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DRAFT PAPER ON:

**Participatory and Procedural Rights in Environmental Matters: State of Play
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PARTICIPATORY AND PROCEDURAL RIGHTS IN ENVIRONMENTAL MATTERS: STATE OF PLAY

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1 OUTLINE

In this paper I identify the support in international law for the notion of participatory and procedural rights in environmental matters. The material considered consists of international agreements, policy documents and jurisprudence of international fora mandated to review compliance by states with international obligations. There are essentially two branches of international law on which the recognition of these rights have developed: *environmental law* and *human rights law*. After a short outline, the conclusions are presented in section 2. This is followed in section 3, by a screening of the international environmental and human rights agreements, policy-relevant documents etc. on which the conclusions in section 2 are based.

The debate on participatory and procedural rights was triggered by the 1992 *Rio Declaration on Environment and Development*, although it was not the first international policy document to address active participation of members of the public in environmental decision-making. Yet, Principle 10 of the Declaration made a significant impact on international environmental law and policy:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

While not legally binding, through the Rio Declaration more than 150 states approved of public participation as an essential feature of environmental governance. The three broad issue-areas for public participation in environmental matters identified in Principle 10 – public access to information, public participation in decision-making proceedings, and access to review procedures and remedies (“access to justice”) – are closely linked: While access to information can be seen as a prerequisite for meaningful participation, access to justice is, inter alia, a means to enforce the rights to access to information and participation. In this report, they will be referred to generically as participatory and procedural rights, thus also including access to information.

Participatory and procedural rights in environmental matters had been subject to debate and legal developments in national contexts before the time around the 1992

Rio Conference, but, with the exception of some elements of human rights law, they had not been much considered in international law and policy. The change in the 1990s showed that environmental governance even in national contexts could no longer be considered a national concern only. The national contexts thus became internationalised. The increasing attention given to participatory and procedural rights in environmental contexts also confirmed important links between environmental governance and human rights.

Several multilateral environmental agreements adopted in the early 1990s and thereafter would somehow endorse public access to information and public participation, although the obligations for the parties would differ between the agreement. While a few treaties set minimum standards for access to information, public participation and access to review procedures in environmental matters, others merely require the promotion or facilitation of public awareness and participation in general terms.

The enhancement of public access to information and public participation in international environmental agreements and policy documents was paralleled by an increasing attention in the 1990s to environmental matters in international human rights law. At the time, a few international human rights treaties, applicable to some regions, already set out a human right related to the environment. In other regions, existing human rights treaties that did not explicitly refer to the environment were nevertheless construed so as to apply to environmental matters as well.

2 STATE OF PLAY

2.1 Participatory and Procedural *Rights*?

In mapping out participatory and procedural rights in environmental matters, it is evident that international law provides for different rights in different parts of the world. Some environmental agreements and human rights treaties provide rights for members of the public to access to information, participation in decision-making and access to review procedures. Other agreements, while referring to access to information and public participation, may not necessarily provide for such a *right*. This is the case e.g. when the references to access to information and public participation give a greater leeway for the parties in deciding not only how, but also when or even *if* public access to information or public participation should actually be granted members of the public. However, even when an agreement does not provide for a right to access or participation, it may nevertheless support rather than be neutral or opposing the *notion* of participatory and procedural rights in environmental matters.

How then, should the concept of participatory and procedural right be approached? A straightforward right-based approach is usually found in human rights contexts, but, with few exceptions, the term “right” hardly occurs in international environmental agreements, not even when providing for access to information and public participation. Thus, participatory or procedural rights cannot only be construed in cases where international agreements are drafted like human rights instruments, i.e. as “everybody has a right to...”. Not even the most advanced environmental agreement

on participatory rights, the *1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice* (Aarhus Convention), is drafted in this way. To be sure, the Aarhus Convention requires that each party shall “guarantee the rights” of access to information, public participation and access to justice “in accordance with the provisions of this Convention.”¹ While this reflects the right-based approach of the human rights treaties, the operative provisions set out that the parties “shall ensure that...” members of the public have access to information or to a review procedure, or “shall apply the provisions” concerning public participation. So, not following the standard of human rights instruments does not as such prevent an agreement from providing participatory and procedural rights in environmental matters.

Another possible way of identifying to what extent an agreement provides rights would be to consider whether there are procedural arrangements established so that these rights can somehow be claimed before an international body. This would require an international complaint procedure, whether a court or a committee, to which members of the public have access. Several human rights instruments provide for such procedures, but only few environmental agreements establish complaint mechanisms or review procedures that are available for members of the public. While such procedural arrangements are likely to increase the effectiveness of agreements and to ensure the rights in question, this, too, seems to be a too narrow an approach to identify the support for participatory and procedural rights in international law.

Yet another way to conclude whether international agreement gives a right for non-state actors would be to consider its impact and application in national contexts. However, the effect of international agreements in domestic fora depends on judicial traditions and constitutional principles, that differ from one jurisdiction to the next. In some states, duly approved agreements in force can be invoked and applied by national courts and authorities, whereas in other jurisdictions domestic courts and authorities are either reluctant or even prevented from doing so. Thus, whether international law provides a right cannot be measured by the way the treaty provision as such is considered by national fora either. It must be considered in yet another way.

The method employed here is to consider what is required by a party to an agreement in order to comply fully with it. In other words, can the agreement be complied with by a party without ensuring members of the public concerned access to certain information, an opportunity to be part of a decision-making process, or access to certain review procedures? Relevant for the question is then whether the agreement sets out the duty of the parties in a sufficiently precise way. Different drafting may reflect different ambitions and approaches, but the same wordings can be construed differently in different contexts and regimes, depending on how the parties agree to interpret the provision in question or how it is interpreted by the international reviewing body (court, committee). Acknowledging that environmental agreements and human rights treaties allow for different degrees of discretion for the parties in providing access to information and public participation, in many cases effective compliance with provisions on access to information and public participation is not possible unless the members of the public can actually claim to obtain the information in question or to take part of the decision-making. However, even when such a claim

¹ Aarhus Convention, art 1.

can be construed, each party would still retain some discretion in designing the forms and procedures for decision-making and public participation.

2.2 Support for Access to Information, Public Participation and Access to Justice

Access to information, public participation in decision-making and access to justice pertain to numerous contexts, data, procedures and matters. The 1992 Rio Declaration sets the policy direction for public participation as a part of environmental governance, but it does not specify – nor exclude – any particular form of environmental decision-making for public participation. Nor does it provide any minimum standard for such participation or design the processes.

The support for the three “pillars” – access to information, public participation and access to justice – takes different forms in different environmental agreements: geographically, in the degree of details and ambitions, and in the scope of procedural issues provided for. Several agreements refer both to access to information and public participation, thus confirming the close link between these aspects. Other agreements refer only to public access to information, and yet others to all the three elements, thus including access to justice. The close connection between access to information and public participation is also revealed in the jurisprudence of human rights bodies. The European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human & Peoples’ Rights all make links between these two issues.

