⁹¹ See Aine Ryall, *Implementation of the Aarhus Convention Through Community Environmental Law*, 6 ENVTL. L. REV. 274, 274 (2004) (discussing "well-documented" problems enforcing EU environmental law at the Member State level, including problematic implementation of the EIA Directive).

In Italy, decisions regarding standing rights have been delegated to a government body, requiring associations to operate in at least five regions for standing requirements.¹⁹² This rule, coupled with the Council of State's case law restricting standing to organizations specifically recognized in law, may severely limit NGO operation at the regional level.¹⁹³ Another potential Aarhus conflict is with the Italian Council of State's narrow definition of environmental information.¹⁹⁴ Denmark has made efforts to improve its access to justice scheme by creating new rights of appeal, and by requiring that all written legal decisions include information on how and where to appeal.¹⁹⁵

Efforts at implementation of the Aarhus convention in the former-Soviet satellite nations reflect both the impediments to Aarhus adoption in the developing world, as well as the potential environmental and collateral democratic benefits. Whereas some of the concepts underpinning the Convention are already fundamental to environmental governance in Western Europe and North America, the Aarhus methodology may be quite foreign to transitional democracies.¹⁹⁶ As explored above, the Aarhus agreement appears more of a repackaged set of concepts analogous to existing US legal practices than a radical departure from American law. By contrast, for developing nations with less developed legal infrastructures, adoption of Aarhus-like principles may in fact signal a major paradigm shift. The make-up of the cases that have been brought before the Compliance Committee reflect the novelty of these concepts in the transitional democracies—the bulk of the early cases have been comprised of compliance issues in Eastern Europe and Central Asia, although an increasing number of cases have involved western European countries, as well.

The former-Soviet satellite states' political and legal systems privileged the state over the individual, and were not accountable to the public at large in any meaningful way, also often lacking an independent judiciary.¹⁹⁷ The broad tradition of state secrecy in these countries led to a number of state secrecy laws being passed soon after the emergence of freedom of information legislation, suggesting that old habits die hard.¹⁹⁸ For states with long traditions of secrecy, allowing access in the relatively narrow area of environmental information may

¹⁹² Andrea Antonelli & Andrea Biondi, *Implementing the Aarhus Convention: Some Lessons from the Italian Experience*, 5 ENVTL. L. REV. 170, 175 (2003).

¹⁹³ *Id.* at 176.

¹⁹⁴ *Id.* at 173.

¹⁹⁵ Alida Ban, *Environmental Protection: Public Participation and Access to Information*, in CROATIAN ACCESSION TO THE EUROPEAN UNION: INSTITUTIONAL CHALLENGES 223, 236-37 (Katarina Ott ed., 2004), available at <http://www.ijf.hr/eng/EU2/Ban.pdf>.

¹⁹⁶ Lee & Abbott, *supra* note 89, at 92.

¹⁹⁷ See generally Tatiana Zaharchenko & Gretta Goldenman, *Accountability in Governance: The Challenge of Implementing the Aarhus Convention in Eastern Europe and Central Asia*, INT'L ENV. AGREEMENTS: POLITICS, LAW AND ECONOMICS 229, 241 (2004).

¹⁹⁸ *Id.* at 235.

represent a compromise or intermediate step to broader actions toward transparency.¹⁹⁹

Ban notes that the division of environmental competences among the various Croatian institutions presents a challenge that will be exacerbated by EU accession.²⁰⁰ Because the Aarhus Convention impacts a number of different areas of law (e.g., administrative, environmental) and government bodies, Aarhus implementation will further complicate the picture. Other complicating factors include a lack of quality statistical data,²⁰¹ a lack of scientific education targeting environmental concerns,²⁰² and a general lack of awareness of Aarhus-like principles necessary for effective public participation.²⁰³ For many countries, the concept of bringing suit against the government is completely novel.²⁰⁴

In some cases, compliance efforts in the former eastern bloc have surpassed that of the western European signatories. The UK Parliamentary report notes that a number of “Aarhus centers” have opened in the region to disseminate environmental information, raise public awareness, and even to offer legal advice to the public.²⁰⁵ Such examples may indicate that the Compliance Committee’s efforts are proving effective, or that the novelty of the Aarhus pillars has required entirely new institutions in these countries. In the case of Estonia, financial support and expertise from Denmark led to a successful implementation plan. The plan included trainings for officials, a special guide detailing the effect of the Convention on everyday activities, and a national internet portal for public comment on environmental regulations.²⁰⁶ With respect to access to justice, the Estonian courts have read Article 9 obligations rather broadly, allowing standing not only for environmental NGOs, but even for *ad hoc* protest groups.²⁰⁷

B. Aarhus Principles in the Developing World

The principles of access to information, access to justice, and public participation have important implications beyond Europe and Eurasia. Although procedural rights are no panacea, they have great potential to address a number of problems often associated with developing countries. These problems include: a lack of financial resources, a lack of accountability and trust in government,

¹⁹⁹ See <http://www.unece.org/env/pp/pubcom.htm> for a list of the various submissions by the public alleging non-compliance by country.

²⁰⁰ Ban, *supra* note 195, at 228 (“The coordination of all the bodies and a clear delimitation of their activities within given competences will be one of the greatest challenges in the achievement of an effective institutional organization for environmental protection, at national, regional and local levels.”).

²⁰¹ *Id.* at 230.

²⁰² *Id.* at 233.

²⁰³ *Id.* at 238.

²⁰⁴ See Kravchenko, *supra* note 158, at 475.