The brief sketch of participatory rights in environmental matters in section 3 shows that while there is today some support in international law for participatory and procedural rights in environmental matters, to a considerable degree the developments have taken place regionally. The strongest support for such rights in international law is found in Europe, but significant support is also provided in North America and Africa. In these three regions, participatory and procedural rights are set out in environmental agreements and the regional human rights regimes have given significant inputs for the development of participatory and procedural rights in environmental matters. In South America, the support for participatory and procedural rights is weaker than in Europe and North America, and is based essentially on Inter-American human rights regime. The weakest support in international law for participatory and procedural rights is in the Pacific and Asia, where there has not been much development beyond the global regimes at all.

Without ignoring the regional lacunae just mentioned, several environmental agreements considered in section 3 somehow support the general notion that members of the public should be informed, be able to make their own views and, in some treaties, be able to express these views in decision-making processes. While some environmental agreements with global reach that endorse access to information and public participation in decision-making essentially aim at improving public awareness about environmental problems and public engagement and participation in these fields, others go further and actually oblige the parties to ensure public access to information and public participation in matters covered by the agreements. Even though they are far from the standard of the Aarhus Convention or the jurisprudence of the European Court of Human Right, interpreted in light of the Rio Declaration and

other policy documents they may set the starting points for more progressive norms on public participation and access to information.

2.2 Access to Information

Of the three “pillars”, public access to information occurs most frequently as an element in environmental agreements. The information to be made publicly available depends on the scope and purpose of the agreement itself. In some contexts, the information concerns a particular procedure or installation, as in the case of environmental impact assessment procedures, and prevention and emergency planning for hazardous activities (including nuclear activities). In other cases, the information concerns particular substances, for instance hazardous chemicals or genetically modified organism. Yet other information on environmental matters to be publically available may concern legislation, decisions by administrative authorities or judgements by courts.

The Aarhus Convention provides that just about all kinds of environmental information, which is defined in the Convention, should be publically available on request, subject only to certain grounds for refusals. It also requires, in particular with its *2003 Protocol on Pollutant Release and Transfer Registers (PRTR Protocol)*, that certain information is made publically available regardless of specific requests. This implies a kind of “right-to-know”, which is also reflected in the jurisprudence of the European Court of Human Rights with respect to hazardous activities.²

Considering the support for access to environmental information in several environmental agreements with global and regional application, in the jurisprudence of regional human rights bodies (European Court of Justice, Inter-American Commission on Human Rights and the African Commission on Human & Peoples’ Rights) and in the UN International Law Commission’s *2001 Articles on Prevention of Transboundary Harm from Hazardous Activities (ILC Articles)*,³ this appears to be the form of participatory and procedural right for which there is most support in international law. It also makes good sense in any further efforts of expanding participatory and procedural rights in environmental matters to build on the right to access to information, since no meaningful public participation can take place without due access to information.

2.3 Public Participation in Decision-making

As with “information”, the concepts of “participation”, “consultation” and “decision-making” refer to numerous contexts and forms for its realisation. While less provided for in environmental agreements than public access to information, there is some support also in the agreements of global scope. Of these agreements, the *1994 UN Convention to Combat Desertification (UNCCD)*, *2002 Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention)* and the *2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity* are most supportive

² European Court of Human Rights in, *Guerra et al v Italy*, 14967/89 of 19 February 1998.

³ UN International Law Commission “Draft Articles on Prevention of Transboundary Harm from Hazardous Activities”, (2001) GAOR 56th Session Supp 10, 370.

to public participation, whereas the *UNFCCC* and the *Convention on Biological Diversity* (CBD) only provide for public participation in more general terms. The considered IAEA conventions concerning nuclear activities, while requiring that certain information is made publically available, are silent on public participation (even the references to environmental assessment are without mentioning of public participation). Moreover, the ILC Articles set out a weaker duty to provide for participation than to provide access to adequate information.

The *Aarhus Convention* is the most advanced environmental agreement also in providing for public participation, by setting relatively detailed minimum standards for different participatory procedures. Whereas the mentioned global instruments and the regional environmental agreements for Africa and South-east Asia refer to public participation only in general terms, the Aarhus Convention prescribes e.g. that the public must be informed at an early stage in decision-making, and the kind of information to be made available as a minimum in such procedures.

It is noteworthy that within the different human regimes, without explicitly referring to public participation, provisions providing for different recognised rights have been construed as also including a right to be duly consulted or able to be part in decision-making procedures in environmental matters. Thus, a right to be able to participate in decision-making is considered a part of the right to respect for private and family life by the European Court of Human Rights, an element of the right to property by the Inter-American Commission of Human Rights, and as included in the right to a satisfactory environment by the African Commission on Human & Peoples' Rights.

Despite the references in the global agreements, there is currently less support for a right to participation in environmental decision-making than for access to information, worldwide. The different regional agreements and the jurisprudence of some human rights bodies nevertheless reveal some support for such participatory and procedural rights in most parts of the world. As already mentioned, the support for such rights in international law is the weakest in the Pacific and Asia.

2.4 Access to Justice

Contrary to access to information and public participation, as far as global treaty regimes are concerned the strongest support for access to justice in environmental matters is found in human rights regimes rather than in multilateral environmental agreements. The *1948 UN Declaration of Human Rights* (UDHR) and the *1966 International Covenant on Civil and Political Rights* (ICCPR) as well as the regional human rights accords provide for a right to a fair trial that applies also to environmental matters.

In addition to the human rights treaties, global and regional, a right to access to justice is provided for also in the *Aarhus Convention* and the *North American Agreement on Environmental Cooperation*. Both agreements require that the parties ensure certain procedural guarantees or minimum standards, and remedies, and these requirements are set with some degree of details. Outside Europe and North America, the only environmental agreement providing for access to justice, but without any detail

whatsoever, is the 2003 *African Nature Conservation Convention* (although not yet in force).

2.5 Transboundary Rights and Non-discrimination

Considering the transboundary risks and impacts of activities harmful to health and the environment, the participatory and procedural rights described should apply also across state borders. Several international environmental agreements and policy documents of global and regional scope recognise the principle of non-discrimination in environmental contexts. There is also some support for the principle of non-discrimination in international human rights law, to the extent that it generally prohibits discrimination on any grounds.

In essence, non-discrimination means that a state must apply its national standards on access to information, public participation or access to justice also across state borders. Thus a person outside the state of the activity shall be granted no less favourable rights to access information, take part in decision-making or accessing a review procedure in the state of the activity than the equally affected subjects in that state.

While important both practically and from a principle point of view, non-discrimination is a supplementary rather than alternative approach in international law to providing for participatory and procedural rights in environmental matters. In itself, the principle of non-discrimination does not require any particular minimum standard for participatory or procedural rights. This means that a state with poor standards for participation is only required to apply the same poor standard across state borders, whereas a state with generous rules on participation, access to information or standing and remedies in judicial procedures must grant these rights also to affected persons outside the territory. Despite these limitations, non-discrimination should be a part of any attempt to further the participatory and procedural rights in international law concerning the environment.

2.6 Access to International Review Procedures

The protection, effectiveness and development of participatory and procedural rights in environmental matters depend also on the existence of an *international body*, available for members of the public, with the mandate to review states compliance with international obligations. This is shown in the cases of the Aarhus Convention, the European Convention on Human Rights, the Inter-American system for the protection of human rights and the African Charter on Human and Peoples' Rights. Such international reviewing instances may take the form of a court, as the Inter-American Court of Human Rights or a non-judicial body, like the ACCC under the Aarhus Convention.

In the Aarhus Convention, the review mechanism focuses on compliance with the minimum standards on participatory and procedural rights set out in the Convention itself, whereas the NAAEC review mechanism is intended to control that the parties

do not fail in enforcing their own national environmental laws. Review bodies in human rights regimes consider compliance with various established human rights.

International procedures for compliance review can have an impact on the implementation by the parties by increasing compliance control as such and setting out whether a party acts in line with its obligations. They also matter because they can provide authoritative interpretations of the legal framework. In the Aarhus Convention, the findings of the Compliance Committee, with the endorsement of the meeting of the Parties, have helped clarifying how different provisions of the Convention should be understood and in specific contexts. In the human rights regimes, the jurisprudence of the European Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human & Peoples' Rights, has been instrumental for participatory and procedural rights in environmental matters by construing established human rights, such as the right to respect for private and family life, the right to property, and the right to a fair trial to "new" environmental contexts.

2.7 New Areas for Participatory and procedural Rights in Environmental Matters?

In assessing the state of play for participatory and procedural rights in environmental matters, focus is on what has been achieved and in which areas these rights have developed. Without further analysis, however, it is also possible to identify some areas where connections to participatory and procedural rights have *not* been established. .

First, although the link between international trade law and other issue areas, such as environmental law and labour law, has been much debated, poor environmental laws or bad working conditions in the state of export are usually not an accepted excuse for a state not to import goods from the exporting state. A possible means for strengthening participatory and procedural rights would be to make it acceptable to prevent the import of goods from states where the goods was harvested or produced with little consideration to health and the environment, and without any possibility for the public concerned to enjoy participatory and procedural rights in such contexts.

The second link, yet to explore, is that between participatory and procedural rights and good governance. A case in point is the legal framework for climate change, i.e. the *1992 UN Framework Convention on Climate Change* (UNFCCC) and the *1997 Kyoto Protocol*. While the commitments, the reporting, verification and the means of implementation could all be subject to corruption, unfairness and poor governance, this issue is hardly considered at all in the treaties. Public access to documents, public participation and access to justice for members of the public could promote better governance and reduce the risk for corrupt climate administration.

The third link is between participatory and procedural rights and corporate responsibility. While the focus of the agreements considered in this paper is on the relation between members of the public and the public administration, e.g. with respect to access to information, an alternative would be to ensure that members of the public could request information directly from the corporations responsible for

harming health and the environment. In some countries, such an opportunity exists, and to some extent the Aarhus Convention as well as the *1993 North American Agreement on Environmental Cooperation* (NAAEC) address also actions, relations and legal procedures between non-state actors.

3 PARTICIPATORY AND PROCEDURAL RIGHTS IN INTERNATIONAL LAW

This section presents the treaties, policy documents, judgements and findings on which the conclusions in section 2 were based. This includes multilateral environmental agreements and policy documents with references to access to information, public participation or access to justice, multilateral treaties and policy documents on human rights, and cases decided by different human rights bodies with a bearing on environmental matters. While relatively comprehensive, the screening is not exhaustive; thus there may be other environmental agreements and human rights regimes where participatory and procedural rights in environmental matters are addressed.

3.1 Support for Participatory and Procedural Rights in General Terms

Principle 10 of the *1992 Rio Declaration on Environment and Development* was confirmed by the *2002 Johannesburg Plan of Action*, adopted at the 2002 Johannesburg World Summit on Sustainable Development, which is peppered with references to participation; e.g. the participation of women, youth, different communities, local enterprises, all stakeholders and civil society in general.⁴ It also repeats the call for access to information and to judicial procedures. Even so, the 2002 Plan of Action does not really further the development of these notions in terms of participatory rights. In addition to these two policy documents, several environmental agreements provide for access to information and public participation, yet in a rather “soft” and general manner.

The *1992 UN Framework Convention on Climate Change* (UNFCCC) (more than 190 parties), obliges the parties to promote “the widest participation..., including that of non-governmental organizations” in the process of education, training and public awareness related to climate change. The UNFCCC parties are also to promote “public access to information on climate change and its effects”, as well as “public participation in addressing climate change and its effects and developing adequate responses”.⁵ The *1997 Kyoto Protocol to the UNFCCC* (about 190 parties) does not add much to the UNFCCC; only that the parties shall facilitate “at the national level public awareness and public access to information on climate change”.⁶ In essence, it only repeats what is already required by the UNFCCC.

The *1994 UN Convention to Combat Desertification* (UNCCD) (more than 190 parties) also requires that the parties generally promote and facilitate “the participation of local populations, particularly women and youth, with the support of

⁴ United Nations Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August- 4 September 2002, UN Doc. A/CONF. 199/20.

⁵ 1992 UNFCCC, art 6.

⁶ 1997 Kyoto Protocol, art 10(e).

non-governmental organizations, in efforts to combat desertification and mitigate the effects of drought”.⁷ As is pointed out below, however, the UNCCD also sets out more specific obligations on providing for access to information and public participation.

This is also the case with the *2002 Stockholm Convention on Persistent Organic Pollutants* (Stockholm Convention) (almost 170 parties), which supports the notion of participatory and procedural rights by generally obliging the parties to promote and facilitate “provision to the public of all available information on persistent organic pollutants”.⁸ It also provides for concrete obligations in ensuring access to certain information and in promoting public participation.

Other environmental agreements of global application, such as the *1992 Convention on Biological Diversity* (CBD) (more than 190 parties), the *2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (more than 150 parties), and the *1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (Rotterdam Convention) (about 130 parties), also provide for access to information or public participation. However, rather than referring to access to information or public participation in a general sense, they set out slightly more specific obligations on these issues, to be further described below.

3.2 Access to Information

International agreements and documents of global reach

Whereas the *UNFCCC* only refers to access to information in a rather general way, the *UNCCD* also obliges the parties to promote access to information in the context of public participation as well as to exchange and make fully, openly and promptly available information from all publicly available sources relevant to combating desertification and mitigating the effects of drought”.⁹

More specific provisions for access to information are set out in the *Stockholm Convention*. Thus, the parties “shall ensure that the public has access to the public information ... [concerning persistent organic pollutants and their effects] and that the information is kept up-to-date”. They are also required to “give sympathetic consideration to developing mechanisms, such as pollutants release and transfer register, for the collection and dissemination of information on estimates on the annual quantities of chemicals.”¹⁰ This goes beyond merely promoting access to information and, while leaving to the parties to define how access is to be ensured (whether by an open register of releases and transfers of pollutants), the Stockholm Convention nevertheless endorses public access to information in environmental matters.