²⁰⁵ UNITED KINGDOM PARLIAMENTARY OFFICE OF SCIENCE AND TECHNOLOGY, *supra* note 29 (highlighting the Center in Yerevan, Armenia as a model for the region).

²⁰⁶ Ban, *supra* note 195, at 238.

²⁰⁷ Veinla, *supra* note 5, at 330.

corruption, difficulty in enforcing environmental law at the regional or local level, and autocratic governments.

For example, China's environmental laws are comparable to and patterned after those found in the developed world, but the government's ability to enforce them is quite limited. Chinese local governments often have a financial interest in the growth of industry—either directly (by owning the facilities), or indirectly (as beneficiaries of tax revenues). Recent developments in the Chinese legal system aim to address systemic issues, reflecting an understanding of the gravity of the pollution problem in China by the Chinese authorities.²⁰⁸ In 2006, the Chinese State Environmental Protection Agency passed legislation to compel disclosure of certain environmental information upon public request.²⁰⁹ A law requiring the government to solicit the impact on the public in environmental impact assessment reports has also been passed. And the number of citizens' suits in China continues to increase.²¹⁰

Other efforts to promote environmental proceduralism have emphasized a tailor-made approach, rather than a one-size-fits-all solution, à la Aarhus. Bruch, in advocating for procedural rights, suggests that efforts in Africa should focus on adopting a uniquely African approach to environmental procedures, in light of the continent's unique socio-political circumstances.²¹¹ Other efforts, such as the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (ISP), has promoted a strategy aimed at creating local governmental support for public participation through recommendations and non-binding commitments.²¹² Such approaches may be more accommodating to local practices, and therefore more politically feasible and effective. Rose-Ackerman and Halpaap note that parliamentary systems, in particular, have little incentive to create procedural systems of rights. By contrast, they note that legislatures in presidential systems with multiple "veto points" or checks and balances are more likely to give outside interests a legally protected role so that subsequent presidents have less power to undermine the laws.²¹³ A tailor-made approach to adopting procedural rules may help take into account different features of local governments. Countries where institutional interests are in upheaval or non-existent may be fertile ground for readily adopting Aarhus-like features. For example, the South African Constitution grants broad standing rights for challenging a right to a healthy environment and access to information.²¹⁴

²⁰⁸ Finemore et al., *supra* note 6, at 434.

²⁰⁹ *Id.* at 435.

²¹⁰ *Id.*

²¹¹ See Bruch, *supra* note 7, at 7 (suggesting, for example, that African access to information procedures might benefit from a strong environmental educational component).

²¹² Organization of American States, *Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development* 48 (2001), available at http://www.oas.org/dsd/PDF_files/ispenglish.pdf.

²¹³ Rose-Ackerman & Halpaap, *supra* note 13, at 14.

²¹⁴ William Onzivu, *International Environmental Law, the Public's Health, and Domestic Environmental Governance in Developing Countries*, 21 AM. U. INT'L L. REV. 597, 673 (2006).

In addition to the additional “eyes and ears” and cost savings that a mobilized civil society may mean to effective monitoring of environmental law, procedural rights empower the public in a very straightforward way. Democracy, which is often thought of in somewhat abstract terms, is distilled into a very basic set of rights. Democracy in practice, or democracy with a small “d,” helps address a fundamental disconnect between the public and their governments. In other words, there is an inherent value in a broader awareness on the part of the public of its ability to access and potentially influence the practice of governance.²¹⁵ Procedural rights are part and parcel of democracy in practice—of the town-hall meeting, of letters to the editor of the local newspaper, of parent-teacher association meetings, and of a sense of communal responsibility and civic republicanism that de Tocqueville admired so much in 19th century America.

Frances Fukuyama, perhaps one of the better-known experts on promoting democracy abroad, has acknowledged the key importance that local and international civil society groups had on promoting the so-called “fourth-wave” of democracy in the former Soviet satellite nations. He also claims that one of the most important preconditions for a democracy is a strong, local demand.²¹⁶ The introduction of basic procedural rights may be a catalyzing factor toward broader adoption of democratic practices.

CONCLUSION

The adoption of Aarhus principles offers new possibilities for cooperation among formerly insulated bureaucracies, the public and NGO sector. This cooperation has been facilitated by public access to new inventories of environmental information, and by greater accountability through broader access to justice.²¹⁷

Empowering the public through the democratic process allows progress toward the ever-elusive democratic ideal. The empowerment of employees, long recognized in the corporate context as an important component of success,²¹⁸ is a closely analogous concept, and is portable and malleable enough to be adaptable to broader societal systems and governance structures. As in the corporate context, the creation of accountability mechanisms and channels for the flow of information need not be feared as representing a majoritarian revolution that threatens to topple what may often be fragile systems of governance. Rather, these mechanisms contribute to more stable, accountable, and ultimately more successful leadership.

²¹⁵ See Lee & Abbot, *supra* note 89, at 97-98 (noting that the British House of Lords has strongly asserted broader public participation rights in the EIA process, going far beyond technical NGO expertise to also require public opinion, “however misguided or wrongheaded its views may be.”).

²¹⁶ Francis Fukuyama, Professor of Int’l Political Economy, Johns Hopkins University, *Do We Really Know How to Promote Democracy?* Remarks before the New York Democracy Forum (May 24, 2005).

²¹⁷ See, e.g., Zaharchenko & Goldenman, *supra* note 197, at 242.

²¹⁸ See Hovland, *supra* note 74, at 57.