⁷ UNCCD, art 5(d).

⁸ Stockholm Convention, art 10.

⁹ UNCCD, arts 16 and 19.

¹⁰ Stockholm Convention, art 10.

The *Rotterdam Convention* is less straightforward than the Stockholm Convention, but still obliges the parties to “ensure, to the extent practicable, that the public has appropriate access to information chemical handling and accident management and on alternatives that are safer for human health or the environment than the [chemicals subject to the prescribed prior informed consent procedure].”¹¹ Despite the slightly softer language within its framework the Rotterdam Convention also supports public access to information in environmental matters.

This is also the case with the *Cartagena Protocol to the CBD*. Whereas the CBD does not contain much in terms of access to information, the parties to the Cartagena Protocol shall “endeavour to ensure that public awareness and education encompass access to information”. Moreover, in consulting with the public in decision-making, which is required by the Protocol, the parties will have to make the result of such decisions available to the public, while respecting confidential information in accordance with the Protocol.¹² The Protocol sets some minimum standards on the scope of information to be made available, and, within its specific scope of application, it endorses access to environmental information.

Some support for access to information is also provided by IAEA conventions on nuclear activities. These conventions attract fewer parties because of the nature of the activities covered, but they are nevertheless global in scope and reflects a common position of states from different parts of the world. In preparing for emergencies, each party to the *1994 Nuclear Safety Convention* (more than 60 parties) shall ensure that its own population in the vicinity of the nuclear installation, insofar as it is likely to be affected by a radiological emergency, is provided with appropriate information for emergency planning and response.¹³ The parties to the *1997 Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (more than 50 parties) shall ensure that procedures are established to make information on facilities intended for spent fuel or radioactive waste management available to members of the public.¹⁴ This may be done through environmental impact assessment procedures, which are required for these facilities,¹⁵ or by other means. Within their respective scope of application, also these two conventions endorse public access to information.

In addition to these global environmental agreements, the UN International Law Commission’s *2001 Articles on Prevention of Transboundary Harm from Hazardous Activities* (ILC Articles), while not an international treaty, are relevant for the development of participatory and procedural rights in international law.¹⁶ In setting out several duties to be complied with in order to prevent transboundary harm, the ILC Articles provide for access to information with respect to activities covered by its scope:

¹¹ Rotterdam Convention, art 15.

¹² Cartagena protocol, art 23. In addition to the quoted requirements, the parties shall “endeavour to inform its public about the means of public access to the Biosafety Clearing-House.”

¹³ Nuclear Safety Convention, art 16.

¹⁴ Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, arts 6 and 13.

¹⁵ Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, arts 8 and 15.

¹⁶ UN International Law Commission “Draft Articles on Prevention of Transboundary Harm from Hazardous Activities”, (2001) GAOR 56th Session Supp 10, 370.

“States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to the activity, the risks involved and the harm which might result and ascertain their views.”¹⁷

Without defining the information to be provided or the means for ascertaining the views of the public, the ILC Articles set out in a more focused way than most of the environmental agreements of global scope the principle that the public shall have access to information and be somehow consulted.

Among the international human rights instruments, both the *1948 UN Declaration of Human Rights* (UDHR) and the *1966 International Covenant on Civil and Political Rights* (ICCPR) (more than 160 parties) provide for a right to freedom of opinion and the right to seek, receive and impart information.¹⁸ While essential for the effective use of access to information as well as for effective participation and access to a fair trial, the right to receive and impart information has not been construed in itself so as to include a right to access to certain information, whether held by public authorities or private persons.¹⁹ Nor does it entail a duty on the part of the state to gather information from operators and have it disseminated to the public.

Regional international agreements and documents

Europe

As already mentioned, the most advanced international agreement on participatory and procedural rights in environmental matters is the *Aarhus Convention* (more than 40 parties in Europe and parts of Asia), which sets out minimum standards on access to information, public participation and access to justice, to be complied with and implemented in domestic laws by the parties. Upon request by any person, public authorities must make information available as soon as possible and at the latest one month after the request (with possible extension up to two months). The Convention provides an exhaustive list of grounds for refusing the disclosure of the requested information. When considering refusing the disclosure of information, the given grounds shall be interpreted in a restrictive way, taking into account the public interest served by the disclosure.²⁰ The Convention parties are also requested to gather, update and disseminate certain environmental information.²¹ As is further described below in section 3.4, the parties must ensure access to a review procedure to any member of the public who considers that his or her request for information has been ignored or wrongfully handled. In its compliance reviews, the ACCC has considered and interpreted the provisions on access to environmental information in cases concerning e.g. *Kazakhstan*,²² *Ukraine*,²³ *Armania*,²⁴ *Romania*²⁵ and *Hungary*²⁶ – and confirmed the right-based approach of the Convention.

¹⁷ ILC Articles, art 13.

¹⁸ UDHR, art 19; ICCPR, art 19.

¹⁹ See the ECtHR, *Guerra an Other v Italy*, discussed below.

²⁰ Aarhus Convention, art. 4.

²¹ Aarhus Convention, art 5.

²² ACCC/C/2004/1, *Kazakhstan*, 11 March 2005.

²³ ACCC/C/2004/3, *Ukraine*, 14 March 2005.

²⁴ ACCC/C/2004/8, *Armania*, 10 May 2006.

²⁵ ACCC/C/2005/15, *Romania*, 16 April 2008.

Within the framework of the Aarhus Convention, the right to access to information is even further developed by the adoption of the *2003 Protocol on Pollutant Release and Transfer Registers* (PRTR Protocol) (more than 20 parties), which obliges the parties to establish and maintain a publicly accessible national pollutant release and transfer register. The Protocol sets out in details the minimum requirements for these registers, and the parties must also ensure that no reasons have to be stated by anyone who wishes to have access to the information provided.

Focusing on environmental impact assessments, the *1991 Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention) (more than 40 parties in Europe and parts of Asia) also obliges the parties to provide access to certain information. The parties shall ensure that the public likely to be affected is informed and provided with a possibility to make comments and objections concerning the proposed activity. The EIA documentation, with relevant information, shall be distributed to the public for comments, and the comments shall be taken into account in the final decision for the proposed activity.

Further support for public access to information is found in the *1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Helsinki Convention) (more than 35 parties). It obliges the parties to ensure that certain information within the scope of the Convention is made available to the public.²⁷ More advanced and precise provisions are found in the *1999 Protocol on Water and Health* (more than 20 parties) related to the Helsinki Convention. The parties confirm the need for access to information and public participation in decision-making concerning water and health,²⁸ and obliges the parties to ensure that certain information is made available to the public within a reasonable time, and that disclosure is only refused on certain grounds (drawing to some extent on the Aarhus Convention).

The *1991 Convention on Transboundary Effects of Industrial Activities* (Industrial Accident Convention) (more than 35 parties) also obliges the parties to ensure that certain information is made available to members of the public. Focusing on prevention and emergency preparedness concerning industrial accidents, the parties shall ensure that adequate information, in accordance with the Convention, is given to the public in areas capable of being affected by an industrial accident arising out of a hazardous activity.

In addition to the environmental agreements presented, participatory and procedural rights in environmental matters are supported by the *European Convention on Human Rights* (ECHR) (more than 45 parties), as interpreted by the European Court of Human Rights (ECtHR) in the last 15-20 years. Although there is no provision that explicitly address environmental issues, the ECtHR has construed some of the provisions as embracing also matters relating to health and the environment, and thus as requiring, inter alia, that certain information be made available to members of the public. When considering environmental issues, the Court has based its findings in most cases on the right to respect for private and family life, set out in article 8.

²⁶ ACCC/C/2004/4, *Hungary*, 14 March 2005.

²⁷ Helsinki Convention, art. 16.

²⁸ Water and Health Protocol, art 5.

It has also derived the right to access to information from the right to respect for private and family life rather than from the right to hold and impart information, as a part of the right to freedom of expressions.²⁹ The most apparent case on access to information is *Guerra and Others v Italy*,³⁰ where the applicants had requested information about the risks to which they were exposed due to an industrial activity. The Court concluded that a state violates the right to respect for private and family life if the state fails to provide essential information about hazardous activities that enables members of the public to assess the risks they and their families might run. This implies a positive duty of the state to ensure that relevant information is made available, and a corresponding right of members of the public concerned to access such information. In *Taskin et al v Turkey*,³¹ based on article 8 the Court held that, where a state must determine complex issues of environmental and economic policy, the decision-making process must include appropriate investigations and studies in order to be able to predict and evaluate the effects. In this context, referring to *Guerra and Others v Italy*, the Court stressed that the “[t]he importance of public access to the conclusions of such studies and to information, which would enable members of the public to assess the danger to which they are exposed is beyond question”. In *Öneryildiz v Turkey*, the Court considered that in cases of dangerous activities, the public’s right to information may also be based on the protection of the right to life as set out in article 2 of the Convention.³² This jurisprudence implies a kind of “right-to-know” for members of the public, as reflected, although in different ways, also in the Aarhus Convention.

Americas

The *1993 North American Agreement on Environmental Cooperation* (NAAEC) is a side agreement to the North American Free Trade Agreement between Canada, USA and Mexico. Without going as far as the Aarhus Convention, the NAAEC obliges the parties to ensure public access to certain information relating to environmental matters, held by public authorities.³³ As set out below, the NAAEC also requires remedies and procedural guarantees to be ensured by the parties.

Provisions for public access to environmental information can also be found in bilateral regimes and cooperative arrangements in North America. One such example is the *1993 USA-Mexico Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank*. While supporting public access to environmental information, the Agreement does not grant a right to such information.

Similarly as the Universal Declaration of Human Rights, the ICCPR and European Convention on Human Rights, the *1969 American Convention on Human Rights* (AmCHR) (about 25 parties) provides for a right to seek, receive and impart information as a part of the right to freedom of thought and expression,³⁴ but it does

²⁹ ECHR, art 10.

³⁰ ECtHR, *Guerra et al v Italy*, 14967/89 of 19 February 1998.

³¹ ECtHR, *Taskin et al v Turkey*, 46117/99 of 10 November 2004).

³² ECtHR, *Öneryildiz v Turkey*, 48939/99, 30 November 2004.

³³ NAAEC, art 4.

³⁴ AmCHR, art 13.

not entail a right to access to particular environmental information. The *1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (almost 15 Parties) sets out that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services”, which can be understood as including also a right to have access to environmental information (see below with respect to the Africa Charter).

The issue of access to information has also been considered with respect to the *1948 American Declaration of the Rights and Duties of Man* (AmDRDM). While the Declaration does not contain any explicit reference to the environment, the Inter-American Commission on Human Rights has applied the existing provisions, e.g. on the right to property,³⁵ also to cases concerning the protection of health and the environment. In *Maya Indigenous Communities of the Toledo District, Belize*, the Commission held that by failing to provide clear standard for consultation, including “information that must be shared with the communities concerned”, the state in question had violated the right to property.³⁶

Africa

The *2003 African Convention on the Conservation of Nature and Natural Resources* (2003 African Nature Conservation Convention) (not yet in force)³⁷ contains a provision on participatory and procedural elements in environmental matters. In addition to providing for public participation, the parties shall adopt legislative and regulatory measures necessary to ensure “timely and appropriate” dissemination of environmental and access of the public to such information.³⁸ While providing for access to information, the Convention does not give any detail on how it is to be made available or on how the other procedural arrangements should be established.

Access to information has also been addressed within the framework of the *1981 African Charter on Human and Peoples’ Rights* (African Charter) (more than 50 parties). Although the Charter also provides for a right to receive information, related to the right of freedom of expression,³⁹ more important for the right to access to information is article 24, according to which “[a]ll peoples shall have a right to a “general satisfactory environment favourable to their development. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, this was interpreted by the African Commission on Human & Peoples’ Rights, operating under the Charter, as including a duty on the state to monitor threatened environments, require environmental and social impact studies, and providing information to the communities exposed to hazardous materials and activities.⁴⁰

³⁵ AmDRDM, art 23.

³⁶ Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District, Belize*, Case 12.053, Report No 40/04 of 12 October 2004.

³⁷ The 1968 version of the African Convention on the Conservation of Nature and Natural Resources, which is in force, does not contain any provision of this sort.

³⁸ 2003 African Nature Conservation Convention, art 16.

³⁹ African Charter, art 9.

⁴⁰ African Commission on Human & Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96, 13-27 October 2001.

Asia

The *Aarhus Convention* and *Espoo Convention* apply to parts of Asia. They were referred to in the above section on Europe.

The *1985 ASEAN Agreement on the Conservation of Nature and Natural Resources* (ASEAN Agreement) (not yet in force) contains provisions for public participation and access to information concerning the environment.⁴¹ The parties are requested to circulate information on conservation measures and “as far as possible” to organise participation of the public in the planning and implementation of such measures. As with the African, the ASEAN Agreement provides no details on how information is to be circulated to the public.

3.3 Public Participation in Decision-making

International agreements and documents of global reach

In the same vein as with access to information, the *UNFCCC* only refers to public participation in a rather general way, and the *Kyoto Protocol* does not add to this.

The *UNCCD* goes further in obliging the parties not only to generally promoting and facilitating public participation in efforts to combat desertification and mitigate the effects of drought.⁴² They shall also:

- “provide for effective participation at the local, national and regional levels of non-governmental organizations and local populations, both women and men, particularly resource users, including farmers and pastoralists and their representative organizations, in policy planning, decision-making, and implementation and review of national action programmes”, and⁴³
- “promote, on a permanent basis, access by the public to relevant information, and wide public participation in education and awareness activities”.⁴⁴

While leaving to the parties to decide on the means, the *UNCCD* is supportive to public participation, e.g. by stressing “effective participation” and the dissemination of existing information on desertification.

The *Stockholm Convention* is more specific on access to information and public participation than most environmental agreements of global reach, in obliging the parties to promote and facilitate:

“public participation in addressing persistent organic pollutants and their health and environmental effects and in developing adequate responses, including opportunities for providing input at the national level regarding implementation of this Convention.”

Despite the softer form of “promote and facilitate”, rather than “ensure”, public participation, the *Stockholm Convention* sets out that participation also must include

⁴¹ ASEAN Agreement, art 16.

⁴² UNCCD, art 5(d).

⁴³ UNCCD, art 10.

⁴⁴ UNCCD, art 19.

an opportunity for members of the public to address responses concerning persistent organic compounds as well as in considering the implementation of the Convention as such. That is, public participation requires more than only giving members of the public access to information.

Concerned with international trade in chemicals, the *Rotterdam Convention* prescribes minimum standards for public access to information, but it does not provide for public participation in any decision-making procedure. Equally concerned with international trade, the *Cartagena Protocol to the CBD* is nevertheless far more supportive to public participation. The parties to the Protocol shall promote and facilitate public participation and access to information concerning living modified organisms in general.⁴⁵ Moreover, they are requested to:

“consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public, while respecting confidential information [in accordance with the Protocol]”

This is slightly similar to the reference to public participation in the Stockholm Convention. The parties are not only requested to endeavour to consult with the public; to comply with the Protocol they must indeed grant opportunities for public participation and consultation.

The participatory elements in the IAEA conventions are marginal. The parties to the *Nuclear Safety Convention* shall provide the “population” with appropriate information for emergency planning and response, but there is no express reference to public participation in the planning (as opposed to the European Industrial Accident Convention).⁴⁶ The *Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* requires preparations of environmental assessments for facilities for spent fuel and radioactive waste, but it does not make any reference to public participation in such procedures. One may, however, consider that, conceptually, an environmental assessment requires public participation in its preparation.

Contrary to some environmental agreements of global scope, the *ILC Articles* are relevant also for public participation in environmental matters. As mentioned, the ILC Articles formulate the principle for access to information and public participation accordingly:

“States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to the activity, the risks involved and the harm which might result and *ascertain their views*.”⁴⁷

The participatory element consists in the requirement that states, when providing the information concerning activities, must also ascertain the views of the public. While not very elaborate, it at least indicates that states would not comply with this duty merely by disseminating information without any consideration of the views of the public.

⁴⁵ Cartagena Protocol, art 23. In addition to the quoted requirements, the parties shall “endeavour to inform its public about the means of public access to the Biosafety Clearing-House.”

⁴⁶ Nuclear Safety Convention, art 16.

⁴⁷ ILC Articles, art 13.

The *Universal Declaration on Human Rights* refers to the right to be part of government, directly or through voting,⁴⁸ and the *ICCPR* to the right to take part in the conduct of public affairs.⁴⁹ In principle, both versions of the right to political participation embrace environmental matters, but this right has not been understood as implying in itself a right for members of the public to take part in specific environmental decision-making.⁵⁰

A right to participate in environmental decision-making is also set out in the *1989 ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (20 parties). Focusing on tribal and indigenous peoples, it provides for consultations and for means by which these peoples may freely participate at all levels of decision-making as well as in the use, management and conservation of natural resources.⁵¹

Regional international agreements and documents

Europe

The *Aarhus Convention* goes further than other environmental agreements also in setting minimum standards for public participation. The Convention distinguishes between three situations and procedures: decisions concerning permits for listed activities (“specific activities”); decisions on plans, programmes, and policies relating to the environment; and the preparation of regulations and other normative instruments. The most detailed provisions on public participation apply to permit procedures.⁵² The parties must ensure that the public concerned is adequately, timely and effectively informed at an early stage; and allowed to participate “when all options are open and effective participation can take place.” The procedures for public participation must allow the public to submit comments and views that it considers relevant, and in the decision, due account must be taken to the outcome of the participation. Rather similar standards apply to decision-making concerning plans, programmes and policies, while the requirements for public participation are less strict for the preparation of regulations and generally applicable normative instruments. The Aarhus Convention standards for access to justice are also relevant for the right to public participation, since members of the public concerned shall be able to challenge decisions, acts and omissions by public authorities also on the ground of procedural legality. The ACCC has in several cases considered and interpreted the provisions concerning public participation, e.g. with respect to *Albania*,⁵³ *Armenia*,⁵⁴ *Ukraine*,⁵⁵ *Kazakhstan*,⁵⁶ *Hungary*,⁵⁷ *Lithuania*,⁵⁸ and *France*.⁵⁹

⁴⁸ UDHR, art 21.

⁴⁹ ICCPR, art 25.

⁵⁰ See e.g. UN Human Rights Committee, Communication 205 (1986) *Mikmaq people v. Canada*, *Official Records of the Human Right Committee 1991/92 (II)*, UN/CCPR/11/Add.1: “Although prior consultations, such as public hearings or consultations with the most interested groups, may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).”

⁵¹ ILO Convention, arts 6 and 15.

⁵² Aarhus Convention, art 6.

⁵³ ACCC/C/2005/12, *Albania*, 31 July 2007.

⁵⁴ ACCC/C/2004/8, *Armenia*, 10 May 2006.

Some participatory elements are also found in the *Espoo Convention*. In addition to establishing a scheme for inter-state notification and consultation in EIA procedures, the Espoo Convention obliges the parties to ensure that the public likely to be affected be informed and provided with a possibility to make comments and objections concerning the proposed activity. The EIA documentation shall be distributed to the public for comments, and the comments shall be taken into account in the final decision for the proposed activity.

Although the Helsinki Convention on transboundary watercourses does not provide for public participation, the parties to the *Protocol on Water and Health* confirm the need also for public participation in decision-making concerning water and health.⁶⁰

The *Industrial Activities Convention* obliges the parties not only to provide and disseminate adequate information on the prevention and emergency preparedness with respect to industrial accidents arising out of hazardous activities. The public capable of being affected by such accidents shall also be given an opportunity to participate in relevant procedures concerning prevention and preparedness measures.

The *European Convention on Human Rights* and the jurisprudence of the European Court of Human Rights have been important also for public participation in environmental matters. Again, article 8, on the right to respect for private and family life, has been construed as providing also for certain procedural rights. Whereas *Guerra and Others v Italy*,⁶¹ referred to above, essentially focuses on access to information, in *Taskin et al v Turkey*,⁶² the Court also considered that the decision-making processes leading to measures of interference must be fair and such as to afford due respect to the interests of the individual safeguarded by the right to respect for the respect for privacy and family life.

Americas

In addition to ensuring public access to certain information, the *NAAEC* parties must ensure procedural rights and procedural guarantees that are open to the public.⁶³ Although interested persons shall be able to request competent authorities to investigate violations of environmental laws, the Agreement does not formulate minimum requirements for public participation in environmental decision-making.⁶⁴

The *American Convention on Human Rights* also provides for a right to take part in the conduct of public affairs,⁶⁵ but a more direct link to the right to participation in decision-making is found in the interpretation of the *American Declaration on Human*

⁵⁵ ACCC/C/2004/3, *Ukraine*, 14 March 2005.

⁵⁶ ACCC/C/2004/2, *Kazakhstan*, 14 March 2005.

⁵⁷ ACCC/C/2004/4, *Hungary*, 14 March 2005.

⁵⁸ ACCC/C/2006/16, *Lithuania*, 4 April 2008.

⁵⁹ ACCC/C/2007/22, *France*, 3 July 2009.

⁶⁰ *Water and Health Protocol*, art 5.

⁶¹ ECtHR, *Guerra et al v Italy*, 14967/89 of 19 February 1998.

⁶² ECtHR, *Taskin et al v Turkey*, 46117/99 of 10 November 2004).

⁶³ NAAEC, arts 6 and 7.

⁶⁴ NAAEC, arts 4 and 7.

⁶⁵ AmCHR, art. 23.

Rights. In *Maya Indigenous Communities of the Toledo District, Belize*,⁶⁶ the Inter-American Commission on Human Rights held that by failing to provide for effective consultation and the informed consent of the Maya people, with resulting environmental damage, when granting logging and oil concessions, Belize had violated the right to property of the Maya people.⁶⁷

The “right to live in a healthy environment and to have access to basic public services”, set out in the *1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* can possibly be construed as also including a right to be consulted and to participate in any relevant decision-making concerning the environment (see below with respect to the Africa Charter).

Africa

In addition to ensuring access to information, the parties to the *2003 African Nature Conservation Convention* shall ensure “timely and appropriate” participation of the public in decision-making with a potentially significant impact, and “access to justice in matters related to the protection of environment and natural resources.”⁶⁸

Although the *African Charter* also provides for a right to participate freely in the government,⁶⁹ more adequate support for public participation is found in the right to a “general satisfactory environment favourable to their development”.⁷⁰ In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, the African Commission on Human & Peoples’ Rights construed this right as including a duty on the state to provide relevant information as well as meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities.⁷¹

Asia

As mentioned, the *Aarhus Convention* and *Espoo Convention* apply to parts of Asia. They were referred to in the above section on Europe.

As also mentioned, while not in force, the *ASEAN Agreement* contains provisions for public participation and access to information concerning the environment,⁷² and the parties shall “as far as possible” organise participation of the public in the planning and implementation of such measures.

⁶⁶ Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District, Belize*, Case 12.053, Report No 40/04 of 12 October 2004.

⁶⁷ AmDHR, art. 23.

⁶⁸ 2003 African Nature Conservation Convention, art 16.

⁶⁹ ACHPR, art 13.

⁷⁰ ACHPR, art 24.

⁷¹ African Commission on Human & Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96, 13-27 October 2001.

⁷² ASEAN Agreement, art 16.

3.4 Access to Justice

International agreements and documents of global reach

Despite the recognition of access to judicial procedures and remedies in the 1992 *Rio Declaration* and the 2002 *Johannesburg Plan of Action*, thus far no environmental agreements of global reach provides for access to justice. Nor do the *ILC Articles* contain any provision on access to legal review of some sort. Therefore, on the global scope, support for access to review procedure in environmental matters is rather to be found in human rights law. In particular, the notion of access to justice in environmental matters draws on the right to a fair trial, set out e.g. in the *Universal Declaration on Human Rights* and the *ICCPR*.⁷³ However, as far as jurisprudence on a fair trial is concerned, this has mainly been developed by regional human rights bodies.

Regional international agreements and documents

Europe

In addition to requiring the parties to ensure public access to information and public participation in decision-making, the *Aarhus Convention* obliges the parties to ensure access to justice in environmental matters.⁷⁴ The Convention distinguishes between three categories of acts, decisions and omissions for which access to a review procedure must be ensured by the Convention parties. In effect, these three categories cover all kinds of acts and omissions relating environmental laws. First, access to a review procedure before a court or court-like body must be ensured for situations where a member of the public considers that his or her request for environmental information has been ignored or wrongfully handled. Second, access to a review procedure must be provided for members of the public concerned to challenge the substantive and procedural legality of any decision, act or omission relating to permits and permit procedures for specific activities. The Convention provides criteria for determining the scope of “the public concerned”. Third, each party shall ensure members of the public access to administrative or judicial procedures to challenge any other act or omission, by private persons and public authorities, which contravene provisions of national law relating to the environment. In different ways, the Convention limits the discretion for the parties in defining the scope of persons with access to review procedures. Moreover, for all these situations, the parties shall ensure that the procedures provide “adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.” The ACCC has also reviewed compliance with the provisions on access to justice, e.g. for *Kazakhstan*,⁷⁵ *Turkmenistan*,⁷⁶ *Armenia*,⁷⁷ *Belgium*,⁷⁸ *Denmark*,⁷⁹ and *Lithuania*.⁸⁰

⁷³ UDHR, art 10; ICCPR, art 14.

⁷⁴ Aarhus Convention, art 9.

⁷⁵ ACCC/C/2004/1, *Kazakhstan*, 11 March 2005. ACCC/C/2004/2, *Kazakhstan*, 14 March 2005.

⁷⁶ ACCC/C/2004/5, *Turkmenistan*, 14 March 2005.

⁷⁷ ACCC/C/2004/8, *Armenia*, 10 May 2006.

⁷⁸ ACCC/C/2005/11, *Belgium*, 28 July 2006.

⁷⁹ ACCC/C/2006/18, *Denmark*, 13 June 2008.

⁸⁰ ACCC/C/2006/16, *Lithuania*, 4 April 2008.

Besides the Aarhus Convention, the *European Convention on Human Rights* provides robust support for the right to access to justice in environmental matters. The ECtHR has mainly considered the right to access to justice in environmental matters with regard to article 6 and the right to a fair trial. It has then taken into account e.g. whether the concerns for a healthy and/or balanced environment amount to a right in the defending state, and whether the applicants had standing in applicable national laws; see *Zander v Sweden*.⁸¹ The Court has also considered access to justice in environmental matters in light of the right to respect to private and family life. In *Taskin et al v Turkey*⁸² and *Giacomelli v Italy*,⁸³ it held that the right to respect for privacy and family life also include a right for the individuals concerned to appeal to the courts environmental decisions, act or omission where they consider that their interests or comments have not been given sufficient weight in the decision-making process. In *Taskin et al v Turkey*, the Court also found that a failure to comply with court decisions in due time amounts to a violation of the right to a fair trial.

Americas

The most advanced part of the NAAEC in terms of promoting participatory and procedural rights concerns access to justice. As mentioned, the three parties to the Agreement shall ensure access to remedies and certain procedural guarantees for private actors.⁸⁴ Thus, persons with a legally recognised interest shall have access to judicial and quasi-judicial or administrative procedures for the enforcement of environmental laws. This includes access to remedies, including the right to sue for damages, and seek sanctions and injunctions.⁸⁵ The parties shall also ensure that administrative, quasi-judicial or judicial proceedings be fair open and equitable, and “comply with due process of law.” Tribunals conducting or reviewing such proceedings must be impartial and independent, and without “any substantial interest in the outcome of the matter.” Furthermore, they must not be “unnecessarily complicated”, nor must they “entail unreasonable charges or time limits or unwarranted delays”.⁸⁶ Accordingly, the NAAEC is clearly supportive of a right to access to justice.

Support for access to justice in environmental matters is also found in the American human rights instruments. Thus under article 8 of the *American Convention on Human Rights* everyone has the right to a fair trial, and article 18 of the *American Declaration on Human Rights* provides for a right to judicial protection by resort to court. In the case of *Maya Indigenous Communities of the Toledo District, Belize*, the Inter-American Commission on Human Rights not only assessed the facts against the right to property, but also considered the right to judicial protection set out in the Declaration. In doing so, it pointed out that states are not only obliged to provide courts or formal procedures, but also to take affirmative steps to ensure that the

⁸¹ ECtHR, *Zander v Sweden*, 45/1992/390/468 of 25 October 1993.

⁸² ECtHR, *Taskin et al v Turkey*, 46117/99 of 10 November 2004. See also ECtHR, *Okuy et al v Turkey*, 36220/97 of 12 July 2005.

⁸³ ECtHR, *Giacomelli v Italy*, 59909/00, 2 November 2006.

⁸⁴ NAAEC, arts 6 and 7.

⁸⁵ NAAEC, art 6.

⁸⁶ NAAEC, art 7.

remedies are “truly effective” in establishing possible violations and in providing redress.⁸⁷ This resembles the notion of access to justice under the Aarhus Convention.

Africa

In addition to ensuring access to information and public participation, the 2003 *African Nature Conservation Convention*, the parties shall ensure “access to justice in matters related to the protection of environment and natural resources.”⁸⁸ While promoting the right to access to justice, the Convention does not provide any minimum standards or further details on how this is to be achieved.

In the *African Charter*, the right to judicial protection is drafted in a different way than under other international human rights instruments, by not referring to a court or court-like, independent and impartial body of law. Instead it provides for a right to be heard and to “appeal to competent national organs against acts violating his fundamental rights”.⁸⁹ This should include appeals against violations of the right to a general satisfactory environment, set out in the Africa Charter itself, thus providing for some form of access to justice in environmental matters.

Asia

As mentioned in previous sections, the *Aarhus Convention*, with its provisions on access to justice, is applicable not only to Europe, but also to a part of Asia.

Whereas the *ASEAN Agreement* contains provisions for public participation and access to information concerning the environment,⁹⁰ it does not require access to justice in environmental matters.

3.5 Transboundary Rights and Non-discrimination

Considering the transboundary risks and impacts of activities harmful to health and the environment, extending the participatory and procedural rights described across state borders may be critical for effective protection of health and the environment. Such opportunities for transboundary participation may be provided by the principle of non-discrimination, which is formulated in the following way in the *ILC Articles*:⁹¹

“Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur in granting to such persons, in accordance with its legal system, access to or other procedures to seek protection or other appropriate redress.”

⁸⁷ Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District, Belize*, Case 12.053, Report No 40/04 of 12 October 2004.

⁸⁸ 2003 African Nature Conservation Convention, art 16.

⁸⁹ Africa Charter, art 7.

⁹⁰ ASEAN Agreement, art 16.

⁹¹ ILC Articles, article 15.

The principle of non-discrimination is also set out in several international agreements and policy documents in the field of the environment, such as the *1997 UN Watercourse Convention*,⁹² *Aarhus Convention*,⁹³ *Espoo Convention*,⁹⁴ *Industrial Accident Convention*,⁹⁵ *1974 Nordic Environment Protection Convention*,⁹⁶ *1909 US-Canada Boundary Water Treaty*,⁹⁷ the *2003 African Nature Conservation Convention*,⁹⁸ and the *OECD Recommendation on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*.⁹⁹

3.6 Access to International Review Procedures

As indicated, some of the treaty arrangements in the field of the environment and most human rights treaties provide for some kind of international review system, available for members of the public. While they differ in mandate, structure and degree of independence, some of them have contributed to the development or confirmation of participatory and procedural rights in international law. In other cases, such bodies may contribute to the protection of the environment in other respects.

Several environmental agreements with global application establish compliance mechanisms where a party may bring concerns about non-compliance by other parties (or itself). Yet, in none of these agreements can compliance reviews be triggered by members of the public. In global contexts, one of few arrangements for complaints by members of the public is found in the Optional Protocol to the ICCPR, which make it possible for individuals claiming to be victims of human rights violations to submit communications to the Human Rights Committee. While not a remedying body, it makes findings on violations of the ICCPR.

Some of the regional human rights regimes have more advanced systems for compliance reviews and even redress. The European Court of Human Rights and the Inter-American Court of Human Rights are both independent courts. The Inter-American Commission on Human Rights and the African Commission on Human & Peoples' Rights are also mandated to review compliance with international human rights instruments.

In regional environmental agreements, three reviewing bodies stand out: the Aarhus Convention Compliance Committee (ACCC), the Council of the Commission for Environmental Cooperation under the NAAEC, and the Standing Committee of the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats (not further dealt with here). The common feature of these regimes is that they all allow for triggering by individuals and NGOs and also permit these

⁹² UN Watercourses Convention, art 32.

⁹³ Aarhus Convention, art 3(9).

⁹⁴ Espoo Convention, art 2(6).

⁹⁵ Industrial Accident Convention, art 9.

⁹⁶ 1974 Nordic Environment protection Convention, art 3.

⁹⁷ 1909 US-Canada Boundary Water Treaty, art 2.

⁹⁸ 2003 African Nature Conservation Convention, art 26.

⁹⁹ See also OECD Recommendation on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, Doc. C(77) 28(Final).

individuals and groups to submit *amicus curiae* briefs in the fact-finding phase. Still, they differ in structure, degree of independence, and judicial properties.

The ACCC consist of nine members, acting in their personal capacity and shall be independent of the governments of the parties. The Committee has received more than 40 communications from members of the public, and in its findings on compliance it has considered and interpreted provisions concerning e.g. the right to request environmental information, the forms for public participation with respect to specific activities and plans, and the scope of persons with access to justice. As part of the *modus operandi* and before making its findings, the ACCC calls the communicant and the party concerned to a meeting to discuss the case. The findings of the ACCC are submitted to the Meeting of the Parties for endorsement. Thus, without making findings that are in themselves legally binding, after such endorsement the ACCC findings indicate an understanding of how the Convention should be interpreted.

The NAAEC review procedure is not concerned with international minimum standards for participatory rights, but rather intended to ensure enforcement of national environmental protection standards. The Council of the CEC consists of cabinet-level (or equivalent) representatives of the parties, and thus provides a far more politicised structure than the Aarhus Convention. The NAAEC Council may make publicly available only a factual record of the case in point.